THE LAND SURVEYOR'S GUIDE
TO THE SUPREME COURT
OF NORTH DAKOTA
1889 – 2009

A REFERENCE TEXT SUPPORTING
THE CONTINUING EDUCATION
OF LAND SURVEYORS

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2010

IMPORTANT, INFORMATIVE AND INTERESTING CASES
INVOLVING BOUNDARIES, CONVEYANCES,
DEDICATION & VACATION ISSUES AND
EASEMENT & RIGHT-OF-WAY ISSUES

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INTRODUCTION

Although the typical modern land surveyor, being highly skilled and versatile, wears many hats and performs a wide variety of functions serving many different purposes, the most basic role of the land surveyor in our society remains what it has always been, as the principal provider of a professional level of expertise on boundary location issues. The primary reason that the practice of land surveying is limited to those who have demonstrated that they are capable of functioning as professional decision makers, is to eliminate the negative consequences of incompetent boundary surveys, which can cause serious economic and social problems when improperly surveyed boundaries are relied upon in the use and development of land, by creating a group of qualified professionals that everyone can rely upon to deal objectively and diligently with boundary issues. Surveyors can be called upon either to create new boundaries or to retrace and restore existing boundaries, and as we will observe, these represent significantly different functions, with very different legal implications. In either case however, land owners expect the surveyor to provide a result that they can rely upon, because boundaries that they cannot rely upon are obviously of no value to them, and in fact can cause expensive problems, potentially resulting in liability for both the land owners and the surveyor. While the right of land owners to rely on new boundaries marked on the ground during an original survey is generally absolute, whenever existing boundaries are surveyed several important questions with significant legal implications appear, concerning the needs, expectations and responsibilities of the land owners relating to the survey and their boundaries, how well the land owners understand the legal effect of a retracement survey, to what extent the land owners are legally entitled to rely on the survey, and the possible presence of other legal factors or conditions that may have an impact on the boundary in question. Obviously, whenever a survey of an existing boundary is requested, it must be presumed that the land owner intends to rely on that boundary for some purpose, and therefore expects the surveyor

to locate and mark the boundary in a manner that the land owner can make use of with complete confidence, so the essential question becomes whether or not the surveyed boundary is legally supportable, justifying the land owner's belief that the corners and lines marked on the ground during the survey represent definite boundaries that the land owner can safely rely upon.

The typical modern surveyor is a master of measurement science, at least as it applies to land, and is well equipped with superb technological tools for that purpose, so if boundaries were controlled entirely by measurements the law would not be a factor, and the surveyor would have no particular motivation to learn about the law. But boundaries, and in fact all of the many related land rights issues that surveyors often encounter, are controlled by evidence, making it essential for the surveyor to recognize the potential value of all the conditions observed on the ground by the surveyor as evidence, to appreciate the importance of discovering all the evidence, and to understand which evidence controls the boundary location. Measurements themselves can be evidence, but as every surveyor should already know, measurements can become potentially controlling evidence only in the absence of any of the many higher and stronger forms of evidence, which are quite seldom truly absent, although their presence may well go unrecognized. Many surveyors however, choose to take the position that they are measurement experts only, with no need or reason to learn the law, and of course they are entitled to make that decision, and no one can require a professional to do anything that the professional feels unqualified to do. Some surveyors believe that the practice of land surveying is strictly limited to applying existing numerical values of record to the ground, therefore measurement and computer skills are all the surveyor really needs, and indeed it is possible to have a full career in certain branches of the surveying profession based entirely on technical knowledge, so in fact there is no absolute necessity for every surveyor to know every aspect of land rights law. The surveyor who intends to participate as a professional in projects involving land rights however, should realize that all professionals bear a fundamental burden to operate in good faith, in all respects, at all times, toward all parties, which means respecting and honoring all land rights, both public and private. In order to carry that professional burden, the surveyor is obligated to protect the land rights of all parties by retracing and

resolving existing boundaries in a manner that is legally supportable, so that the surveyed boundary is of value, and the land can be safely developed without unfortunate legal consequences, which means that the survey must be based upon the best available evidence, rather than on measurements alone, in disregard for superior evidence. Since land rights of all kinds are controlled by evidence, the basic premise set forth here is that the surveyor can clearly benefit from knowing what forms of evidence have historically been upheld as controlling land rights, and also from learning to recognize what does or does not constitute a conveyance or potential transfer of land or land rights, which as we will see, can involve much more than the typical simplistic conveyance by means of description in a deed.

It should be understood that the goal for surveyors, in learning about the law, is not to come to independent conclusions about the legal principles that are involved in land rights controversies, or attempt to apply those principles independently, but simply to objectively observe those principles in action, and thereby come to realize the great importance that they can have on land rights in any given situation. By observing how land rights conflicts are judicially resolved, the surveyor can develop a better appreciation of how the work of the surveyor interacts with the law, and a better understanding of why surveys sometimes control land rights and sometimes do not. Engaging in education of this type is not intended to enable the surveyor to claim to be an expert on the law, it is intended only to familiarize the surveyor with situations that are similar to those that the surveyor may encounter, so the surveyor can see how such situations typically play out, and can recognize the possible presence of important legal factors that may determine the outcome, when the surveyor is confronted with comparable circumstances. Learning about the law can enable surveyors to point out potentially problematic situations, and thereby be of greater assistance to both land owners and attorneys, who are entitled to expect the surveyor on their project team to be able to demonstrate a professional level of knowledge, the ability to understand such matters, and the ability to contribute relevant information and communicate about land rights issues effectively. Only judges and attorneys need to know the procedural aspects of the law that operate in the courtroom, but surveyors should at least have a sound grasp of the basic principles that govern the creation and termination of land rights, in order to be able to understand

how and why land rights can be gained and lost through the operation of law. It's essential for the surveyor to realize that the primary role of the retracement surveyor is that of a gatherer of evidence, and nothing the surveyor does independently, such as laying out or staking a boundary of record, can have any binding effect on any land owners, since no surveyor has any authority to alter existing or established land rights in any way. Therefore, the prudent surveyor focuses first and foremost on fulfilling that responsibility to thoroughly and diligently acquire all the available evidence, rather than proceeding to treat the measured location of the boundary in question as representing ownership rights or any other land rights. In summary, the surveyor is authorized only to honor and follow the law, and is charged with knowing it and respecting it, but the surveyor is not authorized to practice or question the wisdom of the law, and should strive to maintain a perspective on land rights issues that is completely professional and objective.

The purpose of this book is to review and discuss decisions of the Supreme Court of North Dakota that have guided and influenced the development of those aspects of land rights law that matter most to surveyors, throughout the period of statehood, in order to provide surveyors with insight regarding how the Court has dealt with situations in which land rights disputes occur, and to allow surveyors to see which factors the Court has found to be most important and decisive in such situations. It should be understood that statements made by the Court are not intended to constitute an instruction manual for surveyors, and even when specifically discussing surveys, the Court has no intention of laying down specific technical rules of practice. The prudent surveyor may well observe however, those practices and forms of behavior that find favor with the Court, and conversely, those ideas and assertions that the Court consistently rejects or disapproves, from which themes and patterns defining advisable professional behavior may be seen to emerge. Among the items that the surveyor can and should take notice of, are the instances in which surveys are upheld as controlling, and of at least equal importance, the conditions and circumstances under which surveys do not control. As we will see, in some cases surveys were done that had no legal or controlling effect, while in many other cases surveys were not done when they clearly should have been, and the consequences of those failures to obtain surveys are quite

noteworthy as well. While there are several cases that are dismissive toward surveys or critical of surveyors, there are at least as many cases that are affirmative of the value of surveys, particularly those done taking all available evidence into account and treating all evidence with the highest level of respect. One elementary lesson of a general nature to be learned is that a simplistic understanding of the statutes, resulting from merely reading the statutes at face value is insufficient, because only the legal interpretation of the statutes performed by the Court itself fully captures the spirit of the law, which ultimately controls over the mere letter of the law. The law is not to be applied in unintended ways, and was obviously never intended to facilitate injustice, so the Court wisely follows the spirit of the law whenever necessary to achieve results that are in line with equity and justice. Another essential lesson to be gleaned is the value of good faith action following the spirit of the law, as only rarely is a party who endeavored to faithfully follow the spirit of the law punished or penalized, while many instances will be noted in which a party who relied upon an incongruously literal and rigid reading of the letter of the law meets with defeat. As we will discover, all of the powerful principles of law that can apply to land rights are of no avail to a party whose actions run counter to the spirit of the law, or reveal an absence of good faith, since nothing in the entire realm of land rights law can overcome these most fundamental tenets governing human behavior in our society.

Since there have been only a relatively small number of North Dakota Supreme Court decisions focused primarily on boundary issues, this book also embraces other land rights issues that are highly relevant to land surveyors, in order to more fully depict the development of land rights law over the twelve decades of statehood, and to illustrate the fact that many matters other than boundary issues can form the basis of serious land rights controversies. In certain situations, it can be just as important for the surveyor to understand the nature of the rights at issue, and appreciate the significant value of those rights to the land owners, as it is for the surveyor to deal properly with boundary location issues. Having a sound knowledge of the other major types of permanent land rights, beyond fee ownership of land, which very often physically overlap with the rights of others to a great extent, can enable the surveyor to achieve a clearer perspective on how and why many kinds of land rights conflicts develop, which in turn can help the

surveyor appreciate the value of evidence of the origin of such disputes as the surveyor may encounter. Knowledge of easement and dedication law can also be of assistance to a surveyor in trying to figure out how to most appropriately deal with many problems involved in properly platting and describing land, and make it possible for the surveyor to correctly communicate the issues in play to both land owners and fellow professionals, both verbally and in written documentation of all forms encountered or produced by the surveyor. Easement and dedication cases often involve one very prominent and ongoing source of controversy in the field of land rights, which is the interaction between public and private rights, and decisions that adamantly guard essential public land rights will be seen herein, alongside decisions that strongly protect the sanctity of private land rights. Those having a distinct personal bias in favor of either the private or the public side of the equation may come away unsatisfied or even chagrined by some of the rulings outlined here, but the key to appreciating the wisdom in all of these rulings lies in recognizing the need to strike a balance, to support the needs of our society. To that end, it should be understood that only reading objectively, with an open mind and with the intention of learning and appreciating the wisdom of the Court, rather than merely judging and criticizing the results of these cases based on personal preferences and inclinations, will result in a beneficial experience for the reader. In addition, the reader should remain aware that the circumstances of each case are unique, and it cannot be presumed that situations which appear similar are in fact equivalent, since the presence or absence of even one important factor can change the outcome. The efforts of the Court to do justice and uphold time honored principles of equity are richly displayed herein, for the potential benefit of all those who are interested, and each surveyor is free to decide how much of his or her time this learning exercise merits.

It is hoped that even those with little concern for the law itself may find this book interesting from both a historical perspective and a human interest perspective, so to make this learning experience palatable, the cases are presented here in a manner that is intended to provide both enjoyable reading and enlightenment. As opposed to a dry and tedious recital of statutes, each case presented herein is an interesting real life story, involving people from all walks of life, from the wealthy to the impoverished and

desperate, which holds one or more valuable lessons regarding the consequences of sometimes foolish or outrageous human behavior. One hundred cases, balanced to effectively represent the entire period of statehood appropriately, were selected with a view toward touching and covering the most significant legal precedents, landmarks and milestones, that fall within the realm of land rights indicated in the title of this book. Each story begins with an introductory prelude, followed by a timeline objectively presenting all the facts relevant to the controversy at hand that were noted by the Court. It's always important to read the timeline quite carefully, with an appreciation for the potential significance of each factual item mentioned, and it's also often critical to note the passage of time between successive items, which is quite extensive in a large number of the cases, emphasizing the potentially great value of seemingly minor points of evidence that often had their origin in the distant past. In addition to the wide variety of personalities that will be seen, the cases also cover the complete range of physical conditions, representing locations in every part of North Dakota, from intensely urban scenarios to cases set in the most remote areas of the state, so those whose work takes place primarily in rural areas will discover stories about the kind of situations and controversies that they can relate to, just as will those who are more familiar with issues involving platted city lots. Legal citations are not presented in footnote form within the content portion of the book, citations for all of the North Dakota cases referenced in the text are instead provided at the end of the book, and are indexed both alphabetically and by topic, so the surveyor can access and read the full text of any given case, many of which are available for free through the Court's website. All interest in this book is genuinely appreciated, whether complimentary or critical, and all questions and other comments are most welcome. This effort merely opens a door upon the subject matter discussed herein, intended to introduce surveyors to the vast body of public information on the law, which may serve to broaden and fortify their existing professional knowledge, and any surveyors inclined to provide input that will expand upon the start represented here, by contributing additional information that may serve to enhance the legal knowledge base of our noble land surveying profession, now or in the future, are very heartily encouraged and invited to do so.

The following topics are the principal focus of this book:

ABANDONMENT	**ACQUIESCENCE**	**ADVERSE POSSESSION**
AFTER-ACQUIRED TITLE	**CITY STREETS-ALLEYS**	**COLOR OF TITLE**
COUNTY-TOWNSHIP ROADS	**DEDICATION**	**DEED VALIDITY**
DESCRIPTION AMBIGUITY	**DESCRIPTION REFORMATION**	**EASEMENTS**
ENCROACHMENTS	**ESTOPPEL**	**EXTRINSIC EVIDENCE**
LACHES	**LEGAL DESCRIPTIONS**	**NOTICE**
RIPARIAN RIGHTS	**STATE HIGHWAYS**	**STATUTE OF FRAUDS**
SURVEY EVIDENCE	**UTILITIES**	**VACATION**

Although the following topics are involved to some extent in the cases that are included in this book, complete coverage of these and other related legal topics is beyond the scope of this book.

CHAMPERTY	**CEMETARIES**	**CONDEMNATION**
COVENANTS	**DIVORCE**	**DOWER**
EMINENT DOMAIN	**ESCHEAT**	**ESCROW**
FRAUD	**FORGERY**	**HOMESTEADS**
INHERITANCE	**LIENS**	**LEASES**
LIS PENDENS	**MARKETABILITY**	**MINERAL RIGHTS**
MORTGAGES	**PARTITIONING**	**PROBATE**
PROFESSIONAL LIABILITY	**RAILROAD RIGHT-OF-WAY**	**TAXATION**
TRUSTS	**WATER RIGHTS**	**WILLS**

DORAN v DAZEY (1895)

Before reviewing our first case on the subject of conveyances, two earlier cases appear worthy of note, since they set the stage for issues that we will later see develop and play out. During the first five years of statehood, problems and controversies arose involving the proper use of PLSS descriptions and abbreviations, particularly with respect to taxation. In the 1891 case of Powers v Larabee, the Court declared that misunderstanding and improper use of PLSS abbreviations in tax records and tax deeds was a serious problem, causing conflicts over land rights, and ruled that improper abbreviations or descriptions operate to render tax proceedings null and void, invalidating an intended conveyance by tax deed. Similarly, in the 1893 case of Power v Bowdle, the Court struck down another tax deed that employed PLSS abbreviations only. Significantly, in that case the Court first recognized the principle that ambiguous descriptions can be validated by means of extrinsic evidence, which provides certainty by clarifying the intentions of the parties who played a role in the creation of the description. The Court held however, that this rule could not be applied to tax deeds, because all aspects of tax foreclosure proceedings must be carried out in absolutely meticulous adherence to the law, in order to successfully strip a land owner of his land for failure to pay his taxes. This position taken by the Court, requiring strict compliance for successful completion of tax proceedings, would lead to the development of many adverse possession claims over the decades, in cases where some type of defect in the process leaves the holder of an otherwise valid tax deed in the position of an adverse possessor, as we will see. Subsequently, the legislature acted to legitimize the use of PLSS abbreviations, so these two cases no longer hold the legal significance that they held in the 1890s, but they do mark the inception of the Court's description analysis efforts.

We begin our analysis with a case focused on the recording laws, which are clearly relevant to the practice of land surveying, since land surveyors are obviously expected and required to deal with deeds, and should understand their value as evidence. Recordation is certainly a positive and beneficial policy, and North Dakota has always wisely encouraged it, even prior to statehood. Yet the true purpose and significance of recordation, and the consequences of failure to record, has proven to be

very fertile ground for controversy. While some states allow recording laws to form an absolute bar, placing the full burden for a failure to record a document on the party who commits that failure, or his successors, North Dakota has declined to accept the injustice that inevitably results from such a rigid and arbitrary policy. In this case, the Court was presented with the opportunity to put such a bar in place, and was invited to declare that unrecorded rights are of essentially no value, being perpetually in peril. But the Court instead very wisely chose to view the recording laws for what they are, tools that enable society to achieve greater organization of land rights through improved availability of information, rather than viewing such laws as a device with which to deprive those who fail to record their documents, of land that they have acquired in good faith. Like many other cases we will encounter, the fundamental message of this case for the land surveyor is one of caution, warning that it can be quite dangerous to rely too heavily on recorded information alone, while ignoring evidence that may tend to indicate the existence of rights of others.

1883 - The subject property, an urban lot or parcel of unspecified size and shape, was conveyed to Sims by warranty deed. This conveyance was legitimate in all respects, however Sims neglected to record his deed, although recording laws had long been in place at that time. Shortly after acquiring the property, Sims mortgaged it, and the mortgage was recorded.

1884 - Dazey acquired the identical property, also by warranty deed from the same grantor, as part of a transaction that involved other property. Whether or not the grantor had forgotten that this same property had been conveyed to Sims is unknown, but its quite possible that the grantor actually had forgotten, particularly if the grantor happened to be a party who was involved in frequent land transactions, involving numerous properties, and simply kept poor records. Even if the grantor knowingly sold the same property twice, that fact would have no impact on the outcome of this case, as will be seen. Prior to closing this transaction, Dazey's attorney discovered the existence of the Sims mortgage pertaining to the subject property and informed Dazey of it's existence. However, the attorney also told Dazey that the existence of the mortgage was no cause for concern, because there was no evidence of record that Sims was the owner of

that particular property, so Dazey proceeded to close the deal and record his deed. Neither Dazey nor his attorney made any effort to contact Sims to inquire about either the meaning or significance of the mortgage, or to learn what Sims might know regarding the ownership status of the subject property.

1887 - Sims recorded his deed and then sold the subject property to Doran. Whether or not Doran was aware of the existence of the deed to Dazey is unknown. If he did know about it, he evidently concluded that it was illegitimate and was therefore of no significance to him. There is no indication that any of the parties involved ever occupied the subject property, or even visited it, presumably it was vacant land held for investment purposes. The contest over the ownership of this property therefore, turned entirely upon both the knowledge, and the opportunity to obtain knowledge, that the parties had, or did not have, and the presence or absence of that information, either in the public record or elsewhere.

Doran simply argued that Sims had acquired the subject property prior to Dazey, so Dazey had acquired nothing, regardless of the fact that Sims had neglected to record his deed in a timely manner. Dazey argued that his acquisition was entitled to protection under the recording laws, because he was an innocent purchaser who recorded his deed first, and his title should therefore be treated as superior to that of either Sims or Doran. Although it was evidently true that Dazey was genuinely unaware of the existence of an actual deed to Sims, due in part to the failure of Sims to record it, and to that extent at least, Dazey had acted innocently, the trial court quieted title in Doran.

Following decisions from Illinois, Iowa, Nebraska and Oregon, acknowledging that the fundamental purpose of all laws providing for the recordation of documents is to provide notice, the Court adopted the position that:

> “...notice of an unrecorded instrument is equivalent to the recording of it.”

Steadfast in it's unwillingness to accept the idea that an unrecorded

document is worthless, which was the basic proposition lying at the heart of Dazey's argument, the Court went on to point to what it found to be the dispositive factor, in a refrain destined to be reiterated numerous times in the future, under similar or comparable circumstances, very poignantly stating, with reference to Dazey and his reaction when informed that an unexplained document describing the subject property existed, that:

"A prudent man should have made inquiries..."

The Court ruled that Dazey could not obtain any protection from the recording laws, because the knowledge that he had was sufficient to give him good reason to suspect that the ownership status of the land was in some doubt, and having that knowledge was sufficient to motivate a prudent person to seek to resolve the matter, rather than simply ignoring it. In other words, he knew something that should have caused him to realize that another deed could exist, potentially superior to his own. The Court concluded that Dazey was not in fact an innocent purchaser without notice, because he had actual notice of at least one important fact, which would have lead him to the truth, had he pursued the matter, and as a grantee he was under the obligation, the Court determined, to do so. In this instance, it happened to be a mortgage instrument, but any number of other such items or facts, relating to the subject property, could have served the purpose of providing the requisite notice equally well. In effect, the Court found that Dazey had neglected to fulfill the fundamental burden of care that falls upon any person involved in a land transaction. The fact that he had been misinformed, in regard to the extent of his burden of inquiry, by his attorney, was of no significance and could have no effect, the Court decided, on the rights of Doran. Accordingly, the Court upheld both the validity of the deed to Sims and the decision of the lower court quieting title in Doran. Dazey had acquired nothing and Doran had been correct in deducing that fact. If Dazey had any legal remedy for his loss, it would have been against his grantor, who either accidentally or deliberately attempted to convey the same land twice, and not against Doran.

The obvious and immediate consequence of this decision was to make it clear that the Court did not view the recording laws as being intended to represent an absolute means of determining land ownership, and that the

Court would not look kindly upon attempts to base claims to land solely upon information of record, or solely upon being the first to record a deed, while disregarding evidence of other kinds, that may tend to serve as an indication of existing rights of others. Or to put it more directly, one cannot simply choose to ignore evidence that is relevant to the matter at hand, merely because one would prefer not to be aware of it, or prefer not to deal with it. The thrust of the decision was that whenever notice is provided, in any form, the absence of recordation, albeit a failure, is a harmless failure, for which the party failing to record will not be punished or penalized. This decision was controversial in it's day and resulted in changes to the language of the recording laws in 1899. Its lasting significance however, lies in the fact that it marks the point in time when the Court effectively announced that it intended to place great weight and emphasis on the legal concept of notice, in all matters concerning land rights. Notice is a legal concept that is of towering importance in the resolution of land rights issues, including boundary issues, since it appears as a formidable factor in an enormous number of land rights cases, frequently with great impact, repeatedly manifesting itself and playing out in diverse situations, as we shall see going forward.

RADFORD v JOHNSON (1898)

Here we have our first case involving serious consideration of survey evidence by the Court. The evidence actually presented is very minimal, but the principles in play are quite clear. The Court was confronted with a dispute over an original PLSS monument location, which was either lost or obliterated, so the Court had to take a position on where the burden of proof lies in such cases, because that critical decision, as to which party bears that burden, very often determines the outcome in cases of this nature. It's important to keep in mind, when reading cases from this era, that the Court at this time had relatively little guidance to go by on such matters, nothing like the wealth of supporting documentation pertaining to PLSS retracement, recovery and restoration that is available from BLM and others today, in response to questions relating to PLSS issues. Yet despite that lack

of specific guidance, the Court reached a decision in this case that is in full accord with fundamental PLSS principles regarding the proper treatment and consideration of evidence.

Before examining this case however, some other decisions made by the Court in early cases involving PLSS surveys may be of interest. In the 1894 case of Parsons v Venzke, which involved the cancellation of patents by the GLO, the Court declared that it had no jurisdiction to overturn decisions of the GLO on specific factual issues, and could only rule upon whether the GLO decisions were made within the law, or represented an abuse of the law. In the 1898 case of Black v Walker, the Court acknowledged that testimonial evidence relating to an original GLO monument location could be rejected, where there was evidence that the monument may have been moved and the testifying party may have been involved in moving it. Then in 1907, in Nystrom v Lee, the Court held that a county surveyor was justified in ignoring fence lines when retracing a section, since there was no indication and no testimony that the fences were built in reliance on original monuments or were intended to represent original lines. Finally, in 1915, in Jamtgaard v Greendale Township, the Court upheld the testimony of a man who claimed that he had been a transitman on a GLO survey crew over 40 years earlier, and ruled that his memory as to exactly where a particular section line had been originally run, and exactly where a particular quarter corner had been originally set, controlled the corner location. Unfortunately, early cases are often particularly lacking in detail, making it difficult for surveyors to appreciate the value or significance of the decisions and results, because the details that a surveyor would like to know are unavailable, leaving the surveyor uncertain as to the circumstances under which the ruling would, or would not, apply today. But it should be observed that the Court usually spells out the evidence that it finds to be important, and that which it uses to dispose of the case, so when evidence of the kind that a surveyor might prefer to see is absent, that is typically a good indication that the Court did not find such evidence to be essential to the outcome. In fact, cases involving survey issues, as we will see, are generally decided on larger principles of justice, rather than the more detailed principles of land surveying, with which surveyors are already familiar.

Prior to 1898 - Radford owned the southwest quarter of a certain unidentified section and Johnson owned the southeast quarter of the same section. Both parties operated farms, evidently separated by a line of occupation that had existed for an unknown number of years, with no indication that it had ever been disputed or questioned. Presumably all the land involved was described by aliquot part and both parties had clear title, since there was no controversy over their ownership of their respective quarters, and therefore no discussion of any details relating to how or when either of them had acquired their land. Where the section was located in the township is unknown, presumably it was a regular section, the south quarter corner of which had been established on the ground by the GLO during the original survey. All four of the corners of the section were known and undisputed, and nothing was said concerning the north quarter corner or the center quarter corner of the section, the controversy being limited exclusively to the south quarter corner. The county surveyor surveyed the south line of the section, and set this quarter corner at the midpoint between the known section corners, apparently after finding no evidence of the original quarter corner, or at least nothing that he considered to be satisfactory evidence of it's original location. The purpose for which the survey was done is unknown, there is no indication that it was requested by either Radford or Johnson. There was no contention that the county surveyor had measured incorrectly, it appears that the corner he set was truly located at a point midway between the section corners. The first question was whether or not he was justified in setting it at that location, disregarding the physical evidence of a different location, presented by the line of occupation, and the second question was whether or not it should be presumed to be correct, based solely on the fact that it was set by the county surveyor.

Radford argued that the corner set at the midpoint of the section line by the county surveyor was the true quarter corner, and maintained that the county surveyor had the authority to decide where such a corner is, or where it should be restored when the original monument itself is no longer evident, so title should be quieted in him up to that point, regardless of any other evidence. Radford obviously had no real desire to support the county

surveyor, he took this position simply because acceptance of the point set by the county surveyor would result in additional land for him, beyond the existing line of occupation. Johnson argued that the original quarter corner had been located 19 feet west of the midpoint and had been the basis for the position of the line of occupation, so title should be quieted in him up to that point, irrespective of any measurements. What specific evidence he presented to support this idea, if any, is unknown, but it appears that Johnson had always occupied the land up to the point that was 19 feet west of the midpoint, so this point was apparently at the end of a crop line that had been established and accepted for an unknown length of time. The jury decided that the point set by the county surveyor was the true quarter corner, based on an instruction given by the trial judge, stating that the work of the county surveyor was presumptively correct.

The Court began by acknowledging the absolute control of monuments established during an original survey, and then indicated it's agreement with Johnson's assertion that no surveyor can simply choose to ignore evidence of an original monument location, based solely on the fact that the evidence is not in agreement with a location that the surveyor has arrived at by means of measurement, expressing it's approval of the following statement made by the trial judge:

> "...the corners established by the original surveyors under the authority of the United States cannot be altered. Whether properly placed or not, no error in placing them can be corrected by any surveyor deriving his authority from the laws of the state."

The Court also agreed with Johnson that the jury instructions provided by the trial judge had prejudiced the jury against him, by leading the jury to believe that all the work of the county surveyor should be presumed to be correct. With that erroneous instruction, the trial judge had mistakenly placed the burden of proof upon Johnson, the Court stated, wrongly minimizing the value of his testimony regarding his knowledge of the original corner location, in the eyes of the jury. Following decisions from Michigan and South Dakota, the Court took a stern and highly restrictive view of the authority of county surveyors, and the manner in

which the presumption of correctness should be applied to their work. The Court ruled that the presumption of correctness extends only to the technical aspects of survey work, such as measurements and computations, and does not extend to any decisions that the surveyor makes involving the determination of boundaries. In that regard, clearly disturbed by the surveyor's use of measurements to upset the existing conditions under which the parties had been living and functioning harmoniously, the Court held that boundaries are:

> "...to be determined by testimony, and surveyors have no more authority than other men to determine them upon their own notions."

So although the measurements made by the surveyor were not flawed in any way, the decision of the surveyor to set a corner at a place where no evidence indicated that any monument had ever existed, in the face of evidence indicating that the original monument had been in another location, was unsupportable and could have no binding effect. Johnson had the right, the Court decided, to protest the corner planted by the survey, since it was supported by measurements alone, based on his knowledge of the original corner location. Moreover, the Court placed the burden of proof that the original location indicated by Johnson was not authentic, and that the corner in question was truly lost, on the parties asserting that it was lost, Radford and the county surveyor in this case, rather than on Johnson. The Court found accordingly that Johnson was in fact entitled to a new trial, and granted his request, striking down the ruling of the trial court. The outcome of the new trial is unknown. If Johnson's testimony was seriously flawed or otherwise unconvincing, he may very well have simply lost again, and deservedly so. Nonetheless, it's at least equally possible that he actually knew the true original monument location, and the Court made it clear that such knowledge is valid evidence, which must control the corner location, and which should therefore always be taken seriously and given genuine consideration, as potentially valuable evidence, rather than being dismissed without due consideration, as had been done in this instance by the county surveyor.

In so ruling, the Court indicated that it was unwilling to embrace the

idea that measurement evidence should be allowed to overcome either physical evidence or testimonial evidence, particularly where the measurement evidence would result in a new corner location that is not in harmony with any other existing evidence. In this case, the Court clearly viewed the work of the surveyor as needlessly creating a controversy where none existed, as a result of the surveyor's personal preference for measurement evidence, as opposed to other kinds of valid evidence. For that reason, the Court was not inclined to allow the county surveyor's corner location to stand, refusing to allow him to vacate his responsibility to recognize and honor legitimate physical evidence of the original monument location, supported by the testimony of a land owner who had reported his knowledge of the original monument location to the surveyor. Since the parties had never considered the corner to be lost, the Court determined, the burden rested on the surveyor, as the party proposing to treat it as being lost, to prove that it was in fact lost. Ultimately, a land surveyor must make many difficult decisions of this kind, as a professional, but although the surveyor is not a judge, the wise surveyor takes care to make those decisions in the manner that is most likely to find favor with the Court if challenged, which requires the surveyor to understand how the various forms of evidence are viewed, treated and prioritized by the Court. To accomplish that, such decisions must always be based upon the best available evidence, excluding nothing from consideration, and always recognizing that even precise measurements do not always prevail, because even precise measurements cannot justify neglecting superior evidence.

STREETER v FREDRICKSON (1902)

Here we first encounter a topic frequently debated among surveyors, the highly controversial doctrine of adverse possession. This case represents a classic early adverse possession scenario, demonstrating the important fact that adverse possession, as it originally developed, did not involve boundaries in any sense, it was purely intended to resolve ownership rights, so location was not a factor in early adverse possession cases at all. As has already been mentioned, adverse possession in the early years of statehood

often came into play as a consequence of perfectly innocent failures, omissions, blunders or other mistakes that were made by local government officials in the process of taxing land and taking control of land when the taxes on it went unpaid. As a result, parties acquiring land by means of tax deeds were very often in peril of losing their land because, unknown to them, some detail in the tax assessment, foreclosure, or conveyance process had been overlooked or improperly addressed, in violation of the law, creating an opportunity for the property owner of record to emerge years later and claim that the subject property was still his. This obviously created the potential for serious conflicts and made it difficult for holders of tax deeds to feel secure in occupying and developing land that they had acquired in good faith. Holding the subject property for twenty years, the full statutory period for adverse possession, cured all such defects and created an absolute bar against any claims that might subsequently be made by an owner of record who had asserted no claim to the land for that length of time. But a shorter period of ten years was also provided by statute, which was intended to accomplish the same purpose, under certain conditions tending to show specific evidence of good faith possession, as opposed to the aggressive or genuinely hostile possession, with intent to capture land known by the possessor to belong to another, which was envisioned by the twenty year statute. In other words, the ten year statute envisioned that one who was able to show that his possession was based on good faith qualified to have his title quieted sooner than one who relied entirely on abandonment or negligence of the record owner to secure title unto himself. But of course the interpretation and implementation of the ten year statute, although it was intended to foster the development of society, by providing security and encouraging land use, would prove to be fraught with difficulty and controversy, as we shall see.

In the case of Power v Kitching, in 1901, the Court ruled that a void tax deed does provide color of title, enabling an adverse possessor to qualify for the ten year statute, rather than the twenty year statute. Interestingly, it was unsuccessfully argued in that case, by an attorney who would go on to become a Supreme Court Justice himself, that the tax deed was not valid color of title, because the tax itself, upon which the deed was based, was void. But the Court held that even though no tax was actually owed and no tax was collectable, the tax deed was still a document fundamentally rooted

in authority, with the appearance of legitimacy, so an innocent purchaser was entitled to rely on it, making it valid as color of title. The Court, with that decision, had cleared the way for an innocent grantee holding a tax deed that was plagued with some technical or clerical error that was unknown to him, to more readily clear his title and achieve security of possession. This marked the dawn of the era of adverse possession based on good faith, which continues today. Yet numerous issues remained unaddressed, including the issue of tacking consecutive adverse possessions by different individuals, which first confronted the Court in the case we are about to review.

1883 - The subject property, which is not described in any detail in this case, because neither its size nor its location is relevant to the issues, was patented to a predecessor of Streeter. There is no indication that Streeter or any of Streeter's predecessors ever occupied or used this land in any way.

1887 - A tax deed was issued to Howlet, as the taxes on the property had gone unpaid. After only a few months, Howlet conveyed the property to Tofthagen. Howlet may never have occupied the property either, but whether he did or not was inconsequential. Tofthagen went into sole possession of the subject property at this time. Although whether he actually lived on the property or not is unknown, it was undisputed that his possession and use of the land satisfied the requirements of adverse possession during the time he was in control of it.

1892 - After having held the property for five years and paid the taxes during that time period, Tofthagen conveyed the property to Fredrickson. She evidently continued the use made of the land by Tofthagen, either living on it herself or maintaining full control over the use of it, fully satisfying all of the physical elements of adverse possession.

1900 - Fredrickson, after having occupied, operated or otherwise controlled the property for eight years and paid the taxes throughout that time period, was informed that Streeter had acquired the property, and claimed ownership of it, and intended to take control of it. Streeter evidently had somehow discovered that the tax deed to

> Howlet had been invalid and void, for reasons that are not specified, and Streeter elected to take advantage of this flaw in Fredrickson's chain of title. Upon making this discovery regarding the vulnerability of Fredrickson, Streeter filed an action against Fredrickson, seeking to have title to the subject property quieted in Streeter.

Streeter argued that since neither Howlet, nor Tofthagen, nor Fredrickson had held possession of the subject property for the full ten year time period, as required by the applicable statute pertaining to adverse possession, the property had not been lost to adverse possession, even though the total length of time that the property was in the possession of those three parties exceeded the ten year requirement. Fredrickson argued that the total time period of thirteen years, representing the combined periods of possession of Tofthagen and herself, satisfied the statutory requirement, and therefore adverse possession had been successfully completed. The trial court declined to allow Fredrickson to claim any benefit from the period of time that the property had been occupied or used by Tofthagen, and quieted title in Streeter, since Fredrickson had not held the subject property herself for a full ten years.

The Court closely examined and contrasted the relevant statutes, relating to adverse possession, the exact language of which had been set down by the legislature in 1899. Two statutes pertinent to conflicts over land rights existed, one requiring a ten year period of use or control, amounting to physical possession, the other requiring a twenty year time period. The language employed by the legislature in constructing these two statutes was substantially different however. The twenty year statute was written essentially as an absolute bar, preventing any owner of record, after being out of possession for twenty years, from making any claim to the land, regardless of who else was in possession of it, or how many different parties may have possessed it, but obviously this statute was of no use to Fredrickson, because the twenty year requirement could not be met, so only the ten year statute was in play. If Fredrickson could not show evidence of good faith possession, she would lose the land. The ten year period was potentially applicable, if the adverse claimant had paid the taxes and held the land under color of title, which Fredrickson had undisputedly done, but the time requirement would prove to be her downfall. The Court found that

the language of the ten year statute barred the adverse claimant from tacking the possession of a predecessor onto their own period of possession, because the language of that statute focused specifically on the acts of the individual adverse claimant, and not on the absence of the record owner from the land, as the twenty year statute did. The inability of Fredrickson to benefit in any way from the time period during which the land was under the control of her grantor, Tofthagen, doomed her case.

In a move that would prove to set a significant precedent, the Court chose to turn to Wisconsin for guidance in dealing with the subject of adverse possession, which it would go on to do a number of times in the future, when searching for support relating to other important aspects of adverse possession law, as we will see, quoting favorably the following statement from a Wisconsin case:

> "The party whose title is to be destroyed or remedy barred may properly stand on the letter of the statute, and insist on a strict compliance with its conditions."

The applicable statute called for the acts constituting adverse possession to be performed by an individual, or a group such as a family, occupying the land all at the same time, not a series or sequence of different possessing parties, so the question of whether or not Fredrickson could establish privity between Tofthagen and herself, as grantor and grantee, was moot, and was therefore left to be decided another day. The decision of the trial court was therefore upheld by the Court and title was quieted in Streeter. In so ruling, the Court established that the outcome of all claims of adverse possession in North Dakota would henceforward be strictly controlled by statute law, rather than by the common law, since the legislature had seen fit to specifically address the issue of adverse possession, and to distinguish the functional basis of the two relevant statutes with very distinct language. Despite the harsh result for Fredrickson in this case, an apparently innocent occupant who may well have deserved a better fate, the Court would not abandon the innocent, and in fact would go on to staunchly defend the rights of occupants holding and improving land in good faith in the future, as we shall see.

CLAPP v TOWER (1903)

Our next case set an important precedent in North Dakota and it also provides great insight into the way the Court views and handles land rights in general. This case introduces the concept of equitable conversion, which is a policy that serves to assist in determining what constitutes a transfer of land rights and exactly when that transfer of rights occurs. The question of when an intended conveyance takes effect is a matter of great significance in many cases and is not always as simple to answer as it may seem. The Court always has the option to resolve controversies over land rights on the basis of equity, in the interest of justice, and therefore cannot be expected to arbitrarily reach simplistic conclusions, based on such superficial facts as which party holds the older deed or which party recorded their deed first. As we will see in numerous cases, establishing intent is always a key factor, and any evidence of intent is valuable and potentially decisive evidence. This case very well illustrates the fact that the Court looks deeply at the acts of the parties, to ascertain their intentions, and to determine who was the motivating party, whose intentions should be honored, when conflicting intentions appear. Equitable conversion, it should be observed, operates as a restriction or limitation on the rights of the grantor, and in this case on his successors, to the land intended to be conveyed, and as a benefit to the grantee, which is in full accord with the general view of the Court that the grantor is presumed to be the motivating party, in charge of the manner in which a conveyance is conducted, under typical circumstances. As the party executing the conveyance, and the party who stands to profit from it, the grantor typically bears the burden of any consequences that result from poorly expressed intentions anywhere in a deed, including the description. In this case, we will see how the ownership rights of a deceased grantor's successors can be challenged and limited, as a consequence of the grantor's decisions or actions.

Prior to 1903 - A certain section was owned by Tower. How or when he had acquired it, and how the land was used, if it was used by anyone at all, is unknown, but this was not relevant to the outcome. Tower, very late in his life, agreed to sell this land to Hadley, by

means of a contract for deed, but shortly after entering into this contract with Hadley, Tower died. The executor of his will discovered that Hadley was in default, with respect to the contract for deed, apparently having failed to make any of the payments called for in the contract, so the executor foreclosed the contract and took control of the land. Whether Hadley ever actually occupied the land is unknown, but importantly, he had acquired the right to occupy the land, by virtue of the contract for deed. Hadley evidently decided that he no longer cared about the land and made no further attempt to complete his acquisition of it, allowing his rights under the contract to expire and be terminated, as the result of his failure to make any payments on it. If he ever occupied the land, he apparently chose to vacate the premises voluntarily, rather than pay for the land, or attempt to assign the contract to some other party. After Hadley abandoned his contract for deed, the executor sold the land to Clapp and the amount that Clapp paid for the land became part of the Tower estate, to be distributed to the heirs of Tower. The Tower heirs however, lead by Tower's son, decided that they wanted the land itself, rather than the money, and therefore decided to challenge the sale to Clapp.

Clapp argued that Tower had made a valid and binding commitment to sell the land, when he entered into the contract for deed with Hadley, thereby clearly expressing his intent, as the owner and grantor of the land, to terminate his interest in the land, and forsaking any right to later choose to retain the land. Tower's son argued that the voluntary termination of the contract for deed by Hadley completely extinguished any effect on the ownership status of the land that the contract for deed may have had. On that basis, he asserted that he still had the right to elect to retain the land, and the executor had no right or authority to dispose of it against his wishes, so the transaction between the executor and Clapp was invalid and subject to nullification. The trial court decided that the conveyance to Clapp was legitimate and binding and the heirs of Tower had no valid claim to the section.

The Court framed the dispositive question as being whether or not the executor of Tower's will was mistaken in treating the land as personal property, rather than treating it as real estate. The Court took this

opportunity to adopt and apply the doctrine of equitable conversion, describing it as:

> "...a constructive alteration in the nature of property by which, in equity, real estate is regarded as personalty or personal estate as realty."

When Tower agreed to sell the land, and committed himself to doing so, by entering the contract for deed with Hadley, the Court agreed that he had, in effect, conveyed the equitable title to the land and retained only the bare legal title. From that point forward, neither Tower nor any of his successors had any real or complete control over the land itself. His interest in the land had effectively been converted from an interest in real property to a strictly financial interest. In other words, Tower's only remaining right, in connection with the land, was the right to the compensation that was due to him under the terms of the contract for deed. So the executor had done the right thing, the Court determined, by conveying the land, since he held only the bare legal title to the land as a trustee, just as the elder Tower himself had, at the time of his passing. In conveying the land, rather than retaining it as part of the estate, the Court ruled that the executor had properly put the intentions of the deceased grantor into effect, as those intentions had been indicated by the late Tower's own act of conveyance. The Court upheld the conveyance to Clapp, quieting title in him, and in so ruling, clearly placed great weight on the fundamental principle that the intentions of the grantor must be carried out, even after his death, and concluded by quoting the following from a New York case:

> "Courts of equity regard that as done which ought to be done. They look at the substance of things, and not at the mere form of agreements, to which they give the precise effect which the parties intended."

A more forthright statement of the Court's primary objective in ruling on agreements involving land rights is difficult to imagine. Ascertaining and honoring intent forms an exceedingly powerful theme, that can be seen recurring throughout the Court's history, and should therefore be well noted and understood by land surveyors. The doctrine of equitable conversion has

been further developed and evolved over the intervening decades, but has been consistently upheld and adhered to by the Court. In the 1939 case of Lee v Shide, the Court clarified that not every holder of a contract for deed is an equitable owner, the doctrine applies only to those who are entitled to possession of the subject property, emphasizing the significance, in the eyes of the law, of actual physical use and improvement of land. In 1957, in Shure v Dahl, the Court dealt again with a very similar situation, where a land owner sold, by means of a contract for deed, land that he had willed portions of to various parties, and then he died, with a large balance remaining unpaid to him by his grantee. The question was not who would get the land, since the buyer paid the balance, completing the conveyance, the question was who was entitled to the money. Following California, Montana, New York, Ohio & Washington cases, and a North Dakota statute, and reversing a lower court decision, the Court decided that only the parties specifically named in the will were each entitled to a share of the proceeds from the sale of the land, and not any other heirs who had not been specified in the will as devisees of the particular land in question, while noting that South Dakota had held the contrary.

HOUGEN v SKJERVHEIM (1905)

Although the physical abandonment of land often resulted in claims of adverse possession in the early years, situations also developed that involved the concept of abandonment in a different context. In addition to physical abandonment, it's also possible to abandon certain types of land rights without ever leaving the land, and without any written evidence of the relinquishment of those rights. In reviewing this case, involving abandonment of written contractual rights, we again gain important insight into how the Court views and respects the concept of agreement in general. Abandonment of rights can occur either by means of conduct or by means of statements, all that is required to prove abandonment is clear and distinct evidence pointing to the fact that the relevant party or parties either made an actual agreement to forsake certain rights, or they conducted themselves in a manner indicating that they truly intended and agreed to forsake those

rights. This case again demonstrates that the Court draws it's conclusions, regarding the existence of an alleged agreement, primarily from the conduct of the parties, placing a strong emphasis on physical improvements, as the clearest evidence of true intentions, and also as notice of those true intentions to the world. Again here also, we see the Court taking the position that recordation does not create rights, and that recordation alone is not conclusive evidence of the existence of rights. In addition, we see that an agreement of a negative nature, to waive or release rights, can be just as definite and binding as an affirmative agreement of the kind that creates rights, even where written evidence of land rights previously created remains in the public record. A theme begins to emerge here, which we will see developed much further in subsequent case, that indicates how assiduously the Court endeavors to discourage or prevent any parties from sleeping on their rights, and then later deciding or attempting to revive those rights, once forsaken, for their own benefit.

> 1898 - Skjervheim was the owner of 160 acres of farmland, which was being farmed by Hegre, as a tenant under a lease. Hegre evidently decided he wanted to buy the land and Skjervheim agreed to sell it to him, so they entered into a contract for deed.
>
> 1899 - Skjervheim recorded the contract for deed and Hegre continued to farm the land, making his payments to Skjervheim in the form of crops delivered at harvest time, as specified by the contract.
>
> 1900 - Hegre evidently decided, for unknown reasons, that he no longer wanted to buy the land. He informed Skjervheim that he would prefer to abandon their agreement and return to farming the land as a tenant under the lease arrangement. Skjervheim agreed to this, however, he never recorded any document indicating that the contract for deed had been cancelled or terminated. The contract for deed remained a matter of public record, which would naturally appear to any observer to still be an effective instrument.
>
> 1901 to 1902 - Skjervheim made significant improvements to the subject property, including rebuilding an existing house, building a barn and installing wells, materially increasing the value of the subject property. Hegre was present and looked on as these improvements were made, tacitly observing the increasing value of

the property.

1903 - Hegre issued an assignment of the contract for deed to Hougen and also gave Hougen a quitclaim deed, effectively conveying whatever rights Hegre had in the land to Hougen. After this was done, Hougen visited Skjervheim and told him that he had just bought the rights held by Hegre and that he planned to pay Skjervheim for the land. Skjervheim expressed no concern or objection during this conversation. He said nothing to Hougen to suggest that the contract for deed was no longer valid, nor did he indicate that he was unwilling to convey the land to Hougen. Subsequently, when Hougen attempted to pay him for the land, Skjervheim refused to convey it and maintained that he had the right to keep it. Hougen filed an action to compel Skjervheim to convey the land to him, under the terms of the contract for deed.

Hougen argued that he was an innocent purchaser of land, who had relied on the public record. His principal argument was that Skjervheim was legally bound to perform the agreement that he had entered into with Hegre, as defined in the contract for deed, but in addition to that, he also argued that Skjervheim should be estopped from denying that the contract was still in effect, because Skjervheim had mislead Hougen, during their initial conversation about the land, by failing to indicate to Hougen, at that time, that Skjervheim believed the contract was no longer in effect. Skjervheim argued that the contract had been effectively abandoned, by verbal agreement between Hegre and himself, and that this abandonment was borne out by his subsequent behavior in placing new improvements on the subject property. The trial court ruled that a written contract could be abandoned orally or verbally, and that it had been abandoned in this instance, so Hegre had conveyed nothing to Hougen, because by the time of the conveyance to Hougen, Hegre had no rights in the land to convey, despite the recorded contract.

At this point in time, the fact that a written contract could be negated or nullified by means of verbal agreement was already well established in North Dakota. In this case, the Court cited two previous cases, in which that question had been adjudicated and settled, and in which the Court had clearly enunciated it's position on evidence relating to agreements. In the

1902 case of Mahon v Leech, the Court had first taken the position that voluntary and unconditional relinquishment of land, accompanied by evidence of acceptance of that relinquishment, can constitute abandonment of land rights, and need not be written to have effect. Then in 1903, in Wadge v Kittleson, the Court had clearly stated that:

> "A party to a written contract for the sale of land may waive his rights thereunder by parol, and the contract may be annulled and abandoned and extinguished by parol."

With respect to the secondary argument of Hougen, suggesting that Skjervheim was subject to estoppel, the Court found that nothing Skjervheim had said or done, including recording the contract and then failing to record any evidence of its termination, was sufficient to raise an estoppel against him. Skjervheim had the right to decide not to sell the land to Hougen, since Hougen could not show that the initial failure of Skjervheim to repudiate the contract had caused Hougen any trouble, expense, damage or harm. The Court placed strong emphasis on the behavior of Skjervheim, subsequent to the repudiation of the contract by Hegre. The fact that Skjervheim openly treated the land as his own, by continuing to develop it and significantly raise it's value, was a clear indication that the contract had been abandoned, and it could not be revived by any act of Hegre, such as his futile attempt to assign his lost rights in the subject property to Hougen. On that basis, the Court upheld the ruling in favor of Skjervheim and ruled that Hougen had acquired nothing, by either the assignment of the abandoned contract for deed, or the quitclaim from Hegre, since Hegre had no rights left to convey at that time.

It may be suggested that there is an apparent conflict between the result of this case and that of the Clapp case, just previously discussed. It may be asked how the Court could possibly have allowed Skjervheim to keep his land, in spite of the fact that he had admittedly made a definite commitment to sell it, after having ruled that the son of the deceased Tower, in the Clapp case, had no right to keep his late father's land, because his late father had made a commitment to sell it. The appearance of a conflict between these decisions however, disappears, as is typically the case, when the contrasting evidence is more fully examined. Here in the Hougen case,

there was not only clear evidence that an initial agreement had been made to convey the land, there was also clear and distinct evidence that the original agreement had been expressly terminated, including both testimonial evidence and physical evidence, as described above. The key difference in the Clapp case was the fact that Tower, the owner of record, died while still fully intending to sell the land. In other words, he never withdrew his offer to sell it, nor did he ever accept any request from his grantee to cancel or terminate their agreement, so in that case, there were no grounds upon which to claim or to show that the contract had been abandoned before Tower died. Once again, we can see the great importance placed by the Court on first ascertaining the intent of the parties, and secondly, on carrying out their intent, once it has been ascertained. It's also important to note that since the statute of frauds has no application to abandonment, it presents no obstacle to the oral abandonment of a contract for deed. This decision has been cited with favor as recently as 1985, in the case of Sabot v Rykowsky, for the proposition that a written agreement or contract can be abandoned and effectively terminated by the parties without any written documentation, raising another caveat for land surveyors, who may believe that they are entitled to rely solely upon evidence of record, and illustrating the danger inherent in doing so.

NASH v NORTHWEST LAND (1906)

As we have already seen, various obscure errors resulting from carelessness or ignorance in the taxation process can set the stage for adverse possession, and from this case we learn that the same situation can develop as a result of a mortgage foreclosure. When errors are made, rendering a mortgage foreclosure void, adverse possession can often serve as a legal remedy, to bar the owner of record whose mortgage was improperly foreclosed, from asserting ownership years later, after an innocent party has acquired the land from the holder of the mortgage, and occupied and developed the land, elevating it's value. This case is among the most cited cases concerning adverse land rights in North Dakota history, primarily because it marks the acceptance by the Court of the idea of

tacking possessions of successive adverse claimants together. This decision brought the Court into alignment with the view held by most courts nationwide with regard to one key factor in many adverse claims, by virtue of the Court's recognition of the existence of privity between successive adverse claimants, which is the underlying principle that enables and supports tacking. In addition, the Court continued, in this case, to emphasize the fundamentally positive and constructive nature of the improvement and development of land based on good faith, and gave notice to all that it would observe and protect land rights obtained in good faith, at the expense of negligent land owners, going forward. It's also important to note however, that at this point in time, adverse possession in North Dakota was still purely a title issue, involving entire tracts of land only, and did not yet involve any boundary issues, as attested by the Streeter case that we have already reviewed and by this case as well. It would be another quarter century before the Court would allow boundary issues to be introduced in adverse possession cases, and presented as adverse claims to various portions of lots, parcels or tracts, so at this time adverse possession was still only a contest over which party actually held the strongest title, and not a contest over how far that title extended or where it was located on the ground. Nevertheless, the Court's recognition and acceptance of fundamental legal concepts during this early time period, such as privity and tacking, carried over into the modern era, making the critically important principles adopted here applicable to adverse possession situations today.

1889 - Brogan and Flummerfelt, the fee owners of a typical city lot, as tenants in common, executed a mortgage on the lot. There is no indication of how they acquired the lot or how long they had owned it, but the lot was apparently vacant investment property. There is no indication that they ever even saw the lot after this time, much less used it, and in fact they may have never seen it at all.

1890 - The bank holding the mortgage claimed that Brogan and Flummerfelt were in default. They had apparently made no payments, so the bank decided to foreclose on the lot.

1891 - A Sheriff's deed for the lot was issued to the bank and was recorded. However, the foreclosure notice, which is required by law, had been improperly published. This would only later be discovered,

rendering this deed void, and precipitating the controversy over the lot.

1892 - The lot was conveyed by the foreclosing bank to a different bank, and then by that bank to yet another bank. This last bank then conveyed the lot to Strain Brothers, who took possession of the lot and began improving it. All of these transfers were regular conveyances by warranty deed, none of the parties were aware that the Sheriff's deed had been invalid, nor did any of them have any reason to suspect that any problem of that kind existed.

1900 - After occupying and developing the lot for over seven years, Strain sold it to Nash, by warranty deed, and she took possession of it. Whether or not she actually lived on the lot is unknown, but she was clearly the sole party making any type of use of the land.

1904 - It was discovered, presumably by an agent or representative of the Northwest Land Company, which had evidently become interested in the lot, that the foreclosure proceedings had been defective and therefore the Sheriff's deed issued 13 years earlier was void. Northwest then evidently informed Nash that she had no right to occupy the lot and they intended to acquire it and require her to vacate the premises, resulting in her decision to file an action to retain possession of the lot and to quiet her title to it.

Nash recognized the existence of a fatal error in her chain of title and did not attempt to argue that her chain of title was not fatally flawed, she simply argued that she was entitled to the lot by means of adverse possession under color of title. The statutes of limitation had been revisited by the legislature in 1905 and she, or her legal counsel, was apparently confident that her claim of adverse possession would now be successful, despite the general similarity of her case to that of Mrs. Fredrickson, who had been unsuccessful in her adverse possession claim just four years earlier, as we have seen. Northwest, along with their co-defendants Brogan and Flummerfelt and others, argued that the possession was not adverse, that tacking of the possession of one party to that of another party should not be allowed, and that the period of time involved was insufficient to invoke the relevant statutes of limitation. The trial court found that the adverse possession claim of Nash was legitimate and quieted title in her.

The Court disposed of the idea that the possession was not adverse by drawing a distinction between parties who occupy land in recognition of the ownership of others, and parties who occupy land purely as their own. Specifically with respect to parties involved in a mortgage relationship, the Court stated that:

> "...when the mortgagee in possession denies the mortgagor's rights, the statute is put in motion."

Both Strain and Nash had been unaware of any rights of others to the land, and had therefore occupied it as their own, and not in recognition of any rights of others, so their possession was indeed adverse, meaning that the lot had been held adversely for a total of just over eleven years, from late 1892 to early 1904. But Strain had held the land for only seven years, and Nash for only four years, so neither party could satisfy the ten year period alone, leaving Nash potentially in the same position as Fredrickson had been in her case.

In this case however, unlike the Streeter case, the Court found that the applicable statutes did not prevent Nash from tacking the possession of Strain to her own. The key difference was the view that the Court took in this case on the critical issue of privity between successive owners of land. The Court adopted the position that privity does exist between an adverse possessor and the grantee of the possessor, when the title conveyed to the grantee is the same title that was acquired by the adverse possessor. In other words, if it was the intention of the original adverse possessor to convey all the land that they occupied under their title, whether it was occupied adversely or otherwise, then the possession of the grantee under that conveyance becomes equally adverse to the owner of record. The crucial legal effect of this position is to shift the focus away from the point in time when the transfer of the property in question took place between the possessing parties, and place the emphasis on the point in time when the adverse possession originally began. The Court announced this position by declaring that:

> "The transfer of the possession did not give rise to a new cause of action. The cause of action accrued to the mortgagor when

> the adverse possession commenced, and that cause of action remained the same even though other parties have succeeded to the rights of the adverse claimant."

On that basis, the Court ruled that since Nash had shown that both the possession of Strain and her own possession satisfied all the requirements for adverse possession, any and all of the claims to the lot made by Northwest and the various other defendants, who were guilty of conduct amounting to laches, were barred by the ten year statute of limitations, and title to the lot was quieted in Nash. In addition, the Court also saw fit to clarify the full impact and significance of adverse possession, concluding that title resulting from adverse possession is just as strong, complete and absolute as any title acquired by deed, and that such title is acquired at the moment in time when the adverse possession is actually completed. The significance of this last position was soon to be clearly demonstrated, in the 1908 case of Stiles v Granger. In that case, the adverse claimant offered to buy the subject property from the owner of record, after the statute of limitations had run. The record owner argued that this offer constituted recognition of her ownership, destroying the completed adverse possession, but the Court dismissed this idea, because nothing the possessor may say after acquiring his title, can operate to undo the completed adverse possession. In taking these positions, the Court aligned itself with the mainstream of modern judicial thought on the issue of adverse possession, and these important concepts remain in effect today. However, in describing the behavior of the defendants in this case, the Court also began to establish a connection between acquiescence and adverse possession, saying with reference to Brogan and Flummerfelt, the owners of record throughout the period of adverse possession, that by implication:

> “...they consented to and acquiesced in the possession on the part of the mortgagee and it's successors."

In the context of this case, it’s clear that the Court was merely pointing out, as many other Courts have done, by means of this language, that the defendants had been delinquent and remiss in their behavior. To the same effect, the Court also described their posture as being silent and inactive, so there is no suggestion that the Court intended to create any

actual linkage between the divergent legal principles of adverse possession and acquiescence at this time. Yet, this would prove to be an important reference with very significant consequences, when later viewed in combination with subsequent references of the same kind, decades down the road, as we will eventually see.

PROPPER v WOHLWEND (1907)

This case represents the most complete and thorough consideration and discussion of PLSS evidence ever engaged in by the court. Several very basic but highly important principles relating to the proper treatment of the various forms of survey evidence are addressed here, making this one of the most essential North Dakota cases for the land surveyor to understand and appreciate. Although the actual location of the original monument in question is ultimately left undecided by the Court, subject to the subsequent presentation of conclusive evidence, the language used by the Court here very clearly demonstrates it's complete respect for the fundamental principle of monument control. The final decision on where the original monument in question was actually located is remanded back to the lower court in this case, but that decision is to be made, upon a retrial of the matter, in the manner directed by the Court, following the principle of monument control, rather than by arbitrarily relocating the corner in question, based on the erroneous conclusion that the original monument location is lost. The remand process is typically used by the Court in cases where the lower court erred in some way, either in reaching it's decision or in providing instructions to a jury, because this method effectively guides the lower courts in their future application of the law, by compelling them to correct their own errors. So although it may seem very unsatisfying that we never find out who prevails, or which particular testimony is finally deemed to control the original monument location, or where that location actually ends up being, this case nonetheless provides a very powerful statement regarding the relative importance of all the different types of evidence that are presented and discussed, clearly illustrating what the Court sees as the proper prioritization of such boundary evidence. Although we will see many cases in which the Court strongly upholds the controlling value of plats,

when land rights of other types are at issue, here we see the Court focus upon and emphasize the controlling force of physical evidence, in the form of original monumentation, when the controversy is one that falls within the realm of boundary law.

1884 - The southeast quarter of a certain Section 31 was patented. Propper eventually became the owner of this quarter, through an unspecified number of conveyances, and his title to this entire quarter was undisputed.

1893 - The southwest quarter of the same section was patented to Wohlwend. Whether or not Propper was already the owner of the southeast quarter at this time is unknown, but this makes no difference to the outcome, as will be seen. How the land was actually used by these parties is also unknown.

1894 to 1906 - At some point during this time, Wohlwend built a fence along what he believed to be his east line. At some time thereafter, presumably whenever he first observed the fence, Propper claimed that it was 7 to 8 rods too far east, and was therefore on his land. The disagreement was focused exclusively on the true location of the south quarter corner of the section, just as in the Radford case, adjudicated nine years earlier and previously reviewed herein. Unlike the Radford case however, there is no indication that any surveys were ever made, subsequent to the original survey of the township, so there is no way of knowing exactly why Wohlwend built the fence in the particular location where he built it. All of the original monuments around the section, except the south quarter corner, were known and undisputed, and there is no indication of whether or not the center quarter corner had ever been established. The full length of the south line of the section had evidently been measured, although who measured it and how they measured it is unknown, and both of the parties acknowledged that the distance between the southeast and southwest section corners was over 200 feet short of a mile. Which quarter would bear the shortage, or whether the shortage should be shared, was obviously the principal focus of the controversy. Propper filed an action against Wohlwend to quiet title to the land that he claimed was part of his quarter, lying west of the fence built by

Wohlwend.

Propper argued that since section 31 is on the west edge of the township, as the owner of the southeast quarter, he should be allowed a full half mile along the south line of the section, or as his counsel argued the point, his full 160 acres, based upon the patent and the original plat, and Wohlwend, as owner of the westerly portion, must bear all of the shortage. Wohlwend simply argued that his fence was at the correct location. Wohlwend's argument was equivalent to taking the position that the shortage should be shared and split between the parties, since he had evidently built his fence to a point that was roughly at the midpoint of the section line, provided that Propper was correct when he stated that the fence was about 7 to 8 rods east of the quarter corner location which he was claiming, since 7 to 8 rods amounted to roughly half of the total section line shortage. Neither of the litigants testified that they had ever personally seen the original monument in question, but both sides presented several witnesses who provided testimony regarding the original monument location. The trial court, disregarding all the testimony relating to the original monument, decided that splitting the shortage was appropriate and therefore ruled in favor of Wohlwend.

Before reviewing the treatment of this controversy by the Court, its appropriate to observe that every surveyor today should immediately recognize that the arguments made by both sides were fundamentally mistaken. Both parties obviously failed to understand or appreciate the difference between a lost PLSS corner and an obliterated PLSS corner. Both sides based their arguments entirely on measurement principles, each one naturally choosing a measurement solution that was advantageous to him, but in so doing, both of them failed to recognize that since the corner was obliterated, and not lost, no solutions based upon measurements could be applicable, because the original quarter corner location in question was in fact subject to determination based on evidence. Both sides therefore made futile arguments, based on the notion that the corner was lost, rather than merely obliterated. Errors of this kind still occur with some frequency today, primarily because in many cases, there are often no surveyors involved who fully understand the principles governing recovery and restoration of PLSS monuments and corners, and the attorneys that are involved also lack

superior knowledge of such matters, and therefore sometimes fail to make the most appropriate argument. It's also important to realize that at the time this case was decided, the relevant principles were far less clear, and much less well developed, than they are today, so the fact that both parties presented completely misguided arguments is not really surprising and is quite understandable.

The Court began by dismantling the argument made by Propper, that he was entitled to a full half mile of the section line, or a full 160 acres, holding that neither patents, nor plats, nor field notes, nor measurements, nor statements of quantity or acreage, can control PLSS boundaries, if any legitimate evidence of an original monument location exists. This view of the circumstances, taken by the Court based on the presence of the aforementioned testimonial evidence, also effectively negated Wohlwend's argument that he was entitled to all the land west of the midpoint of the south line. The fact that he had fenced a certain line meant nothing, since it shed no light on the true original monument location, and the fence had not stood long enough to become a boundary through any process legally putting that boundary in repose. Driving this important point home, the Court went on to quite forcefully maintain that physical evidence of an original survey is always the highest and strongest form of original boundary evidence:

> "According to all the authorities, the boundaries as actually located by the original survey, must, when established, control ..... the grant is conclusively presumed to be made upon an actual field survey of the land, and the reference in the patent to the section, township and range must be taken as referring absolutely to the actual ground survey of the land as originally made, and upon which the grant was unquestionably made."

The Court was also confronted with the argument that the Supreme Court of the United States had ruled that plats always control, in the landmark case of Cragin v Powell in 1888. Indeed, the US Supreme Court had ruled that an original plat can control PLSS boundaries, in that case, which is cited in the BLM Manual as a cornerstone in the foundation of bona fide rights in this country. However, the Court correctly observed here,

that the ruling in the Cragin case had no application to the matter at hand, since the Cragin case established only the fact that plats control over field notes and measurements, and did not indicate that plats control over original monuments, none of which were present in the Cragin case. The Court agreed that an original plat can and does control boundaries, over field notes and measurements, but the plat can become the controlling evidence only in the absence of superior evidence, and either physical evidence or testimonial evidence of original monuments can overcome any and all other forms of evidence that may be presented. In this case, the Court decided, in complete accord with it's ruling in the Radford case, that the testimony providing the strongest evidence of the original physical monument location, must control the corner location in question, regardless of the fact that the location thus established would inevitably be at variance with the documentary evidence. In so ruling, the Court upheld the right of reliance on physical evidence as primary, rendering all documentary evidence, as well as measurements based on documentation, such as plats and field notes, secondary.

In conclusion, The Court reiterated the principle established by it's ruling in the Radford case, that testimony regarding PLSS monuments is among the most potentially valuable and decisive forms of evidence, and cannot be summarily dismissed or disregarded, as had been wrongly done in this case. Since this case included numerous testimonials provided by various witnesses, the Court determined that the case had to be remanded to the trial court, and a new trial must be held, to allow all the evidence to be fully considered by a jury, in order to properly adjudicate and resolve the quarter corner location, based on the strongest testimonial evidence of it's original location, rather than basing the outcome on any principles of land division involving measurements. In other words, the Court quite correctly and wisely indicated that the question of who would bear the shortage was irrelevant, because that question would be answered when the original monument location was determined. Measurement evidence and principles of proportional land division could only come into play in a situation where no evidence whatsoever, either physical or testimonial, of the original monument location existed, which was clearly not the case here. All forms of evidence, including fences and measurements have their place and can certainly be very important, as we will see in subsequent cases, but both measurements and newly constructed fences must inevitably bow to the

principle of monument control. The essential lesson to be taken by the surveyor from this case, is that ultimately, boundary locations must be based upon, and supported by, the strongest evidence obtainable, in order to be supported by the law and legally upheld, no matter how arduous or time consuming the process of finding all the evidence, and determining which evidence is the best available evidence, may be.

COLE v MINNESOTA LOAN & TRUST (1908)

Here we begin our review of the legal principles relating to easements, and in this particular case, issues relating to dedication. Although sometimes used in other ways, dedication, with respect to land rights, typically refers to the process of devoting land to public use, by burdening the land with an easement in favor of the public, for a particular purpose or set of purposes. The land surveyor, having the responsibility to respect and contribute to the protection of all land rights, held by both private parties and the public, should have a reasonably solid understanding of the concept of dedication, in order to at least avoid unknowingly ignoring or unintentionally damaging such rights, and avoid the potential liability that could come with such a mistake. In the 1901 case of Northern Pacific Railway v Lake, the Court had established that all public streets and highways in existence in North Dakota at that time, including every section line right-of-way, would be presumed to represent an easement, as distinguished from fee ownership of the underlying land by the public. But that case did not expressly address the concept of dedication, and it concerned only those public easements that were intended to form a right-of-way for the purpose of travel, so the legal status of lands dedicated for other purposes, either by plat or otherwise, remained less than completely clear. In the case we are about to review, the Court made the significance of dedication, and it's effect upon the future use of the land in question, very clear, embracing the concept of dedication by means of legal implication, in defense of rights of the public, which in this case were created through the process of platting a subdivision. As we will see, in this case and others, details relating to the manner in which land is platted can be very critical to

dedication, so in that respect at least, the land surveyor, as a vital participant in the platting process, can have very meaningful input concerning the expression and depiction of proposed dedications, and even a surveyor who creates no plats should be able to properly understand the effect of existing plats, with regard to dedication. At the same time however, although proper platting is certainly highly important, this case serves very well to illustrate the fact that the relevant information of record pertaining to any given situation, such as a plat, is definitely not the only factor in play in the determination of land rights, acts and events are also of great significance and therefore cannot be disregarded.

> 1897 - Minnesota Loan & Trust (MLT) acquired land in Ward County and platted the original townsite of Kenmare. This recorded plat showed several blocks that were divided into typical lots, clearly intended for residential occupancy, but it also included one block which was undivided and was labeled only as Block 2.
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> 1898 to 1902 - Many of the lots platted in 1897 were sold and occupied, adjoining areas were also platted, and lots in those adjoining additions to the town were also sold and occupied as the town grew. Block 2 was conveyed to Cassedy, along with other portions of the townsite. Cassedy then conveyed the west half of Block 2 to Smith & Tolley, and conveyed the east half back to MLT. Cassedy, Smith and Tolley all participated in the process of developing and selling various platted lots located in the blocks adjacent to Block 2 and elsewhere in the townsite.
>
> 1903 to 1907 - Block 2 remained undeveloped during this period and was routinely used by the owners of the nearby platted lots, and the public in general, as a public meeting ground and park.
>
> 1908 - The aforementioned group of developers decided to develop Block 2 into residential lots, and had it surveyed for that purpose, and prepared a plat showing that block divided into lots. A group of owners of the existing nearby lots, lead by Cole, who had been using Block 2 as a public square on a regular basis, filed an action to permanently prevent the developers from converting Block 2 into lots and to have the new plat of Block 2 declared null and void.

Cole and his fellow plaintiffs argued that the 1897 plat had effectively dedicated Block 2 to public use. They further argued that Block 2 had been intended to serve as a public square, on a permanent basis, and therefore could not legally be converted to private use by the developers. They asserted that the public use of the block, for various public purposes for several years, constituted legal acceptance of the offer of dedication presented by the plat, and they had thereby established their right to continue using the block as public ground perpetually, and they had the right to insist that it remain devoted to public use forever. MLT and the others attempting to develop Block 2 as private lots argued that the block was never intended to be permanently devoted to public use, and since they were the owners of the land in fee, they had the right to do as they pleased with it, so they were free to subdivide it, terminate all public use of it, and sell it off to private parties. The trial court agreed with the lot owners that a permanent easement for the benefit of the public had been created by implied dedication, so the block could not be platted for purposes of converting it to private use and no lots could be created or sold for private use.

Since the plat contained no explicit dedication statement pertaining to Block 2, the lot owners had to rely on implied dedication, also known as common law dedication, in order to prevail. This legal doctrine supports the creation and preservation of public rights, based on evidence of intention and acceptance. Under this common law doctrine, where the evidence indicates that an intention to dedicate land to public use existed, an offer of dedication is legally recognized. When that offer of dedication is followed by valid evidence of acceptance by the public, the dedication becomes complete and permanently binding. Since statutes relating to dedication had already been created in North Dakota at this time, MLT attacked the concept of implied dedication, suggesting that the common law doctrine had been legally nullified by the creation of such statutes, and was therefore now utterly inoperative in North Dakota. The Court readily disposed of this argument by stating that statutes are not presumed to abrogate common law principles. The Court found that no conflict existed between the dedication statutes and the concept of implied dedication, because the statutes outlining formal dedication merely serve to create another avenue by which dedication may be accomplished, and then went on to adopt the position that

easements may be dedicated for public purposes:

> "...without the aid of any conveyance. It may be done in writing, by parol, by acts in pais, or even by acquiescence in the use of the easement by the public. All that is necessary is that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done, the right or easement becomes instantly vested in the public."

Having established that implied dedication is a legitimate legal doctrine, which can be applied to public grounds of all kinds, and is not limited only to roadways in North Dakota, the Court proceeded to consider the specific circumstances involved in this particular case. The evidence relating to how Block 2 had been used indicated that walkways had been constructed both within and around the perimeter of the block, and trees had been planted in neat rows lining the walkways. In addition, a bandstand had been erected in the center of the square and two wells had been dug, which had been used as public drinking fountains. The testimony further indicated that the developers had verbally informed some of the lot purchasers that the square was intended to remain in this condition and would continue to be used as a public park, at the time when those parties were considering buying their lots. The totality of the evidence made it quite clear that the developers had first used the park as a tool of inducement, to convince the lot owners to purchase their lots, but then the developers had changed their minds and decided to try to use Block 2 as a source from which to create additional lots, which they could profit from selling. Although the developers may have believed that they had left the opportunity to legally do this open to themselves, by not labeling the square as a park on the plat, the Court informed them that they were mistaken in that regard, by defining the fundamental basis upon which true intentions are most clearly revealed:

> "The intent which the law means is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have the right to rely on the conduct of the owner as an indication of his intent. If the acts are .... acted upon by the public, the owner cannot, after

> acceptance by the public, recall the appropriation .... the law will not permit him to assert that there was no intent to dedicate."

The Court concluded by declaring that the testimonial evidence, regarding the verbal promises concerning Block 2 made by the developers to the lot buyers, was in fact sufficient alone, to support the creation of an easement in favor of the public by means of estoppel, even without the further evidence of the developers original intent, provided by the references to the plat in the deeds of the lot owners and by the subsequent construction of public facilities in Block 2. Had the plat contained a clear statement negating the idea that Block 2 was intended for public use, or a statement clearly reserving the right to subdivide it in the future, the outcome could have been different, but that was not the case. Stating that implied dedication is based upon the principle of estoppel, the Court fully upheld the ruling of the lower court, and thereby served notice to subdividers of the burden of complete clarity to which they would be held, a burden which the Court has quite consistently imposed over the decades, as we shall see. In so deciding, the Court had shown that it places a very high value on the right of a grantee to rely upon representations made by a grantor, whenever those representations operate to influence or persuade the grantee to deal with the grantor. In such a situation, the grantee is typically presumed to be the innocent party, fully entitled to trust that the grantor is dealing in complete good faith, so the grantee is justified in placing complete reliance upon such statements made by the grantor, and the reliance made by the grantee will typically be protected by the Court. Under this view of the relationship between a grantor and a grantee, the promises made by the grantor create appurtenant rights in favor of the grantee, which the grantee may subsequently demand the enforcement of. We will see many more situations in which these powerful common law principles of good faith reliance and estoppel play a pivotal role in determining land rights.

ENGHOLM v EKREM (1908)

Here we encounter another case in which the immense legal force and effect of the principle of estoppel is on display, illustrating the great significance placed upon it by the Court in resolving conflicts over land rights. Literally, the concept behind estoppel is that the mouth of one who is not entitled to speak, as a consequence of his own previous acts or failure to act, shall be plugged or stopped, so that his voice, words or claims cannot be legally heard at all. In 1900, in Gjerstadengen v Hartzell, a case involving the partitioning of land between cotenants, the Court had formally adopted the California definition of estoppel, with respect to land rights, which had been first enunciated in an 1869 California case. This definition calls for a four part test to be applied to the situation in controversy, to determine whether or not an estoppel of a certain party or parties should be invoked. While this definition has been consistently upheld by the Court ever since that time, and remains highly important today, other terms have also been used by the Court to define estoppel, making it more flexible and adaptable, under varying circumstances where that earlier and more rigid definition may be inappropriate, as we will see in this case and others going forward. For example, in the 1966 case of Sittner v Mistelski, while reciting both the California definition and the North Dakota statutory definition, the Court also stated that estoppel is fundamentally intended to prevent successful claims from being made based on either false representation or concealment, and that estoppel is essentially a doctrine of good conscience, mandating good faith performance by all parties in all land transactions. In the 1976 case of Farmers Coop v Elmer Cole, the Court spelled out three requirements applying to the party asserting that estoppel should be invoked, which were innocent ignorance of the truth, good faith reliance on the integrity of the opposing party, and actual actions taken, putting the misinformation into effect, to the detriment of the victim. This was fully in accord with the tenor of the Gjerstadengen case, in which the Court had poignantly quoted a passage with favor from a Connecticut case, indicating that estoppel is a purely defensive claim, never intended to create a gain for either party, but rather intended entirely to protect one from inequitable loss or victimization. In the case we are about to review, we will see a clear demonstration of just how powerful estoppel can be.

1902 - Engholm and his wife established a homestead on a tract of land along the Mouse River. The land was fenced, except for the side bordering the river, and they built a house and barn on it and began living on it.

1904 - Engholm verbally agreed to sell a portion of the tract to Ekrem. The size and location of the portion to be sold to Ekrem was negotiated and they agreed that it would be the west 150 feet of the south 200 feet. Engholm promised to deliver a warranty deed for this parcel to Ekrem. Ekrem immediately began construction of a house on this parcel and began making payments to Engholm for the parcel in question. Just four days later, Engholm conveyed the rest of the western part of the homestead tract to Peterson. Engholm and his wife continued to live on the eastern part of the homestead tract. The exact size of the homestead tract is unknown, but this was not a relevant issue.

1905 - Ekrem began building a barn on his parcel. Engholm's wife objected to his presence on the land at this time, for some unknown reason. Ekrem evidently informed Engholm that he wanted their agreement put into writing at this time. A contract for deed was prepared and signed by Engholm and Ekrem. Engholm's wife however, refused to sign the contract, stating that she, as co-owner of the homestead, had never agreed to convey any land to Ekrem, and she wanted him off the land.

Engholm argued that since the land was the Engholm family homestead, no part of the land could be conveyed by Engholm without the agreement and equal participation of his wife in the conveyance, because she was a co-owner of the homestead tract. Engholm also argued that Ekrem had acquired nothing, despite their verbal agreement, because the statute of frauds prevents any conveyance of land by means of verbal agreement alone. Ekrem argued that since he had done everything that was required or expected of him under his verbal agreement with Engholm, his performance of his part of the agreement demonstrated the existence of the agreement and gave rise to an estoppel against both Engholm and his wife, since they had clearly observed him performing the agreement and were fully aware that he understood it to be a definite and permanent agreement. The trial

court agreed with Ekrem, holding that he had proven the existence of a binding conveyance agreement, and ruled in his favor.

The Court first found that the evidence that an agreement between Engholm and Ekrem actually existed was clear and satisfactory, and that the terms of the agreement, including the description of the parcel to be conveyed, was adequate. The evidence indicating that Ekrem had made payments to Engholm was also sufficient, the Court decided. Mrs. Engholm had in fact signed a receipt for a payment made by Ekrem to her husband, along with her husband, but she testified that she had signed it only as a witness to her husband's signature, and not understanding that it was related to a conveyance of part of their homestead. The Court agreed that the contract for deed, in the absence of Mrs. Engholm's signature, was null and void, because neither spouse can convey any rights to a homestead against the wishes of the other spouse. Nevertheless, the Court showed no sympathy for the position taken by Mrs. Engholm, and ruled that both Engholm and his wife were estopped from denying that they had agreed to sell the parcel to Ekrem, holding that:

> “Neither the statute of frauds nor the various statutory provisions enacted for the protection of a homestead claimant can be held to do away with the general equity doctrine of estoppel in pais."

Citing two very widely quoted and highly respected landmark decisions on estoppel, from Idaho and Tennessee, the Court adopted the position that where the evidence is sufficient to raise an estoppel, it is the responsibility of the Court to see that justice is done, with respect to land rights, and the Court will not allow statutes of any kind tending to the contrary, such as the statute of frauds in this instance, to be manipulated and used as tools of injustice by anyone. Statutory protections are by no means absolute and cannot be taken for granted, being reserved for the benefit of those who have acted in good faith, and are unavailable to those who would pervert them into tools of entrapment, as the evidence convinced the Court that the Engholms had attempted to do here. Estoppel, as can be readily seen here, is among the most powerful and important factors in play in cases involving land rights, and we will see it in action a number of times, as we

proceed.

Many things can happen, in the course of human affairs, and we will never know exactly what happened between these parties. Its possible that Engholm lied to his wife about his intentions to sell the land, and she may have simply been ignorant or foolish enough to fail to comprehend that a transaction involving land was taking place between her husband and Ekrem, and failed to realize that her homestead rights might be in peril, in which case, she may have been an innocent victim, at least to some extent. Its equally possible however, that she actually knew about the agreement to sell the parcel to Ekrem all along, but something happened between Ekrem and herself. Perhaps he said or did something that she found insulting and she decided to seek revenge against him by forcing him off the land. But the Court ruled that the openly visible actions of Ekrem, involving construction and improvement of the land, provided ample and complete notice to her of his intentions to permanently occupy the land. She observed him building his house, day by day, without ever raising any objection or even questioning him about it, and nothing else, that may or may not have happened, was relevant therefore, in the eyes of the Court. Mrs. Engholm was put on inquiry notice by Ekrem's performance of the agreement, and she failed to fulfill her burden of inquiry, effectively terminating her own homestead rights, with respect to the Ekrem parcel, by virtue of that failure. Engholm and his wife were both estopped from denying that the parcel in question had been conveyed to Ekrem, and title to it was quieted in Ekrem.

This case also stands as a classic example of the performance exception to the statute of frauds, and demonstrates a typical application of the fundamental principle that any agreement made in good faith should be upheld. This is a principle upon which the Court has been quite consistent, and which is still very much in effect today. Where there is satisfactory evidence that a parol agreement took place, and it was put into effect by the physical performance of it's terms by one or both of the parties, it can become binding upon both of them, despite the existence of the statute of frauds, because the statute of frauds was never intended to render every unwritten agreement void, it was only intended to serve as a tool, by which unperformed agreements can be treated as voidable. Adhering to the time honored principle that actions speak louder than words, the Court has often

upheld the validity of such agreements involving land rights, by means of estoppel and otherwise, for well over a century now, consistently focusing on ascertaining the intent of the parties as it is evidenced by their conduct, as the Court recently indicated in the 2007 case of B. J. Kadrmas v Oxbow Energy:

> "An implied contract is one the existence and terms of which are manifested by conduct .... it is the intent of the parties which controls, and a binding agreement is created unless the parties intended there be no agreement..."

MITCHELL v KNUDTSON LAND (1910)

Although our last case provided a brief introduction to the statute of frauds, this is our first case fully focused on that important requirement for the legitimate conveyance of land rights, and is one of several cases that we will review on this topic, all of which serve to demonstrate and clarify the conditions and circumstances under which the statute of frauds may be deemed by the Court to be either applicable or inapplicable. In it's most basic sense, the statute of frauds is intended to lend certainty to land transactions, and as it's name suggests, to prevent fraud. By requiring written evidence to support and validate a conveyance of land rights, the law seeks to eliminate, or at least minimize, the opportunity for either of the participants in a transaction to change their minds and claim that something was intended to be either included or excluded, contrary to the actual original agreement made between the parties. Further, provided that the parties are careful and diligent in expressing their true intentions regarding what is being conveyed at the outset, the statute also operates, by mandating written evidence, to eliminate or minimize opportunities for innocent or honest misunderstanding of what is being conveyed, which can very easily occur, where ideas and intentions are expressed only verbally. As can logically be observed, the fundamental objective of the statute of frauds is simply to insure that an agreement, once made, is fully and properly carried out as intended. The statute was never intended to invalidate or destroy an

agreement of any kind, quite the contrary, it is intended solely to provide for the presence of reliable evidence that an agreement exists, and evidence of what the true nature of the agreement is. So it's very important for the surveyor, in order to avoid misunderstanding the purpose of the statute of frauds, to realize that, rather than being a tool for the prevention or destruction of agreements, it is fundamentally supportive of agreements. We learn from cases such as this one that the Court is concerned primarily with evidence, in whatever form it may appear, and where evidence supporting the existence of an agreement can be shown, the extent to which the details of that agreement have been documented is not a valid basis for rejecting the agreement's existence, and the Court will typically reach the conclusion, even in such cases where the documentation is very minimal or ephemeral, that the evidence of the agreement's existence is sufficient to uphold it as binding.

> February 1906 - Knudtson was an employee of the Knudtson Land Company, working in Minneapolis, Minnesota. The company advertised an unknown number of tracts of land, located in North Dakota, in a circular, which stated that the tracts listed were being offered for sale. Casey, working as an agent for Mitchell in North Dakota, contacted Knudtson about a certain quarter section of farmland in McLean County that was listed in the circular. Following negotiations conducted entirely through correspondence, and not in person, Casey sent Knudtson a letter along with a check, as a deposit for the land, on behalf of Mitchell, and Knudtson cashed it, on behalf of his company.
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> March 1906 - Casey wrote to Knudtson, asking about the status of the transaction, and Knudtson responded, indicating that the paperwork was being processed.
>
> April 1906 - Casey notified Knudtson that Mitchell had occupied the tract and begun cultivating it, and asking Knudtson again about the status of the paperwork. Knudtson responded, again indicating that he foresaw no problems with the transaction and he had no problem with Mitchell's use and occupation of the land.
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> June 1906 - Knudtson returned the initial payment to Casey, along with a letter notifying him that the proposed conveyance had been

rejected. Knudtson also sent Mitchell a settlement agreement, in which Knudtson offered to compensate Mitchell for his labor expended in cultivating the subject property, provided that Mitchell would agree to drop the matter, along with a compensation check. Mitchell signed and returned the settlement agreement, but did not cash the check.

November 1906 - Mitchell, having evidently decided that he did not want to drop the matter, and that he still wanted the land, rejected the compensation check, by depositing it at a bank to the credit of Knudtson, and informed Knudtson that he had done so. Mitchell then filed an action against the company, to compel Knudtson to complete the intended conveyance.

Mitchell argued that the correspondence constituted ample evidence of a complete and binding agreement to convey the subject property to him, so he had the right to demand that it be conveyed to him. Knudtson argued that no binding agreement had been created or finalized, relying on the statute of frauds, since no deed for this particular tract had ever been signed, or even prepared in fact, and he had never even met either Casey or Mitchell. In addition, Knudtson testified that he had actually wanted and intended to convey the land to Mitchell, but the owner of all the land advertised in the circular, who was evidently in New York, had simply decided that all the land must be sold at one time, and was therefore now unwilling to sell it as individual tracts, so he and his company should not be held responsible for that change of heart on the part of the grantor. The trial court agreed with Mitchell and ruled that Knudtson must either perform his part of the agreement, by completing the conveyance of the subject property to Mitchell, or if Knudtson's company was either unwilling or unable to complete the conveyance for any reason, then the company would be liable to Mitchell for that failure or inability to uphold it's agreement.

The Court found that a complete and unconditional agreement had been reached, which fully satisfied the statute of frauds, even though the full agreement was not contained in any one document alone, and despite the fact that no document specifically identified as a document of conveyance had ever been prepared. The series of letters and telegrams between Casey and Knudtson, when viewed as a whole, the Court determined, amounted to

sufficient evidence of the existence of an agreement, the terms of which were all adequately defined and not in dispute, including the description of the subject property, which was properly described as an aliquot part of the appropriate section. With regard to the alleged settlement agreement proposed by Knudtson, in an apparent attempt to mitigate the effects of the rejection of the conveyance to Mitchell, the Court ruled that it was irrelevant, as evidence concerning the land rights issue being adjudicated, since it related only to compensation for the labor involved in cultivating the land, and not to the land itself. The Court stated the law as follows:

> "An offer in specific terms, and without conditions, for the purchase of a tract of land made by letter or telegram, unconditionally accepted, becomes a binding contract ..... The fact that the requirements of the statute of frauds have not been complied with in making a contract for the sale of real estate will not defeat an action for the specific performance of such contract, where the vendee has been placed in possession of the land under the contract, and has made valuable improvements and paid part of the purchase price."

In this case, the Court made several significant points that are worthy of recognition. The statute of frauds, in keeping with the venerable legal maxim that the law honors substance over form, requires only satisfactory evidence of the existence of an agreement, and that evidence need not come in any particular form, as long as it indicates a meeting of the minds of the parties, it may come in the form of a number of separate documents that all pertain to the same subject property. Also importantly, the Court determined that the cultivation of land alone, can constitute significant improvement of the land, meaning that there is no need for construction of any kind of structures on the land, in order to maintain that it has been gainfully and productively used in good faith by the occupant. In addition, the Court again pointed to the great significance of evidence of actual use of the land, for a productive purpose, as a very powerful factor in the determination of land rights, just as it had two years earlier in the Engholm case, just previously discussed. A grantee who had made little or no actual use of the land being claimed, would be in a substantially inferior position to assert any rights, than the positions held by Ekrem, in the Engholm case, and Mitchell, in this

case. Here once again we see that the Court is clearly inclined to honor meaningful physical use and improvement of land, made in good faith, as superior evidence over documentation, just as we have already seen that it likewise honors physical objects, such as monuments, over documentary evidence. Even the complete absence of any document of conveyance, was insufficient, under these circumstances, to convince the Court to allow Knudtson the shelter that he sought under the statute of frauds, and the Court fully upheld the decision of the lower court, requiring him to complete the conveyance on the terms that had been agreed to in the correspondence.

Finally, one last point that is certainly a matter worthy of the attention of land surveyors, is that this case also supports the often overlooked fact that courts in general have a strong tendency to hold those who deal with land as professionals to a distinctly higher burden than those who are innocent or ignorant, regarding land rights issues, due to being non-professionals. We have already seen other cases, such as the Nash and Cole cases, and yet more will be seen, that also evidence this general tendency of the judiciary to look sternly upon any acts or omissions committed by those operating in a professional capacity, and therefore possessing a professional level of knowledge, including both verbal and written representations. The 1914 case of Patterson v Lynn, in which the Court came down hard on an attorney who had prepared a number of deeds, and then attempted to claim that the deeds that he had prepared were invalid, in order to create an opportunity to acquire the same land for himself by a series of quitclaims, is another example of the high burden of integrity that rests upon every professional. Professionals must always use and apply their knowledge and skills, first and foremost, for the benefit of others, and never for their own benefit to the detriment of others. Courts are keenly aware that the public is generally uninformed about land rights, and that professionals familiar with land rights issues are in a position of potentially unfair advantage, so the courts are prepared to ferret out and punish any abuses of professional knowledge that they detect, which was instrumental here, regarding the Court's treatment of Knudtson, in view of his professional status. Surveyors, as well as attorneys, real estate agents, and all other professionals dealing with land, should well note the fact that professional status may bring benefits, but it also brings serious duties, responsibilities and obligations.

BURLEIGH COUNTY v RHUD (1912)

This case marks the beginning of our study of the Court's interpretation and application of the principles of law relating to the creation of public right-of-way for purposes of travel. A right-of-way is typically an easement, which comes into existence for a certain purpose, such as travel or access, and thereafter represents a burden on the land, protecting the right to use a certain portion of the land for that purpose. Perhaps the most common and most frequently disputed form of easement is the right-of-way for public travel, and this is particularly true in the Dakotas, where generally all section lines, with certain exceptions, represent a public right-of-way for purposes of travel and access. We will reach the particular issues relating to the public right-of-way along section lines later, here we begin with the most basic form of public right-of-way, that which is created solely by use and the passage of time. The legal concept known as prescription exists to protect rights that have been in long use, without any open controversy creating any involuntary interruptions of that use, but which remain potentially vulnerable to arbitrary and immediate termination, being unsupported by any known documentation. The general principle that such rights are worthy of protection is legally recognized in every state, but the burden of proof is always carried by the party asserting the existence of an undocumented easement by virtue of prescription. The theory behind the concept of prescription rests on the presumption that all existing uses originally had a legitimate basis in an agreement of some kind, potentially one creating a valid right of reliance deserving protection, although no specific evidence of the actual origin of the current use may exist. The law provides therefore, that after the passage of a certain length of time, twenty years in North Dakota, the use can no longer be questioned or challenged, and becomes legally binding, creating a permanent right known as a prescriptive easement. A prescriptive easement can be either public or private in character, depending primarily on who made use of it over the twenty year period in question, but numerous other factors can also play a critical role in determining the validity of any such easement, as we shall see in this case and the subsequent cases involving prescriptive claims. We

will encounter and review the Court's treatment of private easement claims in later cases, in this case, the use of the roadway in controversy, and the alleged right-of-way, are entirely public in nature.

> 1909 - Rhud acquired the east half of a certain Section 27. He was not an original patentee, he acquired the land from an unknown previous owner, but how long the previous owner had owned the land is unspecified, since it was not crucial to the outcome. The land was evidently never used by the previous owner, since it was described as "open, wild and uncultivated prairie". A road however, traversed the east half of the section diagonally, entering near the northeast section corner and exiting near the south quarter corner. This road had been in regular use by the public for several years, but it's origin was unknown. Shortly after Rhud acquired the land, Burleigh County built a road along the north line of the section, in the public section line right-of-way. Rhud decided that the diagonal road was no longer necessary and he blocked it off, in the belief that he had the right to do so.
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> 1910 - Burleigh County filed an action against Rhud, to require him to unblock the road and allow it to continue to be used by the public.

Burleigh County argued that the road had existed in the same location, and been in use by the public, for over twenty years, therefore it had become a permanent public highway by virtue of that historical use, under the legal doctrine known as prescription. Rhud argued that the use of the road by the public had not been substantial enough to justify the creation of a highway by means of use alone. He also argued that the path of the road was indefinite and had varied somewhat over the years. Lastly, he argued that under the applicable statutes, pertaining to the creation of public roads through use alone, this particular road did not meet the twenty year requirement. The trial court agreed with the county and ruled that the road had become a public highway, by virtue of the fact that it had been used by the public for the previous twenty years, at the time it was blocked by Rhud.

Although the factual situation presented by this case is a rather simplistic one, some knowledge of the historical development of the law relating to prescriptive rights, with respect to public roads, is required to

understand the outcome. In 1866, realizing the need for the establishment of public roads to support the development of the west, congress agreed that the unpatented public domain should be subject to the creation of public roads, and enacted the legislation known today as U.S. Revised Statutes 2477 (RS 2477), which rendered that vast expanse of land subject to the creation of roads for public use. The absence of any specificity or particularity in the language of RS 2477 has lead to varying interpretations of it's true meaning and intent, but it is generally acknowledged that congress anticipated and expected that public roadways would be created and adopted in those locations that had already come to be historically used for travel throughout the west by 1866, and also in such locations as may come to be so used going forward, as the settlement of the west progressed. In the 1897 case of Walcott Township v Skauge, the Court examined RS 2477 and concluded that all such roads used for a twenty year period in North Dakota had become public roads, not by means of adverse use, but by virtue of use pursuant to the grant that was implicit in RS 2477. The passage of the twenty year period, the Court determined, when applied to routes crossing the public domain, served merely as confirmation of the acceptance of the grant, and was therefore not adverse to the federal government, the owner of the underlying land. On that basis, the road in question in that case was deemed to be a public roadway, establishing the precedent for creation of a prescriptive road right-of-way, for the benefit of the public, in North Dakota.

In 1896 however, with the passing of the frontier, a law had been passed banning the establishment of public highways by means of prescriptive use, effectively ending the time period, under the Court's interpretation of that law, during which a public roadway could be established by means of use alone. After 1896, a public road could still be found to have been created by means of RS 2477, but only if the road had been in use for a full twenty years prior to 1896. Therefore, any roads that were not already being used in 1876, could not become public by use alone, because twenty years of use prior to 1896 could not be shown. But the matter was not yet fully legally settled, as it turned out, because just over a year later in 1897, the 1896 law was repealed and the ban on prescriptive road creation was lifted. The Court held, in this case, that the 1897 legislation was not retroactive, and therefore could not eliminate or negate

the effect of the legal interruption in the development of prescriptive rights that had taken place while the 1896 law had been in effect. So although prescriptive rights could once again begin to accrue, as of 1897, the running of the required twenty year time period, with respect to any roads that had come into use between 1876 and 1896, had been reset to zero at that time. Therefore, no roads that had come into use by the public after 1876 could legally become a public roadway in North Dakota by prescriptive means until at least 1917, twenty years after the brief ban on the creation of public roads by prescription had ended. With the closing of the frontier, during the early years of statehood, prescriptive claims based on RS 2477 rapidly faded into history, and virtually all prescriptive road right-of-way or easement claims made since that time have been based on the assertion that the use of the road in question was adverse to the private party or parties owning the underlying land.

Turning to the specific circumstances present in this case, the Court found that the evidence showed that the road in question had existed and been in use by the public for approximately 22 years as of 1909, when the controversy had erupted. The road may in fact have been much older, but if it was, Burleigh County was either unable to present any evidence to prove that, or simply failed to recognize that stronger evidence would be necessary to prevail in this case. This road was therefore among those whose prescriptive development had fallen victim to the legislation that had put the ban on prescriptive rights for the benefit of the public into effect in 1896. For that reason, the public use of this road could not ripen into a public right-of-way until 1917, the Court decided, so the ruling of the lower court must be reversed, Burleigh County had no right to maintain the road, and Rhud was free to close it off and plow it up. Ironically, the Court had agreed with the county that the actual use of the road by the public had in fact been sufficient to justify the creation of a public roadway, and had also agreed that the variations in the path of the road over the years had been negligible and were insufficient to prevent the road from being deemed to be a consistent thoroughfare with a definite location. So in the end, it was only by virtue of the brief ban on the accrual of public prescriptive rights that Rhud was able to successfully escape the burden of a public road right-of-way crossing essentially through the middle of his land. We will review several more conflicts involving roadways of various types, and the creation

or existence of easements for right-of-way purposes, both public and private in nature, as we observe the development, through adjudication, of the law pertaining to rights of access and travel in North Dakota.

JOHNSON v BARTRON (1912)

In this first case that we will review involving a private easement claim, resulting from a dispute between adjoining lot owners, we will see the Court establish it's view of the distinction between an easement and a license. While an easement is generally a permanent right, typically associated with the land itself, rather than with any particular person or persons, a license is merely a form of permission or privilege, which is therefore personal in nature, and is not legally attached to the land itself. In the most basic context of an agreement made by any two parties as land owners, an easement represents a benefit bestowed upon one tract, parcel or lot and a burden upon the other tract, parcel or lot, but a license, not being permanent or binding, results in no such benefit and no such burden. Therefore, an easement is obviously preferable to the party who owns the land that stands to benefit from it, but a license is preferable to the party whose land would bear the burden of the easement. In addition, a license is subject to revocation, often on an immediate basis without notice, but an easement cannot simply be unilaterally revoked, and typically can be terminated only in a formal manner, requiring not only notice, but mutual participation and cooperation as well. A license can be revoked either by a plain decision and statement to that effect, made by the party who granted it, or by the permanent departure of that party from the premises, because once the licensor no longer has any involvement with the land, the authority under which the licensee was formerly acting is gone, so the same activity, performed on the same land by the licensee, can become a trespass. The true significance of the distinction between a license and an easement very often arises when land is conveyed, and a different relationship between the new neighbors results in controversy over the rights of the parties, as we will see very well illustrated in this case. The fundamental question in such cases, is whether the conveyance included or was subject to an easement, which is appurtenant and permanent, or whether on the other hand, the conveyance

instead represented the potential extinguishment of a license. In the case of an easement appurtenant to the land, it remains useful and in place regardless of who comes or goes when the parties change, but a license, being personal rather than appurtenant to the land, caries no such protection and can simply disappear. What this very obviously points out of course, is the high importance of proper documentation, fully explaining the true nature and extent of any agreement, and likewise, the potential consequences when the parties fail to document an agreement, or do so improperly or ineffectively. It should be understood that the Court will always endeavor to do justice, by arriving at a result that is based on all of the acceptable evidence regarding the true original intent of the parties, but in many cases the failure to clarify the nature of an agreement at the outset, by means of proper documentation, leaves one or more of the parties with good reason for regret.

> 1905 - Hull and Bartron were neighbors, living on adjoining lots in a typical platted residential subdivision. They decided they would like to have a well that they could share, so they agreed to share the cost of having a well dug. There was a fence between their lots, the origin of which is unknown, but both of them believed that it was on their common lot line. Therefore, they instructed the well digger to sink the well directly on the fence line, which he did, so both parties would be assured of having access to the well. The well was completed, Hull and Bartron split the cost as they had agreed, and the well was put into use by both parties.
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> 1906 - A windmill was erected directly over the well, the parties again split the cost of this work, and they continued to share the well. Hull then conveyed his lot, including his right to use the well and the equipment associated with it, to Johnson, by warranty deed, and the mutual use of the well continued.
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> 1908 - Relations between Johnson and Bartron were evidently not as good as the relations between Hull and Bartron had been. Bartron decided that he did not want Johnson to use the well any longer, so Bartron informed Johnson that he believed he had the right to prevent Johnson from using the well, because his agreement had been only with Hull, and not with Johnson. Johnson evidently made less use of

the well after this time, presumably using it only when Bartron was not around.

1909 - A survey was performed, which indicated that the center of the well and windmill was 21 inches on Bartron's side of the lot line. How the survey was made, what evidence it was based on, and who had requested it, are all unknown, but no one disputed the result of the survey, so the survey was presumed to have correctly located the lot line. Bartron then built a fence on the portion of the lot line next to the well, completely blocking Johnson's access to it. Johnson filed an action against Bartron, seeking to have that portion of the fence removed, in order to regain access to the well.

Johnson argued that as Hull's successor, he had the same rights to the well that Hull had. He argued that the original agreement between Hull and Bartron was still legally in effect, and it had not been terminated by Hull's departure, because Hull had conveyed all of his rights to Johnson, so Bartron had no right to terminate the agreement and claim the well as his own, even though it was located on Bartron's land. Johnson asserted that he was entitled to an easement over that portion of Bartron's lot upon which the well was located, for purposes of accessing and using the well. Bartron argued that his agreement with Hull was not intended to be permanent and was merely a personal agreement between Hull and himself, which did not involve any other parties, so Hull had no permanent rights that he could legally convey to anyone else, such as Johnson, therefore the agreement was legally terminated when Hull departed. Bartron also argued that since the well had turned out to be located on his lot, he had the right to exert complete control over it, and he was not obligated to share it with anyone. The trial court ruled in favor of Bartron, holding that the agreement between Hull and Bartron was no longer in effect, Bartron had the right to complete control of the well, and no well easement existed, so Johnson had no right to use the well at all.

The Court began, as is so often the case with disputes that have their origin in some type of agreement, by looking into the original intentions of the parties to the agreement. Hull and Bartron had evidently written down some of the components of their agreement but neither of them had ever signed anything relating to the agreement. For that reason, the Court

concluded, their agreement must be treated as an oral and personal one, rather than as a permanent and binding agreement that was appurtenant to the lots owned by the parties. In the absence of any evidence clearly indicating that the parties intended to create an easement for use of the well, the Court agreed that no easement could be said to exist, since an easement is a permanent land right, which cannot be created by means of verbal agreement alone, being within the scope of the statute of frauds. In addition, the time period required for creation of an easement by means of prescription had not yet passed, so no easement could be claimed based on the actual use of the well. The Court also emphasized the fact that Hull and Bartron had clearly not intended to convey any portion of their lots to each other, or to relocate their lot line, or to allow the well location to control the lot line location, either at the time of the agreement or at any subsequent time. Due to the fact that the lot line location indicated by the survey was acknowledged as being correct by both Johnson and Bartron, without any protest or dispute as to the survey, the Court had no option but to treat the well location as a mistake, since it was also clear that the well had been intended to sit directly on the true lot line. In the eyes of the Court, Hull and Bartron had failed in their objective of placing the well on the lot line, due to their mutual failure to confirm the lot line location by means of a survey, prior to having the well installed. Under those circumstances, the Court was not inclined to favor a party who had acted negligently, as Hull had, either by holding that an easement in Hull's favor had been created by the acts of the parties, which Hull had evidently believed, or by judicially imposing an easement in Johnson's favor. Since Johnson made no claim that the fence was actually on the original lot line, and did not claim that anyone had ever lead him to believe that the fence represented the lot line, the Court decided that he must suffer the consequences of the mistake made by his grantor, and agreed with the trial court that Johnson had acquired no permanent rights relating to the well or the windmill, even though such rights had been spelled out in his warranty deed. The Court did not address the question of whether or not Johnson might have a valid case against Hull for breach of warranty.

The great legal significance of this case does not result from it's factual details or it's outcome, but rather from the important precedent that the Court established in this case, which has been invoked by the Court in

subsequent cases involving similar disputes over land rights allegedly stemming from various other agreements of a similar nature. The Court determined that the original agreement between Hull and Bartron had created only a license, which by definition was a personal agreement that was revocable by either party, and which ceased to exist when either party permanently left the scene since it was reciprocal, rather than an easement, which would have been permanent. The Court acknowledged that a majority of states treat a license that has resulted in the construction of valuable improvements as irrevocable, resulting in an easement, in order to protect innocent parties from being tricked into building improvements, or sharing in the cost of the construction of improvements, and then being deprived of the use of those improvements. The Court decided however, that North Dakota would not follow that rule, and that no such license can become irrevocable in North Dakota, because a license is not a land right, while an easement is a land right, so allowing a license created by verbal agreement to be converted into an easement would amount to a violation of the statute of frauds. In other words, the Court announced that it would not follow the widely recognized legal rule relating to irrevocable licenses, because it could not be reconciled, in the view of the Court, with the absence of any intent of the parties to create or convey any land rights. As we have already seen, and will see again in the future, the Court is quite open to recognizing physical acts made in performance of agreements as exceptions to the statute of frauds, yet the Court has remained steadfastly true to the position that it took here a century ago, and has never allowed performance of an agreement characterized as a license to result in the creation of an easement.

The Court did recognize however, both the fundamental injustice done to Johnson by the ruling of the trial court, and the windfall to Bartron that resulted from it. The lower court had left Johnson with nothing, and allowed Bartron to obtain complete control over all the improvements that had been built, even though he had paid only a portion of the construction costs. The Court was very aware that although Bartron had been fortunate, in the discovery that the well was actually on his land, he had been no less negligent at the outset than Hull had been, in failing to confirm the true lot line location prior to construction. Since the behavior of Bartron had clearly contributed to both the creation and the escalation of the conflict, the Court chose to exercise it's equitable powers to achieve a finer balance of equity

than had the lower court. Although the Court ruled that Johnson had acquired no permanent land rights relating to any of the improvements jointly built as a result of the agreement between Hull and Bartron, the Court elected to craft a financial remedy for Johnson. If Bartron should choose to continue to exclude Johnson from the well, the Court indicated, Bartron would be required to pay Johnson half the value of the well and the windmill. On the other hand, should Bartron decline to pay Johnson that amount, Bartron would be prohibited from barring Johnson's use of the well, effectively imposing an easement in favor of Johnson. The choice was up to Bartron, but either way, the Court decided, justice and equity would be best served by this resolution, modifying the decision of the lower court to that extent, and remanding the case for completion in accordance with these instructions from the Court.

BISSEL v OLSON (1913)

Before reviewing our first detailed case on riparian issues, which deals with the fundamental question of navigability, two earlier cases that involved riparian issues are worthy of being mentioned. In 1896, the Court first ruled upon riparian rights, in the case of Bigelow v Draper, in the context of a situation which involved the condemnation and relocation of a portion of the Heart River, for railroad construction purposes. In the course of upholding the right of the railroad to condemn and relocate a portion of the river, which was acknowledged by all parties as being a non-navigable stream, the Court adopted the widely accepted position that the beds of all non-navigable bodies of water are owned by the entrymen or their successors, by virtue of their patents. In addition, the Court also declared in that case that riparian rights have significant value and are distinct from other rights associated with land ownership, so the railroad was required to compensate the land owners for the loss of their riparian rights, resulting from the relocation of the river, as well as compensating them for the use or loss of those portions of their land that were used or taken for railroad purposes. Then in 1898, in the case of Heald v Yumisko, the Court first had occasion to address issues relating to government lots that had been created

due to the presence of a body of water. In that case, which took place as the result of a dispute over the actual acreage and value of certain government lots lying along the James River, the Court announced it's approval and acceptance of two important riparian principles. The Court first ruled that meander lines were not originally intended to serve as boundaries and are therefore not boundaries, except in situations where they have subsequently become boundaries by operation of law. The Court then also ruled in that case that while an acreage figure stated on a GLO plat does determine the amount for which the government conveys the government lot to a patentee, that acreage figure is subject to change and is therefore not binding upon any subsequent parties, who are entitled to claim the true acreage of the entire lot, including any land lying beyond the meander line, whatever the actual acreage of the lot may be at any given time. In the case we are about to review, the issue of navigability was once again the focal point of the controversy, and as we shall see, the Court looked more deeply into that issue than it had in the Bigelow case and took this opportunity to begin to expand and develop the definition of navigability that was to be applied in North Dakota.

1880 to 1889 - Olson and several other land owners, many of whom would serve as witnesses in this case, acquired land along the Mouse River in Ward County. The size and shape of the tract owned by Olson is unknown, but this was not essential to the outcome of this case. The river had not been meandered during the original GLO surveys in this area. As the area became settled, railroad companies began building dams at various locations along the river.

1890 to 1905 - A number of dams were completed on portions of the river downstream from Olson's property, which straddled the river, raising the water level of the river and making it deeper and wider, where it passed through his property.

1906 to 1912 - The water level of the river in the subject area was, at least during certain times of year, high enough that the river could support some commercial boat traffic. Bissel began operating a passenger boat service on the river. Olson built a footbridge across the river on his property, which was apparently low enough that boats like Bissel's could not get under it, making it an obstacle to river

traffic. Olson's bridge evidently blocked a portion of Bissel's route and Olson refused to remove it, so Bissel filed an action against Olson, demanding that it be removed.

Bissel argued that the river was navigable, since there was evidence that it had been successfully navigated at various times by substantial boats during the previous seven years, under the general rule that any body of water which is navigable in fact, must necessarily be considered navigable in law, and therefore Olson had no right to obstruct boat traffic on the river. Olson argued that the river had only become navigable because the natural flow and level of the water in his area had been altered by the dams built downstream, and that it was not navigable at the time of the original survey of the land, or at the time when he acquired his land. He asserted that a body of water which was not originally or naturally navigable in fact cannot become navigable in law as a result of artificial changes to it's water level or depth, and therefore he had the right to maintain a bridge on his land, even though it prevented river travel by boat, so he could not be ordered or required to keep the river unobstructed. The trial court agreed with Bissel and ordered the bridge removed.

In order to resolve this controversy, the Court adopted five fundamental rules relating to navigability:

1. Although the presence or absence of meander lines along any stream is not absolutely conclusive as to it's navigability, the absence of meander lines does raise the presumption that the stream was not originally navigable, placing the burden of proof on the party who is asserting that it is navigable.

2. To be deemed navigable, a stream must be navigable in it's natural state, without any artificial aid, and it's capacity must be sufficient to make it capable of being used as a highway for commercial use or passenger travel.

3. To be deemed navigable, a stream must be capable of being used as a public highway for a considerable portion of each year, not just on rare or isolated occasions, and not just for brief periods of time that occur only at irregular intervals.

4. A stream that is navigable during natural freshets and during natural periods of high water, which occur frequently and with reasonable certainty, is a public highway.

5. The capacity of a navigable stream cannot be increased by artificial means, to the injury of a riparian land owner, unless compensation is provided to that land owner for any injury, damage or loss that the land owner may suffer, with respect to either the land itself, or to some or all of the land owner's riparian rights.

These ideas, concepts and principles, with regard to the determination of navigability, were all well known and well established at this time, and the Court cited a great many cases from other states, and federal cases as well, upholding them. The Court then went on to quote from a Michigan case, authored by Justice Cooley, perhaps the most esteemed author of judicial opinions on the subjects of land rights and riparian rights in our nation's history, as follows:

> "...the question of public right in a case like this is to be decided without reference to the effect which artificial improvements have had in the navigable capacity of the river; in other words, the public right is measured by the capacity of the stream for valuable public use in it's natural condition..."

The Court found that although Bissel had presented evidence that the river had been successfully navigated on certain isolated occasions, he had failed to prove that the river was actually navigable on any regular basis. Olson had presented a large number of witnesses, who had all been living or working along the river for decades, all of whom testified that the river was originally much smaller, and also that even in recent years it was still frequently too shallow to be navigated or used for travel at all. Some of the witnesses even testified that the river went completely dry at times, and the totality of the testimony generally indicated that the river had never been a reliable route for boat travel. Therefore, under the rules stated above, the Court decided that Olson did have the right to maintain the bridge, and vacated the order of the lower court to remove it. Since it had been

determined that the river was non-navigable in this area, and Olson owned all the land in the vicinity of the bridge, on both sides of the river, he also owned the entire bed of the river itself, with respect to the portion of the river lying within his property boundaries. Therefore, he had a perfect right to build as many bridges, piers or docks as he desired in the river, as long as he did not materially disrupt or prevent the flow of the water itself to his neighbors downstream, and he had no obligation to allow the public to travel his portion of the river. As we go on, we will see the legal principles relating to navigability, riparian rights and water boundaries further expounded upon, and learn how they have played out in a variety of different situations, throughout the twentieth century.

SIMONSON v WENZEL (1914)

Returning to our study of the Court's interpretation of the recording laws, which began with the Doran case of 1895, four cases tracking the path taken by the Court with respect to this topic over the intervening years provide additional perspective. In the 1903 case of Hunter v McDevitt, a situation essentially the same as that which appeared in the Doran case was again addressed by the Court, the only significant difference being the fact that while Doran's claim had been based on an unrecorded deed, Hunter's claim was based only on an unrecorded contract for deed, and might have been considered to be a weaker claim for that reason. The Court adhered to the stance it had taken in the Doran case however, holding that Hunter's failure to record his contract for deed did not operate to deprive him of his right to the land in question, which had been subsequently conveyed to McDevitt. Since McDevitt had verbal notice that Hunter had acquired a right to the land, Hunter's failure to record his contract was irrelevant, and McDevitt had no valid claim to the land, although he had promptly recorded his deed. The Court ruled that McDevitt's subsequent acquisition was subject to the existing contract to convey the land to Hunter, so McDevitt was ordered by the Court to relinquish the land, by conveying it to Hunter. In the 1907 case of Woodward v McCollum, the Court reiterated it's view that the holder of a contract for deed immediately becomes the equitable owner of the subject property, following it's ruling in the Clapp case, which

we have already reviewed. Next in 1911, in Trumbo v Vernon, the Court emphatically stated that any form of notice of existing rights of others in land being acquired, that is sufficient to put a grantee on inquiry, bars any subsequent claim to the land in question by that grantee, regardless of whether any documents have been recorded by the holder of the existing rights or not. In so ruling, the Court squarely placed the highest possible burden of diligent inquiry on grantees, flatly stating that no man is entitled to claim any protection from the recording laws after he has shut his eyes to visible facts or circumstances that would cause a reasonable person to make an inquiry. Then in 1913, in Horgan v Russell, the Court decided that even without the existence of a contract for deed, a party who had merely obtained an option to purchase a certain tract had in fact become the equitable owner of the tract immediately upon expressing his intention to exercise the option, effectively negating a sale of the same tract to another party who was aware that the option existed and remained viable. Again, the Court ruled that recording a deed had no impact, in this case on the rights of the option holder, which were paramount, although unrecorded. As can be seen, by 1914 the significance of the burden of notice had already been repeatedly driven home by the Court, and should have been clear to all, but yet another controversy, involving both the value of recordation and the implications of a failure to record, arrived on the Court's doorstep to be adjudicated.

> 1906 - The subject property, the size and location of which was not specified and was not at issue, was owned by the Dakota Development Company. The company executed a contract for deed to Wenzel and he took possession of the property and built a house on it and lived there. The contract for deed was never recorded. After making one initial payment, Wenzel never made any subsequent payments on the land.
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> 1907 - Wenzel executed a mortgage to Simonson, which was promptly recorded.
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> 1908 - Wenzel assigned his contract for deed to Krupp and turned over possession of the subject property to Krupp, who promptly paid the full balance remaining due on the contract to Dakota Development, and the company issued a warranty deed to him, which

was promptly recorded. Wenzel never informed Krupp of the existence of the mortgage.

1910 - Wenzel, having never made any payments on the mortgage to Simonson, was adjudged bankrupt in federal court. Simonson filed an action to foreclose the mortgage and take the subject property.

Simonson argued that, in keeping with numerous prior decisions of the Court, Wenzel was the equitable owner of the subject property at the time the mortgage was executed, by virtue of the contract for deed, despite the fact that the contract was unrecorded, and therefore the mortgage was valid and Simonson was entitled to the property. Krupp, who obviously became the principal defendant on appeal, since Wenzel no longer had any stake in the land and did not appeal, argued that he was an innocent purchaser of land, without any notice of the existence of the mortgage, and therefore Krupp was entitled to the property. The trial court agreed with Simonson that Wenzel, as the equitable owner at the time of the mortgage, had both the right and the ability to legally execute a valid mortgage, and since the mortgage was recorded, Krupp was charged with notice of it's existence and could not successfully claim to be an innocent purchaser, therefore Simonson held the superior right to the property and accordingly title was quieted in him against both Wenzel and Krupp.

Once again, just as in the seminal Doran case in 1895, and in the several cases noted above that played out over the ensuing years, the Court was confronted with a situation requiring it to address the relative value of claims involving rights connected to an unrecorded conveyance. The statutes relevant to recordation had been revised during that period of time, but the Court continued to consistently follow the same path in dealing with such rights and issues, remaining steadily and intently focused on the tremendous importance of the legal concept of notice, and it's application to matters involving unrecorded documents of conveyance. In this case, the Court expressly set out to clarify what constitutes a conveyance, for purposes of recordation and notice. This would have far reaching significance, since the chain of title to any property, the content of which provides constructive notice concerning ownership rights and interests in the property, is comprised of conveyances. The Court recited the applicable statutory definition of a document of conveyance, per what is now 47-19-42,

as:

> “every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to any real property may be affected, except wills, and powers of attorney."

Under this definition, the Court found that a mortgage, being a document that can potentially result in a transfer of land, is a conveyance, and therefore cannot be treated as if it were outside the chain of title and ignored. This broad definition of a conveyance has been consistently honored and reinforced ever since. In the 1930 case of Putnam v Broden, a subordination agreement was found to be a conveyance. In 1956, in Northern Pacific Railway v Advance Realty, a mineral reservation was found to be a conveyance. As recently as 1975, in the case of Eakman v Robb, this definition has been reiterated, supported and relied on by the Court, and it remains in place in the statutes currently in effect. In addition, having determined that the mortgage was in fact a conveyance, and that it therefore must properly be treated as a document coming within the chain of title, the Court again provided guidance to the legislature, resulting in further statute revisions, regarding notice and recordation, that are still in effect today. In ruling that Simonson did indeed hold the superior right to the subject property, and fully upholding the trial court's decision, the Court emphasized the fact that Krupp had observed that Wenzel was in actual possession of the land, and Krupp had knowingly dealt with Wenzel in a manner that showed he considered Wenzel to be the owner of the land. When viewed in that light, Krupp's argument that he had no reason to suspect that a mortgage might exist, and no responsibility to learn whether Wenzel had executed a mortgage by checking the public records, collapsed. Clearly, Krupp had recognized that Wenzel was the owner of the subject property, so he should have realized that he had an obligation to verify whether or not Wenzel had burdened it in some way, for his own protection, and he was unjustified in assuming that Wenzel had never burdened the subject property, just because Wenzel said nothing to indicate that he had done so.

Interestingly, two other cases, highly similar to this case in many

respects, reached the Court within the next few years. In 1916, in Quashneck v Blodgett, the Court again pointed out the significance of actual possession of land, under an unrecorded document, and hammered home the importance of possession to any parties seeking to acquire any interests in land. The Court upheld the ownership of Quashneck, who had acquired the land by means of a contract for deed, which he had not recorded, citing the Simonson case, over the claim of Blodgett, who had acquired a mortgage on the land from the owner of record during the time that Quashneck was actually living on the land. The Court dismissed Blodgett's claim that Quashneck should lose, due to his failure to record, stating that Quashneck's open possession of the land was at least equal in force and effect, as notice of his rights to all the world, as recordation of a document would have been. Then in 1917, in the case of McCoy v Davis, where unlike the Simonson and Quashneck cases, the land involved was vacant and had never been occupied or improved at all, the Court ruled that the right of Davis, who obtained a judgment against a land owner of record, was superior to the right of McCoy, who had previously obtained a deed to the same land, which he failed to promptly record, since the failure of McCoy to occupy or use the land in any way provided no physical form of notice to Davis, or to anyone, of any possible claim relating to the land, by McCoy or anyone else. At this early time in the history of the Court, it had already clearly charted a course decisively directed toward upholding the high value and great legal significance of the principle of notice, and specifically emphasizing the importance of physical notice, in all matters involving land rights.

RAMSTAD v CARR (1915)

Our second case focusing on issues related to dedication is quite similar to the 1908 Cole case, already reviewed, as the controversy is once again the result of a lack of complete clarity on a subdivision plat. The physical circumstances of this case are somewhat different from the Cole case, since in that case substantial public use of the platted land in question was evident, supporting the Court's decision to rule that an entire city block

had been dedicated as a park and accepted as such by the public, although not specifically identified as a park on the plat in question, while in this case, such public use of the area in controversy was absent. Nevertheless, the manner in which the Court views the situation presented by this case is fundamentally the same as the view taken by the Court in the earlier case, for two critical reasons. First, the manner in which the rights in dispute were created was the same in both cases, both being based on a recorded subdivision plat, and secondly, in both cases the plat in question was used as the basis for the conveyance of the platted lots. So even though the physical circumstances were markedly different in these two cases, and the intended use of the platted area in question was very different, one being a public square and the other being essentially a nature preserve, we will see that the Court still arrives at the same ultimate conclusion regarding dedication, because the Court focuses not on details concerning actual use, but on the legal principles that apply, due to the way in which the rights were created. In the 1914 case of City of La Moure v Lasell, a development group lead by Lasell had acquired a substantial portion of a previously platted subdivision and attempted to assert complete control over it, including the right to close off platted streets, by virtue of a declaration of vacation, describing the relevant portion of the original subdivision plat, which they had recorded. Neither La Moure nor any of the owners of the other platted lots had participated in, or approved, this attempted vacation however. The Court in that case ruled that the attempted vacation was invalid, being in violation of the rights of both those who had purchased platted lots in reliance on the plat, and the rights of the public in general, as manifested by the acceptance of the plat by La Moure. The basis for the Court's decision in that case, which mandated the procedures necessary for a proper legal vacation, was the fundamental concept that both private parties and the public have the right to rely on the conditions represented on a subdivision plat, and once the plat is used for the purpose of conveying any portion of the platted land, those rights take effect and become binding upon the subdivider and all successors of the subdivider. In the case we are about to review, we will see the Court again uphold that same broad right of reliance, created when a subdivision plat is referenced in the conveyance of platted lots.

1905 - Ramstad acquired a large tract in Ward County and created the North Minot Subdivision. The subdivision plat created 14 blocks,

containing over 100 lots, and the plat was surveyed, certified and recorded. Near the center of the subdivision, the plat showed Block 8, which contained just four lots, one of which, Lot 4, was the largest lot in the subdivision. Lot 4 was shown on the plat as containing a lake, and this lot was also very prominently labeled "Lincoln Park". The plat also contained a dedication statement, which was signed by Ramstad, but the statement made reference only to streets and alleys, and was silent with respect to the park.

1906 to 1912 - During this period, Ramstad sold lots in the subdivision. He showed the plat to many, if not all, of the lot buyers, and he told those who asked about Lot 4 in Block 8 that it was intended to become and remain a park, as shown on the plat. The area in question remained an undeveloped swamp throughout this period, no improvements of any kind were built there, and Ramstad continued to pay the taxes on the vacant lot. By the end of this period, all the lots adjoining the park lot had been sold, and some of the adjoining lot owners had begun using portions of the park lot as vegetable and flower gardens, but there was no evidence that the public had made any use of it.

1913 - Minot embarked upon a park beautification program, and Carr, who was the Park Commissioner, included Lincoln Park in the plan. City personnel began working on improvements to the park, most notably planting a number of trees. Ramstad observed the work taking place and ordered the city personnel to cease and desist and vacate the area. The workers ignored this order and continued working on improving the park. Ramstad filed an action against Carr, claiming that Carr had erroneously assumed that Lot 4 in Block 8 had been intended to become a city park, causing the city personnel to trespass on his land.

Ramstad argued that Lot 4 in Block 8 was never intended to become a city park, it was intended to be a private park, over which he intended to maintain complete and permanent control. He argued that it was for this reason that he had not included it in the dedication statement on the plat, and he never had any intention to dedicate it. He asserted that because it was labeled with a lot number, it was clearly intended to be a private lot, just like

every other lot on the plat, and the tax assessor had correctly recognized this fact by taxing the lot in the same manner that he taxed every other lot on the plat. Carr argued that since the plat failed to indicate any intention that the park was to be private, rather than public, the plat constituted a legal offer of dedication by implication, even though the park was not expressly dedicated by means of the dedication statement that appeared on the plat, and the implied offer of dedication had been accepted by the city and therefore could not be legally withdrawn by Ramstad. The trial court decided the park had never been dedicated and ruled in favor of Ramstad.

Since intent is fundamental to the legal principle of dedication, as it is in fact to all other forms of conveyance, and Ramstad's true intent was in question, the Court deemed it appropriate to begin with a clarification of how intent is determined under the law. The clearest and strongest manifestation of the intentions of a party who acts as a grantor or a creator of land rights resides in the acts and the conduct of that party. Intentions that are hidden, disguised or otherwise kept secret are not honored under the law, and in fact can be barred from being put into effect by the law, in situations where allowing such secondary or covert intentions to be implemented would operate to create a deception or work an injustice. Citing the Cole case decided seven years earlier, which we have already reviewed, the Court held that Ramstad could be estopped from denying an intention to dedicate the park to the public, by virtue of his use of the plat as a tool in promoting sales of the other platted lots, and by virtue of the verbal promises relating to the park that he had made to numerous lot buyers. Some of the lot buyers appeared as witnesses and testified that Ramstad had made specific promises to them regarding the park, leading them to believe that it was to become a typical city park. In the Cole case, it may be recalled, the block in question did not bear a lot number, while in this case the area in question was numbered as a lot. The Court however, determined that the significance of the lot number was overcome by the text appearing above it on the plat, expressly declaring that the lot was a park. If Ramstad had hoped to avoid the fate of the developers in the Cole case, by adding the lot number, he was destined to discover that the Court was unwilling to allow this detail to tip the balance in his favor.

Ramstad did not dispute that the lot was to be a park, and he did not

claim to have the right to convert it to some other kind of use, which was what the developers in the Cole case had attempted to do, he merely insisted that it remained his own private property, unburdened by dedication to public use. His specific intentions for the future use of the land are unknown, presumably he wanted to retain the right to control who used the park. He may have merely desired to limit use of the park, by permanently excluding the public and reserving it for the lot owners and himself, or he may have intended to develop park facilities himself in the area and then charge admission to the park. The Court stated however, that if he had any such intentions he should have labeled the area "Ramstad's Park", which would have given some indication that he intended to retain personal control over it. Naming it as he did, the Court found, he had given no indication of any intention to retain control over it, and in the absence of such a reservation of control unto himself, the lot buyers had the right to presume that the area was intended to be subject to dedication. Ramstad called his surveyor as a witness, and the surveyor attempted to support Ramstad's contention that the park was intended to be private by testifying that the park "was not anything more than is stated on the plat". But the Court nonetheless maintained that the plat failed to make it sufficiently clear that the park was to be private, and even if Ramstad's true intent was known to his surveyor, that fact could have no bearing or influence on the rights of the public, because the intent of the surveyor was indistinguishable from that of Ramstad himself. Since a surveyor, in laying out and platting a subdivision, functions merely as an agent of the developer, the intent of the surveyor is legally identical to the intent of the developer, and therefore has no independent significance. So the fact that Ramstad may have informed his surveyor of his intentions was of no assistance to him, the Court was concerned only with the fact that Ramstad had failed to fully communicate his true intentions to either the lot buyers or the public, on the face of the plat. The Court placed the full burden of correctly and completely expressing his true intentions, clearly enough that all parties could easily and immediately ascertain them, squarely on Ramstad, as the motivating party behind the creation of the plat, and as the beneficiary of the subsequent conveyances of all the platted lots. Quoting a New Jersey case to the same effect, the Court said:

> “The reasonable inference .... is that such easement is intended

> to give value to the adjacent lots .... the burden should be thrown on the vendor to show, by the clearest proofs, that the inference thus made was unwarranted."

The last hurdle to be overcome in the dedication process was the question of the acceptance of the dedication offer. Acceptance, like the offer of dedication itself, the Court indicated, may be ascertained through acts, conduct or words. As noted above, Lot 4 in Block 8 had sat vacant and unused by the public for eight years after being platted. Ramstad had done nothing with it himself and given no indication that he ever intended to do anything with it, other than leave it in it's natural state. The Court ruled that the action taken by Carr, including the park in his park improvement plan, and sending city workers to the site to begin work on it, constituted a legal acceptance of the implied dedication offered by the plat. The passage of time had not extinguished the offer of dedication, or amounted to an abandonment of the offer, the Court decided, since all such offers remain in effect until expressly rejected by the authority of the jurisdiction to which the offer of dedication was made, which in this case was Minot, and there was no evidence that Minot had ever rejected the offer. Having so ruled, the Court reversed the ruling of the lower court, confirming that although Ramstad was still the fee owner of the park lot, it was burdened with an easement for public use, which Ramstad was estopped to deny, and it was under the complete and permanent control of the Park Commissioner. Further, once offered, the dedication could only have been undone by means of the formal vacation process, and since lots in the plat had been sold, the plat itself was no longer subject to vacation, so vacation of the park alone would now require the participation of the lot owners, as well as the public. Neither was the fact that he had faithfully paid all the taxes on the park lot of any assistance to Ramstad, the Court stated, since the tax assessor has no authority to make a binding determination as to whether or not land has been dedicated. Therefore, the fact that the assessor had treated the park lot as undedicated, and taxed it accordingly, was inconsequential and could not result in any loss of the public rights to the park. Had Ramstad simply included a note in his dedication statement on the plat, clarifying that the park was to be private and was not being dedicated to the public, his right to retain personal control over it would have been protected, but by his failure to do so, he had put his own rights in peril. The Court had again made it

quite clear that anyone who sets out to orchestrate and profit from the development and conveyance of land bears a heavy burden to display their complete intentions in great detail, and in failing to do so, they can bring the consequences of any subsequent conflicts over land rights down upon themselves.

PAGE v SMITH (1916)

Here we again observe the progress of adverse possession law, as we find the Court clarifying it's definition of the physical conditions that can, or cannot, support adverse possession. A few cases on this topic that took place in the decade since the last landmark case of this type, the Nash case of 1906, are worthy of note at this point. In the 1909 case of Mears v Somers Land, the Court had reached an unusual conclusion, upholding adverse possession even in the absence of any actual physical possession, because the owner of record conceded that he had full knowledge of the adverse claim to the land for the full statutory period, and the Court deemed the evidence of actual notice to be equivalent in value to the physical notice that would have been supplied by occupation or use of the land that was being adversely claimed. This decision, not surprisingly, appears to have drawn some criticism, leading the Court to seek an opportunity to pull back from it to some extent, without overruling it, and settle into a view more in line with the modern mainstream of judicial thought on the subject, as will be seen in the case we are about to review. It was not until the 1954 case of Grandin v Gardiner however, that the Court finally concluded that adverse possession is impossible without actual physical possession that is sufficient to provide physical notice. The 1911 case of Woolfolk v Albrecht presented a situation in which a railroad had conveyed land that had been granted to the railroad in 1864, but which remained unpatented until 1896. The Court ruled that the land was subject to both taxes and adverse possession during part of that period, even though it had never been patented, because the land had been legally granted by the federal government to the railroad, and subsequently conveyed by the railroad to Woolfolk in 1883. Woolfolk failed to pay taxes on the land, but still claimed it nearly three decades later, when

it was discovered that an 1895 tax deed to Albrecht was void. The Court determined that the fact that no patent had ever been issued was a mere formal technicality that created no obstacle to adverse possession of the land, again protecting the rights of an innocent tax deed holder, by means of adverse possession. The Court began to more clearly define what is required to constitute open and adverse possession in the 1916 case of Buttz v James, which involved a fraudulent conveyance made in an attempt to avoid loss of the land in question to bankruptcy, striking down the adverse possession claim of James, based on evidence of bad faith on her part, resulting from her participation, along with her mother, in a conveyance amounting to a fraud. In the present case, we see the Court distinctly outlining the physical restrictions that it intends to apply in adverse possession cases henceforward.

1883 - Conser, who was the owner of a certain quarter section, mortgaged it to Reckitt & Saunders. This quarter was virgin prairie.

1887 - Conser conveyed the quarter to Smith by warranty deed. Smith was an absentee owner, who acquired the land as an investment and therefore left it entirely unused and in it's natural state.

1892 - The mortgage was foreclosed by a mortgage company, having acquired it by assignment from Reckitt & Saunders. When he learned of the foreclosure, Smith offered to pay off the mortgage, but the company declined his offer. From this time forward, Smith paid no taxes on the land, they were paid first by the mortgage company, and afterward by all of the ensuing adverse claimants under this foreclosure, which turned out to have been void. Also at this point in time, Hill, who was an owner of some adjoining land, began occasionally harvesting wild hay that grew on some portions of this quarter, becoming the first party ever to make any actual use of the land in question.

1899 - A Sheriff's deed was issued to the mortgage company, based on the foreclosure, no one being aware that it was void.

1902 - The mortgage company conveyed the quarter to Hill. Hill conveyed it to a bank, then that bank conveyed it to another bank, then that bank conveyed it to Knox.

1907 - The virgin quarter came under cultivation for the first time, by Knox.

1908 - Smith visited the area, observed that a portion of the quarter was under cultivation, and thereby discovered that the quarter was in use by someone, but he took no action at this time.

1912 - Knox conveyed the quarter to Page, having paid the taxes on it throughout the period of his ownership. By this time, practically the entire quarter was being cultivated and producing crops, yet Smith still took no action.

1913 - Evidently confident that the statutory ten year period for adverse possession under color of title had begun in 1902 or earlier, Page filed an action against Smith to quiet title to the quarter.

Page argued that the requirements of adverse possession had been satisfied. Obviously he relied on tacking, which had been instrumental to the successful claim of adverse possession made by Mrs. Nash, in her case, as previously discussed, since Page had only been on the scene himself for a few years at the time he initiated his legal action. But he not only relied on tacking, he also relied heavily on the payment of taxes, under color of title, stemming from the void mortgage foreclosure, by those who had claimed the quarter before him, as indicated above. He also argued that the absence of any tax payments by Smith should be treated as an indication of an abandonment of the land by Smith, and suggested that Smith should therefore be estopped from claiming that he still had any interest in the land. Smith argued simply that he was still the owner of record, and that nothing he had done, or that he had failed to do, could be construed as an abandonment of the subject property. Once again, it was the ownership of the entirety of the quarter that was at issue, the contest was limited to the relative strength of the title claims made by the competing litigants, as adverse possession was at this time still legally unrelated to boundary issues or disputes. The trial court found the case presented by Page to adequately support his claim of adverse possession and quieted title to the entire quarter in him.

As has been noted, other adverse possession cases similar to this one had been decided by the Court in the years preceding this case. Some of

those cases had involved wild, unused, unimproved, undeveloped or unoccupied land. The Court had already suggested, in those cases, that occasional, sporadic or intermittent use of land that was still essentially in a wild or natural state, was generally insufficient to prove adverse possession, because such use, in failing to observably disturb or alter the fundamentally wild character of the land, provided no opportunity for the record owner of the land to realize that his land was being used at all. Again, in this regard, we can clearly see the significance placed by the Court on notice, as provided by a visible physical presence, manifested with a reasonable degree of continuity over time. A use of land that occurs only very briefly and rapidly passes away leaving no trace, such as gathering wild hay, is not one that an owner of record can be charged with notice of, because he could only observe it by watching the property constantly, or by being lucky enough to visit the property at a moment when such a use is actually in progress. Although the use of this quarter, up until 1907, was highly transitory, amounting only to the infrequent harvesting of some patches of wild grain, Page evidently believed that the payment of taxes, under color of title, would be enough to tip the balance in his favor, probably as a result of the Court's decision to that effect in the Mears case mentioned above, and indeed, the trial court had awarded the quarter to him on that basis. But unfortunately for Page, the Court was about to return the focus of adverse possession, from concerns over color of title and payment of taxes, back to the more fundamental issue of the physical acts and conduct of the adverse possessor.

Confronted with evidence that Smith had paid no taxes for over twenty years, the Court acknowledged that he had been negligent, but the fact that he had expressly offered to pay off the mortgage, and been rebuffed in that effort by the mortgage company, saved him. The Court found that the mortgage company had demonstrated an even higher degree of negligence than Smith, and the manner in which they dealt with him indicated bad faith on the part of the company. As a result, the Court ruled that Smith's failure to pay any taxes for over twenty years did not represent an abandonment of his ownership and did not raise an estoppel against his claim of ownership, nor was he guilty of laches. Since the Court had found that the payment of the taxes by the mortgage company had been the product of it's actions taken in bad faith, neither the tax payments nor the color of title could be of

any benefit to either the mortgage company or it's successors, because color of title can only benefit one who does not actually know that it is illegitimate. Therefore, the color of title and the tax payments made during the time that the mortgage company had claimed the land were of no value or benefit to Page. Moreover, the Court determined that the possession had not become truly adverse to Smith at all until 1907, when the actual use being made of the land, for substantial crop production, finally became prominent enough to provide him with a genuine opportunity to observe the fact that it was being put to use. The Court decided that as long as the land remained substantially in an unimproved and undeveloped state, any minor trespasses, for purposes such as the harvesting of wild grain, formed no basis for adverse possession, due to the physical insufficiency of such acts to provide definite notice of an adverse claim. Only the open cultivation of the land had set the clock for adverse possession running, and it had therefore been ticking for only six years, not nearly long enough to bar Smith from asserting his ownership of the quarter. Accordingly, the Court remanded the case, ordering the trial court to accept further evidence, regarding the costs to be paid by Smith to atone for his negligence, and by Page for his profits taken from the land, and ordering title quieted in Smith.

ROTHECKER v WOLHOWE (1918)

As the period of time during which prescriptive uses could not mature into prescriptive easements in North Dakota drew to a close, as discussed in the 1912 case of Burleigh v Rhud, the Court experienced an increase in the number of cases involving claims of public rights based on public use. In Koloen v Pilot Mound Township in 1916, the Court reiterated it's position, established in previous cases, that a prescriptive public right-of-way could be established by twenty years of public use of a road, regardless of whether the road in question runs over public or private land. If the road was on public land, the twenty years of use served to confirm the acceptance of the RS 2477 grant, as previously discussed herein, and if the road in question was on private land, then the twenty year period served to create a public roadway by means of adverse use. Pilot Mound however, lost it's public

right-of-way claim, although well over twenty years of public use of Koloen's land was evident in that case, because Koloen was able to show that his predecessors and adjoining land owners had effectively blocked the use of each of several different routes by the public, forcing the route of travel across his land to change significantly many times. For that reason, the Court found that Koloen and his adjoiners had maintained full control over all of their land, and had never treated or acknowledged any one of the routes in question as a public roadway, so because the incessant variability in the road's location made it impossible to identify and define any one specific route, no public right-of-way existed, despite the fact that one of the routes had been surveyed by the county surveyor, since the county surveyor had no authority to decide or declare that a public right-of-way existed. Later that same year, in Semerad v Dunn County, the Court again struck down a proposed route surveyed by a county surveyor, this time on the basis that it failed to match a description of the route that had been approved by the county commissioners, even though the route had been so poorly and incompetently described that the surveyor's work could not have been said to match the description, regardless of where the county surveyor had staked it. In that case, the Court maintained it's established position, previously referenced in the Radford case herein, that a county surveyor has no independent judgmental or decision making authority of any binding nature, so any surveyed location always remains subject to challenge or appeal, and cannot be deemed binding until adjudicated. In the case we are about to review however, we will observe a set of circumstances, involving the creation of a public right-of-way along an established route, that the Court found to be acceptable and binding upon the land owner in question, as a consequence of his own actions, despite the presence of definite legal irregularities in the road creation process, including the absence of any survey or description.

> 1886 to 1908 - A road that had developed from use alone, ran along or near the Mouse River, through a portion of McHenry County. The road was used by the public throughout this period, and although in some places it's path may have varied minimally at times, it remained in substantially the same location. Wolhowe owned a tract of unspecified size and location, abutting or near the river, and a portion of the road was on his land. No evidence was presented concerning

how he had acquired his land or how long he had owned it. Presumably he was an original patentee and the road was already in existence when he arrived on the scene, but this was not a factor in the outcome.

1909 - Wolhowe was one of several land owners in his portion of the county who wanted the road to be adopted and improved by the county, so they filed a petition with the county for that purpose. The county promptly responded and began making improvements to the road, including the construction of a bridge over the river, which Wolhowe had desired, since it was near his home and was therefore highly beneficial to him. Wolhowe actually participated in the construction of the bridge himself, and he observed the other road improvement work that took place on his land, knowing that the work was funded by the county. The work was completed and the road and bridge were put into regular use by the public.

1912 - At this time, Wolhowe evidently inquired with the county about the legal status of the road, in the belief that he was entitled to compensation for the portion of his land that had been devoted to use as a public road, and he discovered that the statutory provisions required for the creation of a county road had not been followed by the county. Specifically, the road's location had never been surveyed or legally described in any manner. Wolhowe's efforts to obtain compensation were unsuccessful.

1917 - Frustrated by his inability to obtain any compensation for the public use of a portion of his land, Wolhowe blocked off the portion of the road that crossed his property. Rothecker, who was evidently the township supervisor responsible for maintaining the public roads in the area, filed an action against Wolhowe to require him to unblock the road and allow the public use of it to resume.

Rothecker conceded that there was no evidence that the full statutory procedure for creation of a county road had been followed, yet he did not assert that the road had become a public roadway by means of prescription. He argued instead that since Wolhowe had been among those who requested that the road become a county road, and since Wolhowe had full knowledge of the work that was actually done on the road under the direction of the

county, by virtue of his own observation of it and participation in it, Wolhowe had acquiesced in the use of a portion of his land for roadway purposes, and had obtained the benefit of the bargain, as a result of the construction of the bridge that Wolhowe had requested and had been using. Wolhowe conceded that he had wanted the bridge to be built, and that he had used it, but he argued that he was still entitled to insist upon complete compliance with the statutory procedures, which included the creation of a description of the portion of his land that constituted the public right-of-way, and monetary compensation for the taking of that portion of his land for public use. The trial court found that the road was public, despite the material irregularities in it's creation and the absence of compliance with statutory procedures, and ruled that Wolhowe had no right to compensation and no right to block the road.

Disputes over roads began to occur with increasing frequency during this period, as North Dakota developed, and highways came into use by early automobiles, which many people considered to be obnoxious and intrusive mechanized contraptions at this time, disrupting pastoral life. The Court was therefore confronted once again in this case with the eternal clash of public and private rights, just as it had been in numerous previous cases, but the circumstances here gave the Court an opportunity to make an early use of the principle of acquiescence, which as we will later see, would eventually become a powerful and uniquely controversial legal tool in North Dakota in a different context, with reference to boundary disputes. As always, the Court attempts to strike a balance of equity in cases such as this, where there is certainly some legitimacy and merit in the arguments made by both sides. The Court has always been reluctant to allow any diminution of private rights for public purposes, consistently upholding the right of private parties to compensation for any rights taken from them for the benefit of the public. But at this time the Court was beginning to become more open to recognition of the value in public rights, and the need to support the development of the state through support for the infrastructure essential to a modern society. While the Court generally seeks to uphold statutory procedures, it also realizes that perfection is impossible in the real world, and real progress cannot be justifiably reversed or undone based on the absence of items amounting to mere technicalities, which may be preferable to have in place, but which are not absolute necessities, and in

this case we learn that this can include surveys and descriptions, in the view of the Court. In addition here, the actions, intentions and knowledge of the private land owner bring his behavior within the scope of the principle of acquiescence, and the Court, albeit with some reluctance, finds that he cannot stand in the shoes of the completely innocent, stripping him of the most essential element protecting any equitable claimant, good faith.

Wolhowe was certainly within his rights, the Court observed, to inquire about compensation for the public use of his land, and he had the right to seek compensation, if he could make a clear case demonstrating that he was entitled to it. His drastic action in blocking the road however, undoubtedly won him no favor, in the eyes of the Court. The lesson should be well noted and understood that precipitous acts which tend to interrupt or disturb the affairs of other parties very seldom play out favorably in court for the party choosing to take any such action. Having cast himself in a negative light by means of this ill advised action, he had made himself vulnerable, and essentially invited the Court to scrutinize his behavior and intent. The Court found from the testimony that the county had a history of adopting and improving roads, while ignoring the statutory procedures for legal road establishment. Evidently, both the county officials and the people of the county were generally focused on getting good roads built and were operating on the theory that creating county roads was, in itself, mutually beneficial to all. The absence of the survey and description of the road that was mandated by statute, the Court decided, was not fatal to the successful creation of public rights in such a well established and historically defined location. Since Wolhowe had requested the road improvement, he could not deny that it represented a benefit to him, and since he had expressed no objection whatsoever, as he watched all of the county work going on, very near his house, the Court upheld the decision of the lower court that Wolhowe no longer had any right to protest either the location or the use of the road by the public, and he obviously had no right to endanger public safety by obstructing it in any manner. The Court specifically indicated that this decision was based on Wolhowe's acquiescence, and not on the principle of prescription. Interestingly, in the course of so ruling, the Court quoted a Nebraska case, expressly stating that acquiescence should not become binding unless it persists for the statutory period, a position which the Court would eventually itself adopt and stridently adhere to in the future.

But in this case, the Court determined that Wolhowe's acquiescence, even though it lasted only for a period of time that was much less than the prescriptive period, was binding upon him, because his acquiescence combined with his subsequent behavior was sufficient to give rise to an estoppel against him, making this case a rare exception to the general rule, frequently reiterated by the Court over the years, that acquiescence is not binding in North Dakota short of the passage of the full statutory time period required for adverse rights to ripen and become vested.

STOLL v GOTTBREHT (1920)

As we have seen, during the first three decades of statehood the Court was called upon to decide only a very modest number of adverse possession cases, nowhere near as many as were litigated in more populous states with large urban areas during the same time period. Perhaps the good people of North Dakota were blessed with a relatively strong sense of appreciation for the value of land, making them inclined to properly maintain their own land rights and properly respect those of others, resulting in a fairly low number of serious controversies over land. If not for problems caused by illegitimate tax and mortgage foreclosures, it appears that the number of adverse possession claims in North Dakota during the early years of statehood would have been quite small indeed. But as the fourth decade of statehood began, the Court faced it's most complex adverse possession case yet, and one of the toughest decisions of that kind that it would ever face. Once again, boundaries were not a factor at all here, since adverse possession was still recognized at this juncture by the Court only as a means of asserting a claim to either an entire existing tract, or to an undivided or unpartitioned interest in an existing tract, and not as a means of asserting a boundary claim of any kind. This case was unusually complex, because it not only involved members of the same extended family, but some of those who were at the very center of the matter were initially minors, who matured into adults during the period of time when the alleged adverse possession was taking place. In addition to that, the parties were also in a cotenant relationship, and it was in fact this issue that was primarily focused upon by

the Court, and upon which the outcome turned. The question of how different the burdens applied to cotenants should be, with regard to supporting and proving adverse possession, from the burdens applied to strangers, split the Court. The Court appears to have been as deeply divided on this issue as it has ever been in any land rights case, but the outcome of this case would nevertheless go on to be cited and generally followed in future cases, so it served to set the tone for the manner in which the Court would view and treat cotenants, and their respective rights, going forward.

1902 - Kelly, a man of advanced years, who had just recently begun to establish a homestead on a certain quarter section, died widowless. Kelly had three children during his life, but his only son was already deceased by this time. Stoll was a daughter of Kelly's deceased son, and was a minor at this time. Gottbreht was one of Kelly's two daughters and she had been his caretaker during his final days. Kelly's other daughter claimed no rights to Kelly's land and was therefore not involved in this controversy between an aunt and her two nieces. Kelly allegedly willed the subject property to Gottbreht, and her husband was to be the executor of the will. The will was lost however, and was never probated. Gottbreht and her husband immediately took sole possession of the Kelly homestead, following Kelly's death. Precisely where Stoll and her sister lived is unknown, but they evidently lived either in a distant part of the state, or somewhere outside the state, presumably in the care of their widowed mother at this time, since they were still just small children.

1903 - The Gottbrehts began paying the taxes on the subject property, and continued to do so every year thereafter.

1904 - The Gottbrehts completed the time period necessary to obtain a patent and the federal government issued the patent, which stated that the quarter was now owned by the heirs of Kelly. Mrs. Gottbreht then allegedly deeded her interest in the land to her husband, but this deed was not recorded and was also allegedly lost. The Gottbrehts continued to be the sole occupants of the quarter at all times going forward, and no one ever challenged or contested their right to live there and make complete use of the land, just as any typical land owner would use it.

1916 - Mr. Gottbreht sent quitclaim deeds to Stoll and her sister, evidently either expecting or hoping that they would simply sign away any interest they might have in the quarter. They had been children at the time Kelly died, but they were now young women, and in fact both of them were now married. The Gottbrehts had sent annual payments to their nieces for several years, since this had been stipulated in the will of Kelly, but this was the first time either Stoll or her sister learned that they might have a legal interest in the subject property. They did not sign the quitclaim deeds.

1918 - Stoll and her sister filed an action against the Gottbrehts seeking to quiet title to their inherited interests in the quarter.

Stoll argued that she and her sister were legitimate heirs of Kelly and were therefore rightful owners of a partial interest in the homestead, since the patent specifically indicated that it had been issued to the heirs of Kelly. The Gottbrehts argued that it had been the intent of the will for them to possess and maintain the homestead, and for them to make payments to the nieces, which they had faithfully done. They also argued that regardless of the language used in the patent, they had become the sole owners of the homestead, by virtue of adverse possession, supported by their payment of all the taxes, under color of title. They maintained this position even though the two documents that they had relied on to provide their color of title, those being the Kelly will and the 1904 deed from Mrs. Gottbreht to Mr. Gottbreht, had both been lost, and evidently there were no witnesses who could testify that either of those documents had ever existed. The trial court was sympathetic to the Gottbrehts situation and quieted title in them.

The Court was sharply and deeply divided, regarding the relative value and interpretation of the evidence in this case. All of the Justices shared the same goal of course, which as always was to assess the relative strengths of the evidence, ascertain the truth of the matter to the fullest extent possible, and ultimately to do justice. They all agreed that the patent created rights to the land in all the heirs of Kelly, not just in Mrs. Gottbreht, but they diverged on the value of a lost will and a lost deed as color of title. Gottbreht had been mistaken in her assumption that she could successfully claim to be the sole intended legal heir and that she could dismiss the interests of the other heirs to the quarter. Even if that truly was her father's

intention, the patent had failed to express that intention, and in the absence of the will, the language of the patent itself controlled. The deed Gottbreht claimed to have given to her husband in 1904, if in fact she did so, conveyed only her own interest in the quarter to him, and did not operate to cut out the other heirs, so it would have been of little if any value to her in this battle, even if it had not been lost. Her husband became merely a cotenant by virtue of this conveyance, provided that it actually took place as alleged, along with the other heirs, and not the sole owner, despite the fact that the cotenants never occupied or even visited the subject property. Since Stoll and here sister were minors for most of the time period in question, the fact that they made no effort to assert any rights to the subject property obviously could not be held against them. The key difference of opinion between the Justices was over the question of whether or not the possession by the Gottbrehts, for more than ten years, was truly adverse to the other heirs. In the end, the Justices were split, 3 to 2, with the highly respected Chief Justice coming down on the dissenting side, and writing a strong dissenting opinion that was arguably more eloquent and persuasive than the majority opinion.

The majority found that the cotenant relationship was never broken or severed by anything the Gottbrehts did, or by the failure of the other heirs to raise their claims to the quarter at an earlier time. The fact that the nieces were children during part of the period of allegedly adverse possession was not the decisive factor in the view of the majority, so the outcome would have been the same even if they had been mature throughout the time period in question. The majority chose to focus upon the cotenant relationship, and set the bar for cotenants in possession, attempting to claim adverse possession against any cotenants not in possession, very high:

> “...to start the statute to operate by adverse holding, it was necessary for the cotenant claiming adversely to perform or do some act in direct hostility to the claims of his other cotenants, so as to show in some way an ouster of the rights of such cotenants. This meant .... emphatic deprivation of the rights of the cotenants..."

The Court thus ruled that the nieces did in fact have a valid interest in

the quarter, reversing the ruling of the trial court, not because adverse possession could never apply against them, due to the fact that they were children, or due to the fact that they were members of the same family, but rather because the statutory period had never begun to run against them, since neither of the Gottbrehts had ever done, or even said, anything that amounted to a clear denial of the rights of the nieces to a share of the subject property. In the view of the majority, even the continuous, exclusive and sustained use of all the land in question by the Gottbrehts, in a manner that was clearly indicative of a claim of ownership, was insufficient to create an adverse condition, because nothing they ever did served to observably manifest the idea that their nieces would never be allowed to take possession of any portion of the subject property. Their tacit intentions to exclude all others from the land were never physically manifested, because no physical confrontation ever occurred, since their nieces never showed up to assert any physical claim to the land, so ironically, the Gottbrehts never got the opportunity to demonstrate the adverse nature of their possession by physically turning either Stoll or her sister away. In occupying and using the land, the majority determined, the Gottbrehts were doing only what the law anticipates that any typical cotenant will do, which is to make full use of the land until such time as another cotenant arrives to claim their portion of it. Between cotenants, the majority decided, even undisputedly sole possession of land is not enough, alone, to provide notice to another cotenant, who is not living on the land, that the cotenant who is living on the land, or making use of it, intends to permanently exclude and bar their fellow property owners from the premises.

Although this was an exceedingly close decision, as noted herein, it would prove to have a lasting influence and a major impact on subsequent decisions. For example, 53 years later in 1973, in the case of Handy v Handy, the Court found that even though one particular member of that family had undisputedly held sole dominion over a tract of land for 65 years, essentially his entire lifetime, he could not eliminate or overcome the interests of other family members, that had been derived through inheritance. If the family members had ever attempted to take control or possession of the land, and the cotenant in possession had turned them away, that would have started the statute of limitations running against them, since that would constitute a genuine ouster, but that never happened,

so even the passage of a lifetime was not enough to diminish their rights to the land. Similarly, in the 1975 case of Brooks v Bogart a husband claimed that he had completed adverse possession against his own wife. He made this claim only because his wife had died and bequeathed her interest in their land to a son that she had by an earlier marriage, who the husband obviously did not like, so the husband claimed that since he had adversely possessed the land against his wife, while she was still alive, her son had inherited nothing from her when she died. The Court did not state that adverse possession between family members is impossible, since in fact it is not impossible, but ruled once again that a close relationship, such as that between a husband and wife, creates a higher burden on the party claiming adverse possession against the other, and decided the case against the husband. We will also see however, other cases proving that adverse relations can and do develop between family members, with very serious implications.

MORGAN v JENSON (1921)

In this case we observe the first attempt to convert or expand the doctrine of adverse possession in North Dakota into a tool for the relocation or alteration of record boundaries. The Court had long been open, by this time, as we have seen, to the idea that adverse possession is a viable and legitimate means of acquiring conclusive title to a given tract or parcel of any size or shape, in it's entirety, based on the presentation of adequate proof that the owner of record can and should be legally barred from asserting ownership of the land in question, for some valid reason. But the Court had never been asked to partition or split an existing lot, parcel or tract of any kind, by means of adverse possession. Whether such a division of any existing lot, parcel or tract is viewed as creating a new boundary line that effectively supersedes the original line of record, or viewed simply as shifting the location of the original record boundary line, based on evidence of physical use or occupation, the net result was the same in the eyes of the Court, amounting to a deliberate deviation from a known original boundary location. Adverse possession, in it's most basic and essential form, is

focused solely on the comparative strength or weakness of competing title claims, without regard to boundaries, in other words, it is not fundamentally concerned with issues such as extent and location. Since adverse possession was originally intended simply to resolve title conflicts, by allowing stale land claims to be entirely dismissed and disregarded, the idea of using adverse possession for the purpose of altering boundaries was seen by the Court as extending the doctrine beyond it's intended purpose. Short of so extending it however, the Court was left with no distinct or dedicated tool, by means of which to do justice in certain cases involving boundary conflicts, the powerful boundary resolution doctrine of practical location, adroitly employed to uphold boundary agreements in many other states, being unavailable, due to the Court's unwillingness to embrace it. Although larger equitable principles, such as estoppel and laches, could be applied to accomplish the ends of justice, with respect to land rights, we will see the Court adopt and develop another tool for this specific purpose in the coming years. In 1921 however, as this case shows, the Court was not yet convinced of the need to craft a specific legal tool for use in boundary resolution, but the internal discord experienced by the Court in dealing with this case set the stage for the important steps that the Court would take in that direction a decade later.

> 1877 - A platted city lot, in a city block of the typical rectangular design, was purchased by Ball. This lot was vacant, never having been developed, and it still remained vacant 44 years later, at the time of this case.
>
> 1893 - The house on the lot north of the vacant Ball lot burned down. This lot was then purchased by Faley, who erected a total of five buildings on it. These buildings were all described in testimony as shacks, although three of them were evidently inhabited dwellings for some unknown period of time.
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> 1903 - Jenson acquired Faley's lot. He testified that Faley told him all of the buildings extended over the lot line and onto the vacant Ball lot, by amounts ranging from a few inches up to about a foot and a half. There is no indication that any surveys were done at any time, or that any monuments ever existed or were known to any of the parties, so how the lot line location was determined, and why Faley believed

that the buildings were over the lot line, are both unknown, but the Court simply accepted the premise that the buildings were over the line, since no one ever suggested anything to the contrary.

1904 - Jenson had a conversation with one member of the Ball family, who was not the record owner of the vacant lot, concerning the buildings and the lot line, but nothing was decided, and no action was taken by either party.

1912 - The elder Ball, who was the record owner of the vacant lot, died and ownership of that lot passed to another member of the Ball family.

1913 - The vacant lot was conveyed to Morgan.

1919 - Morgan agreed to sell this lot to Schas, who evidently learned of the issue involving the buildings and demanded that Morgan get it resolved, in order to satisfy Schas that the lot he was buying was whole and unencumbered. Schas evidently planned to demand that the buildings be moved or torn down, once he acquired the lot from Morgan. For that reason, Morgan filed an action against Jenson to quiet title to the vacant lot.

Morgan argued that the buildings represented mere encroachments upon the vacant lot and were therefore subject to removal at any time. He argued that since the existence of the encroachment was known to all parties at all times down through the years, it amounted to a permissive condition, so the fact that the encroachment had been allowed to remain undisturbed for decades created no rights and had no effect on the boundary between the lots. Jenson argued that the presence of the buildings for well over twenty years represented adverse possession of a portion of the vacant lot, that portion being a strip comprised of the northerly one and a half feet of the vacant lot. The trial court agreed with Jenson that the buildings were nothing more than encroachments that created no rights to any portion of the vacant lot and were subject to removal, quieting title to the entire vacant lot, as platted, in Jenson.

In most other states, cases of this type, where the ownership of only a portion of a certain lot was at issue, rather than the ownership of the lot as a whole, had already been decided on the basis of adverse possession,

although adverse possession is arguably applicable only where an otherwise irreconcilable title conflict exists. In fact, adverse possession had come to be commonly and routinely used to resolve disputes in most states that could have been more appropriately treated as boundary location issues, rather than title conflicts, but due to the fact that most attorneys and judges are simply more comfortable dealing with such matters as title issues, adverse possession had came to be frequently applied in a boundary context. In those states, a finding of adverse possession up to a certain line would typically result in a de facto partitioning of the lot in question, essentially creating a new boundary based on physical use, rendering the record boundary moot, on the theory that the record title has been partially extinguished, to the extent of the adverse physical use. Due to a general lack of understanding of the numerous sources from which boundary uncertainty can arise, many of which are related to survey errors of various kinds, as surveyors very well know, adverse possession had come to be seen as a simpler means of resolving boundary disputes, since it effectively eliminates any need for an intense examination of often obscure boundary evidence. In addition, it was also already well established in most other states at this time that a permanent structure, such as a house, was a valid basis for a claim of adverse possession of any adjoining private land onto which it extended, provided that the structure had been in place for the full period stipulated in the appropriate statute of limitations. In North Dakota however, the Court had thus far drawn a reasonably clear distinction between title and boundary issues, and no such precedent relating to structures had been established, so the Court was free to review opinions of other states on this question and adopt a position on the matter that could serve to establish a precedent for North Dakota.

Just as it had in the Streeter case 19 years before, the Court turned to Wisconsin for guidance on this issue, relating to adverse possession, and followed a Wisconsin ruling indicating that a lack of privity between grantor and grantee was potentially fatal to adverse possession claims. Since Jenson had acquired a platted lot, the boundaries of which appeared to be quite clearly defined by depiction on the plat, his claim was vulnerable to attack on this basis, although the platted lot corners and lines may well have been decidedly less than clear on the ground. In this case, unlike the Nash case 15 years earlier, the Court was unsympathetic to the adverse claimant and

refused to allow Jenson the benefit of the concept of privity, even though the Court had specifically indicated in that 1906 case that privity between grantor and grantee could apply to claims of adverse possession. Not only was Jenson, with his dilapidated tenements, a far less appealing figure than Mrs. Nash had been, this case also confronted the Court with what amounted to a potential expansion of adverse possession, from the realm of title law into the realm of boundary law, which turned out to be a step that the Court was not prepared to take at this time, although it would later go on to do so, as we will see. Nevertheless, two Justices, interestingly the same two who had dissented in the Stoll case, which we have just reviewed, dissented again, but only on the issue of privity, rendering the ruling in this case, as it might apply to that specific issue, a feeble one. Ironically, they cited a different Wisconsin case, which actually supported the concept of privity in the same context, pointing out the shallowness, on that particular issue, of the majority position. Yet they agreed that Jenson's claim was an unworthy one, based on the shabbiness and decrepitude of the buildings in question. The outcome clearly could have been to the contrary, had the buildings involved been more substantial and respectable.

Emphasizing that the buildings which formed the basis of Jenson's claim were disgusting, and implying that they deserved to be torn down anyway, the Court upheld the decision of the trial court that no adverse possession had taken place and Morgan held clear title to the entirety of the lot that he had purchased, in accordance with its record dimensions as platted. Unable to tack the possession of Faley to his own, for lack of privity, and unable to show any color of title to the vacant lot, Jenson could not meet the applicable statutory time period of twenty years. The Court determined that the Ball family had not been remiss in failing to take any action to have the buildings removed, since they had no motivation or reason to seek removal of the buildings, even though they evidently knew of the situation, until such time as they wanted to develop their lot, which in fact they never did. Since the buildings were little more than sheds, the Court found it perfectly understandable that the Balls saw them as having no significance, and no potential impact on their lot. The Court did not explicitly order the removal of the buildings, since that had not been an issue that was expressly argued in this case, but the effect of the Court's ruling was to fully uphold the decision of the trial court and verify that if the

buildings were in fact over the lot line, as all the parties agreed they were, then they represented nothing more than encroachments, and were subject to removal. We will see similar cases as we go on, involving buildings constructed over property lines, under very different circumstances however, and the reader will observe that the Court genuinely endeavors to treat each case of this kind, particularly those resulting from construction measurement errors, in accordance with the specific and unique evidence presented in each case.

ROBERTS v TAYLOR (1921)

In the 1916 case of Brignall v Hannah, the Court first extended it's established riparian policies to lakes, ruling that meander lines around lakes are not boundaries, in the absence of evidence that the treatment of the body of water as a lake, by the surveyor who created the meander line, amounted to fraud. In that case, which involved an attempt by non-riparian parties to claim a portion of a relicted lake bed, the court also held that the riparian owners around a non-navigable lake each own a portion of the bed of the lake, and they are therefore free to exclude any non-riparian parties from using any portion of the lake bed that becomes exposed as a result of reliction. In other words, while lands omitted from an original survey due to fraud remain public domain, beds of actual existing non-navigable lakes are part of the adjoining patented lands, whether meandered or not, and are no longer in the public domain, once the riparian land around the lake has been patented, even if the lake subsequently dries up completely. A claimant asserting the existence of omitted land in such a situation has the burden of proving that the lake in question did not actually exist at the time of the original GLO survey during which it was meandered, because original surveys are presumed to have been correct, until proof to the contrary is shown. In the case we are about to review, we continue to trace the early progress of riparian law in North Dakota, and we find the Court addressing three important aspects of riparian law in a more detailed way that it previously had. The Court rules here upon the applicability of the basic riparian principles to an island, advances a more expansive definition of

navigability, and expresses it's interpretation of the law regarding how far riparian lands actually extend toward navigable waters. Every riparian case has it's own unique conditions and features, but the circumstances present in this case are particularly unusual and extreme, involving reliction that is so severe that it actually creates two lakes, where there had previously been only one. Although it may be highly unlikely that the specific circumstances present here will ever be encountered by the reader, this case still provides a fine example of some of the most important riparian principles at work, and represents another important step in the development of North Dakota riparian law, that has frequently been referenced and applied in subsequent riparian cases, as we shall later see.

1883 - Sweetwater Lake was meandered, during the original surveys subdividing the two townships that included portions of the lake. One portion of the lake occupied the central portion of a certain Section 36. The lake, being several miles long, extended far to the north and to the south, but it was relatively narrow in Section 36, so at the time of the original survey there was some dry land in both the east and west parts of Section 36, and there was also a small island near the middle of that section. Therefore, Government lots were created and shown in that section on the GLO plat. Lots 1 & 2 included the part of Section 36 lying east of the lake and Lots 3 & 4 included the part of Section 36 lying west of the lake. The island was completely ignored during the original survey and was not platted. The portion of the lake covering the middle of Section 36 also happened to be the shallowest part of the lake, the deepest parts of it being at it's north and south ends, and this would prove to be the critical factor that would result in the controversy we will see play out here. The lake was already in use by the public, primarily as a waterfowl hunting area, and this use continued all the way up to the time of the trial.

1889 to 1900 - Since Section 36 was a school section, all of this land was originally granted to North Dakota. Lohnes acquired all four of the lots in this section from the state during this period of time, under a contract for deed, and occupied the land for an unspecified length of time. How he used the land, or whether he used all of it, is unknown, but he did build a fence running more or less along the east edge of the lake. During all this time, the lake level was diminishing and the

water was receding. As a result, the island increased in size, and since the eastern portion of the lake bed was evidently deepest, the western shore migrated eastward, toward the fence, while the eastern shore location remained more or less stable.

1901 - Roberts acquired Lots 1 & 2, by assignment of the contract for deed relating to those lots from Lohnes, and Roberts obtained a deed to those lots from the state. Lohnes told Roberts that he had intended the fence to represent the west boundary of those lots at the time he built it.

1905 - Taylor acquired Lots 3 & 4, by assignment of the contract for deed relating to those lots from Lohnes, and he obtained a deed to those lots from the state. It appears that by this time the lake bed covered only a fairly small strip of land running along the west side of the fence that been built by Lohnes. The western shore of the lake had gradually migrated so far east by this time that the island no longer existed separately, it had become physically engulfed and essentially swallowed up by the dramatic eastward movement of the western shore, which had moved at least several hundred feet east over the previous twenty years or so.

1906 to 1921 - During this period, the last remaining part of the lake bed in the central portion of Section 36 gradually dried up completely, so that the fence became the only physical line of division between the lands of Roberts and Taylor. The lake had split into two lakes, one still covering just a small amount of the north part of the section, and the other still covering just a small amount of the south part of the section. By the time of the trial, Taylor had been farming practically all of the exposed lake bed for several years, up to the fence, and Roberts had been farming the land on his side of the fence. Roberts decided to challenge Taylor's alleged right to farm virtually the entire exposed lake bed, and filed an action to quiet his title to Lots 1 & 2, and to have the true location of the west boundary of his lots judicially determined.

Roberts argued that the lake was non-navigable, since there was no evidence that any commercial use had ever been made of it. On that premise, he maintained that he had a valid claim to half of the exposed lake

bed, based on the rule set down in the Brignall case discussed above, that property owners situated on a non-navigable lake each own a portion of the bed of the lake, up to the center of the lake, and each owner is therefore entitled to a proportional share of the bed, in the event of reliction. In addition, he argued that it could not be proven that the island existed at the time of the original survey, and that in fact the GLO plat conclusively proved that it did not exist at that time, because the island did not appear on the original plat, so the island should be disregarded. Taylor argued that the lake was navigable, based on the fact that it had been used by the public, even though the only use of it had been by individuals or small groups in small boats for recreational purposes. Based on that premise, he maintained that he was entitled to virtually all of the exposed lake bed, because given the manner in which the water had receded, virtually all of the bed had attached to his lots, and little or none of it had attached to the lots owned by Roberts. In other words, he claimed to be entitled to practically all of the relicted bed, even well beyond the center of the former bed, up to the point where the last trickle of water had run before the lakes became disconnected, which was evidently just a short distance west of the fence built by Lohnes. In addition, he argued that he was also entitled to the whole area, up to the fence, by adverse possession. He also argued that the question of whether or not the island actually existed at the time of the original survey was not important, and he claimed the area covered by the former island, along with the whole relicted area surrounding it. Roberts prevailed at the trial court level.

Quite logically, the Court first addressed the issue of navigability. Their decision on this question would establish a very powerful precedent, that not would not only guide North Dakota law, but would also play into the nationwide controversy over public use of waterways of various kinds, which would rage for decades, and still goes on today. Using language that was very progressive in 1921, and citing similar decisions from Minnesota and South Dakota, the Court took the position that:

> "A public use may not be confined entirely within a use for trade purposes alone. A use public in its character may exist when the waters may be used for the convenience and enjoyment of the public, whether traveling upon trade purposes

> or pleasure purposes. There is a growing recognition that the utilities of nature, so far as public use are concerned, are not always to be measured by the sign of the dollar. Purposes of pleasure, public convenience, and enjoyment may be public as well as purposes of trade. Navigation may as surely exist in the former as in the latter."

Having come down strongly in favor of the public on the question of navigability, in keeping with it's strong stance in defense of public rights, which we have already seen exhibited in a number of cases, the Court next turned it's attention to the island. Ironically, the one thing Roberts and Taylor agreed on was that the island should be treated as a nullity. They were in agreement on that of course, only because that position served their personal interests, making both of their respective claims possible, but neither of them was persuasive enough on that issue to satisfy the Court, and the Court's answer would bring down the arguments of both parties. Based on testimony regarding the existence of the island at the time of the original survey, the Court found that the failure of the original surveyors to note or plat the island was not conclusive, and determined that it had in fact existed at that time. The island therefore had to be treated as omitted land, which had erroneously gone unsurveyed. Since it was undisputed that the island was completely within Section 36, it had passed from federal ownership into state ownership, under the federal grant of school lands, and since it was not part of any of the four government lots that had been created in that section, it had never been conveyed by the state. The state had owned the island since the moment of statehood, and the state still owned it, the Court determined, since adverse possession cannot run against the state. Here again we see very high value placed by the Court upon testimony, in ruling upon land rights, the testimony in this case being strong enough to overcome evidence regarding the existence of an island supplied by an original GLO plat.

Having established this foundation for rights of the state, by upholding the state as owner of the island, the ultimate question of the division of the former lake bed between the parties remained to be resolved. The Court ruled that neither party had presented a valid claim. They both had rights to a share of the relicted bed, by virtue of being riparian owners,

but neither of them was entitled to anything close to the full extent of the area that they had argued for, because both of them had wholly neglected and discounted the presence of the island, and the riparian rights that were appurtenant to it. Since the island was a separate and independent tract of land, with valid riparian rights of its own, the state, as it's owner, was entitled to claim those portions of the reliction that had attached to the island, as the water had receded, which amounted to a very substantial, if not huge, area. For that reason, the matter of reliction division could not be adjudicated without the state being represented. Therefore, the case was sent back to the trial court for a new trial on that particular issue, with North Dakota being given the opportunity to participate, in order to protect it's interests in both the former island itself, and any or all of the relicted land surrounding it. Whether North Dakota chose to make any claim to the island or not is unknown, it's possible that the state may have chosen not to claim any of the land, in which event Roberts and Taylor may have settled the matter between themselves without any further litigation, since the case never returned to the Court. Notably, in the process of reaching this decision, the Court stated for the first time, that under it's interpretation of the applicable statutes, the rights of all owners of riparian lands extend to the low water mark, and also acknowledged that all islands which have formed in navigable waters since the date of statehood belong to the state. Although neither of these issues were instrumental in this case, they would both eventually become the focus of serious controversy in future cases, as we will later see, and these important positions taken here by the Court would be often cited in the course of resolving future conflicts involving these specific issues.

OWENSON v BRADLEY (1924)

Although we have already seen cases involving boundary conflicts of various kinds, this case provides an excellent example of how the Court deals with boundary issues that come before the Court in a different context, in the form of encroachment claims. As will be noted, the Court does not treat the boundary itself as the focal point of the dispute in such cases. In

fact, the Court does not even see the boundary location, in this context, as being central to their ruling or to the outcome. The Court focuses primarily on the evidence pertaining to what the parties did and why they did it, and the Court is willing to decide such cases even where little or no real boundary evidence is ever presented. As always, the acts of the parties, and their motivation, ultimately determines the path taken by the decision making process employed by the Court. In this case, the Court proceeds on the assumption that the conditions on the ground are as they are stated to be by the parties. The Court is unconcerned with whether or not an encroachment really exists, and hands down a ruling that answers the question of how the matter shall be resolved, based entirely upon the conditions as they are depicted by the parties, which create an implicit presumption that an encroachment exists. The Court will not venture off on explorations or investigations, even when only inconclusive evidence of relevant matters is presented, if a reasonable and meaningful decision can be reached based on the evidence that is presented. Surveyors may be uncomfortable with decisions such as this one, in which a party who was negligent, to the extent of failing to have his boundaries marked prior to commencing construction, suffers no penalty for the consequences of that failure, at the hands of the Court. But rather than being critical of the Court for such decisions, surveyors should simply recognize that the Court operates and functions as a mechanism of equity, and therefore it's perspective on boundary issues varies dramatically from the more scientific and technical inclinations of the land surveyor. Another important lesson offered by cases such as this, is that in situations where boundary issues are relevant to the controversy at hand, clear and strong evidence must be presented to that effect, or else the boundary issues may be completely disregarded in the adjudication process, because the Court will only address the issues that are put in play by the parties. Surveyors who come to realize how factors such as these influence and shape the decisions of the Court will experience the largest measure of success in dealing with the legal aspects of boundary and encroachment issues.

> 1916 - Wilcox was the owner of Lot 8 and Kumrine was the owner of Lot 9, which were evidently typical platted city lots. How or when the lots were acquired by these parties is unknown, but the ownership of each lot was undisputed. Lot 8 was vacant and Lot 9 contained a

building. There is no evidence that there had ever been any conflict or other concern regarding the boundary between the two lots. Wilcox agreed to sell Lot 8 to Kumrine. Kumrine immediately began to offer the two lots for sale. Bradley, acting as Kumrine's agent, contacted Harbke, who agreed to buy both lots. Bradley wanted Lot 8 for himself, but before he could make an arrangement to that effect with Harbke, Harbke agreed to let Owenson acquire Lot 8, so Wilcox deeded it to Owenson. Bradley felt as if he had been cheated and responded by filing an action against Kumrine, to compel her to sell Lot 8 to him, based on an arrangement that they had made. Bradley prevailed in that case, and as a result, Kumrine deeded Lot 8 to him, although she had never completed her own acquisition of it. Meanwhile, Owenson had already begun construction of a building on Lot 8. Bradley showed up, claiming to own Lot 8, and attempted to set up a camp on the rear portion of the lot. Owenson physically ousted Bradley and his possessions from the lot. Bradley, evidently bent on revenge, somehow discovered that Owenson's new building was slightly over the lot line, so that one brick wall was on Lot 9. Harbke defaulted on his purchase of Lot 9 from Kumrine, so Bradley took that opportunity to step in and buy Lot 9 from Kumrine. Bradley then pointed to the encroaching wall and demanded that Owenson either relinquish Lot 8 to him or remove the wall from Lot 9, which would require Owenson to tear down his new building. Owenson filed an action against Bradley to quiet title to Lot 8, asking that the deed by which Kumrine allegedly conveyed Lot 8 to Bradley be declared null and void.

Owenson argued that Bradley had no legitimate claim to lot 8, and that the construction of the wall on Lot 9 had been an innocent construction measurement error, so he should not be required to tear it down, and he should instead be allowed to acquire the strip occupied by the wall from Bradley at a reasonable price, which he offered to do. Bradley argued that his right to Lot 8 was superior to Owenson's, and also that he had the right to demand that the wall be removed from Lot 9, so he could not be legally compelled to convey any portion of Lot 9 to Owenson. The trial court ruled in favor of Owenson on both issues.

The Court quickly disposed of the contest over the ownership of Lot 8, by ruling that the acquisition of that lot by Owenson was perfectly legitimate, and Kumrine's deed conveying Lot 8 to Bradley was worthless, quieting title to Lot 8 in Owenson. Then the Court turned to the issue presented by the wall encroaching on Lot 9, which the Court characterized as a more difficult issue. There was no evidence that any kind of survey had been performed on either of these lots, and no evidence was presented regarding the existence of any lot corner monuments. How Bradley knew that the wall was actually on Lot 9 is unknown, he may have simply made some measurements of his own, or he may have obtained a survey and just never made any specific reference to it, but be that as it may, the Court accepted his proposition that the building foundation and the wall were encroaching on his lot by up to 16 and 3/4 inches, and the Court's decision was therefore based on the presumption that the wall really was over the line. Courts rarely order surveys to be performed in cases such as this, the issues are simply decided based on whatever evidence has been put before the Court, since the Court always operates on the presumption that any evidence which is uncontested is accurate and correct. Owenson never suggested that the building might not actually be over the lot line, so the Court simply accepted Bradley's assertion that it was encroaching on his lot as a verity. Untold numbers of cases have undoubtedly been lost, due to the failure of one party to challenge an incorrect boundary line assertion made by the opposing party, and whether or not this was such a situation we will never know, but the Court proceeded to resolve the matter just as if the boundary location and the encroachment had been conclusively proven, since no evidence to the contrary was ever introduced.

On the surface, the situation may appear to be practically identical to the situation in the Morgan case of 1921, which involved a building encroachment of the same magnitude, but there were at least two major differences. First, the building in this case was highly valuable, as opposed to the rundown shacks in the Morgan case, which were practically worthless. Secondly, this building was brand new, not old like Jenson's buildings in the Morgan case, so there was no opportunity for Owenson to rely on adverse possession, or any other theory based on the passage of time, to justify keeping the wall where it was. The Court was clearly aware that Bradley was out for revenge against Owenson, since Bradley believed

that the arrival of Owenson on the scene, at the time when Bradley was planning to acquire Lot 8 himself, had prevented him from having the opportunity to buy that lot. But in order to protect Owenson, the Court would have to deny Bradley the right to insist on removal of the wall, which would mean that the Court would have to take a position respecting Owenson's building that was directly contrary to the position it had taken just three years earlier regarding Jenson's buildings. To accomplish that without creating a conflict between these two decisions, the Court chose to invoke it's power to do equity, and relying on the two significant differences noted above, while speaking with reference to the legal right of Bradley to demand that the wall be removed from his lot, decided that:

> "...equity will not interfere by granting a mandatory injunction in such a case, even to vindicate a clear legal right .... greater injustice will be done by compelling a removal than by awarding damages..."

Following and quoting from similar decisions from Massachusetts and New York, the Court ruled that although Bradley had the clear legal right to demand removal, justice could not be served by allowing him to use that right as a tool to carry out an act of revenge. In effect, the Court found that Owenson had acted innocently, while Bradley had not, and therefore the balance of equity was on Owenson's side. Since the Owenson building was new and valuable, and his placement of it had been an innocent mistake, the Court would not allow it to be treated as a mere encroachment, subject to removal. The Court upheld the trial court ruling in Owenson's favor, and ruled that Bradley would have to settle for the offer that had been made by Owenson to buy the strip occupied by the building, which was actually above the market value of the strip. In so ruling, the Court provided a classic example of the judicial remedy known as balancing the equities, and revealed that it would be flexible in it's treatment of alleged encroachments, rather than simply ordering their removal in every case, regardless of the circumstances. A party who acted in good faith, although that party may have made some type of mistake in their actions or decisions, can always seek the protection of the Court, and very often will meet with success, as can be seen in this case. Perhaps most important for the surveyor to observe, is the fact that in this situation the failure of Owenson to obtain a survey of

his lot, in order to learn the location of the lot lines prior to construction, was not seen by the Court a basis upon which to charge him with bad faith. Although he evidently acted, in erecting the building over the lot line, based on either a mistaken idea or a false assumption regarding the lot line location, he was still innocent and guiltless, in the eyes of the Court, in so doing, because the circumstances gave him no reason to suspect that the building would be over the line. This is an essential concept for surveyors to grasp, because the Court has always been consistent in holding that unless visible conditions or circumstances suggest that a problem or conflict exists, with respect to a boundary, a grantee is under no absolute legal obligation to obtain a survey, prior to acquiring and using land. Conversely, it should also be observed that a party who appears to have acted in bad faith, such as Bradley in this case, may be unable to prevail, even if that party has managed to develop a case that is valid on the surface, and would prevail under a strict application of the law, if equitable considerations were to be disregarded, because the ultimate objective of the Court is always to reach the most equitable result.

EARNEST v FIRST NATIONAL BANK OF CROSBY (1927)

Tracing the footsteps of the Court as it deals with issues relating to recordation, we note three more cases that reiterate significant established precedents. In First National Bank of Dickinson v Big Bend Land, in 1917, the Court stated that the recordation laws had always been understood to have no application, as a form of notice, to any party whose land rights existed prior to the recordation of documents by another party claiming the same land. In other words, one cannot record a deed and then claim that it is superior to a previously existing unrecorded deed which conveyed the same land to another party, because recordation is solely for the purpose of providing notice going forward in time, and is not for the purpose of destroying existing rights of others that were acquired at an earlier time. Even 80 years later, the Court was still continuing to cite that case for the proposition that recordation is inoperative as notice against holders of existing rights. In 1919, in Mueller v Bohn, the Court again emphasized that recordation is for the sole purpose of providing notice, and declared that no

party with actual notice of existing rights of others to the same land can qualify for protection under the recording laws as an innocent purchaser, staunchly adhering to the course it had previously set, as we have seen, in the Doran case in 1895. It was in the Mueller case that the Court first defined good faith as the intention to abstain from taking unconscientious advantage of another, by means of legal technicalities that would overturn or defeat the spirit of the law, a definition which it has often restated and applied in subsequent land rights cases. Then in 1921, in Eynon v Thompson, the Court yet again maintained that recordation fundamentally creates no rights, reiterating that a document gains no additional validity or legitimacy merely by virtue of being recorded, again emphasizing that a failure to record is not equivalent to a lack of good faith, and does not mean that unrecorded rights are unworthy of legal protection. In the case we are about to review, the Court faithfully follows this same course, putting particular emphasis in this instance on the high value to be afforded to evidence of physical possession of land, that bears the appearance of permanence, as the surest form of notice to the world of existing independent rights to the land. In addition, the Court finds no difficulty in placing a full and heavy burden of inquiry upon the acquiring party, and denying that party the right to rely solely upon documentary evidence of ownership, even where the use and occupation of the land in question is being made by close blood relatives of the record owner, whose presence on the land an objective observer might logically tend to attribute to a close family relationship with the record owner, rather than to the existence of distinct and independent land rights held by the occupying party. But as we shall see here, that represents a serious mistaken assumption on the part of any party acquiring land.

1921 - Whitaker, who was the owner of an unspecified number of platted city lots in Crosby, obtained money from the Bank of Crosby, secured by a promissory note from Whitaker to the Bank.

1922 - Whitaker gave his daughter, Earnest, a deed to a particular lot, which she and her husband and children had been living on for an unspecified number of years as a homestead. This deed was simply held by Earnest and was not recorded.

1923 - Whitaker defaulted on the promissory note. The Bank acquired

all of Whitaker's lots by means of a sheriff's deed and immediately began paying the taxes on the lots. The Bank declined to acknowledge the claim of ownership of the lot that was made by Earnest when she discovered what had taken place, and the Bank asserted it's ownership of all the land that was held of record in the name of Whitaker, forcing Earnest to file an action to maintain her ownership of her lot.

Earnest argued that her full and obvious possession and occupancy of her lot, for a number of years, was completely apparent to all the world, and therefore provided adequate notice to all the world that she held rights to the lot, despite her failure to record the deed from her father. The fundamental implication of her assertion was that her physical presence on the land created a legal obligation upon any party proposing to acquire her lot, or claiming to have acquired her lot, to inquire with her, to discover the true extent of her rights to the land. The Bank, relying upon the failure of Earnest to record her deed, claimed that it had no obligation to investigate the circumstances that resulted in her presence on the land, or to attempt to discover or verify any rights that she might claim. Because she was Whitaker's daughter, and because her occupancy had begun as that of a mere tenant of her father, the Bank claimed the right to assume that she was still merely a tenant, and not an owner, in the absence of any deed of record announcing her ownership of the lot in question. The Bank did not argue that the conveyance from Whitaker to Earnest was invalid and did not challenge the legitimacy of that conveyance. The Bank did argue, however, that Earnest should be estopped from asserting any claim to the land, either based on her deed or her possession, because she had notice that the Bank intended to claim the land, and she failed to reveal her claim, or her deed, immediately upon first learning that the Bank had paid taxes on it. The trial court was unsympathetic to Earnest and ruled in favor of the Bank.

Expressly following the rule established by the 1895 Doran case, that either actual or physical notice renders a failure to record a deed irrelevant, the Court found that the possession of Earnest was a legitimate form of notice, at least equivalent in effect, if not superior to, notice provided by means of recordation. The Court noted that this principle was well established and had been very consistently applied and upheld, in a number

of cases including those mentioned herein. The Bank, even if it had never sent anyone to visit the subject property, still could not legitimately claim that it was unaware of her possession and was genuinely ignorant of her presence on the land, because her house provided the opportunity for the Bank, or any other interested party, to take notice at any given moment, if they cared enough to simply visit and view the subject property. Just as it had in numerous past cases involving possession rights, the Court ruled that the occupying party has no absolute obligation to specifically announce what rights they hold to the world. While recordation is clearly beneficial to all parties, typically including the land owner, it provides merely one option by which an owner of land may elect to announce their ownership of land to the general public, and is certainly not the only means by which the land owner may provide that notice to the world, nor is a land owner who openly occupies land guilty of hiding the fact that they own the land, merely because that owner did not place any evidence of their ownership upon the public record. Any party in possession is obligated only to openly provide the opportunity for all others to observe their presence, and not to hide or disguise their presence in some way that might make it difficult to observe, since that would amount to an action taken in bad faith, representing fraud or deception. Only if the legally required inquiry is actually made, and the possessor is specifically asked to state their rights, and the possessor then lies or otherwise hides the truth about their rights, can the party in possession be found to have sacrificed, forsaken or otherwise lost any rights, by virtue of estoppel.

As already noted, the ruling in this case follows a course that had been well established by the Court by this time. This decision however, is particularly significant, because it demonstrates that the Court supports the concept of notice so emphatically that it even extends the principle to land that is occupied by close family members and blood relatives of the record owner. Under this ruling, a party contemplating acquiring property cannot assume that use and occupancy of the subject property by anyone, even the owner's own offspring, does not represent an independent right held by one or more of the people who are making visible use of the land, in clear distinction to the recorded rights of the owner of record. It stands as obvious that use of land by a third party, having no clear reason to be on the land, should and does give rise to notice, sufficient to burden the party proposing

to acquire the land with inquiry. It may not be nearly so obvious however, that the person or persons using the land have independent rights, when they are relatives of the record owner. So a significant lesson to be gleaned here is that the burden of inquiry is not one to be taken lightly, and should be very diligently pursued by any prospective buyer of land, whenever anyone aside from the actual grantor is observed or known to be making any use of the subject property. Certainly, the commonly made but false assumption that complete reliance upon publicly recorded information, on the part of a grantee, can be justified, is clearly seen here to be anathema to the Court, which invariably strives to take all relevant evidence, especially the existing conditions on the ground, into account whenever ruling upon land rights.

Regarding estoppel, the Court ruled that Earnest could not be estopped from asserting her claim, as had been suggested by the Bank, even though she failed to do so at the earliest possible opportunity. This ruling, it should be observed, is in perfect accord with the ruling on estoppel in the 1905 Haugen case, previously discussed herein. Earnest had the right to rely on the document of conveyance from her father, which was in her possession, and her failure to record it could not operate to nullify her rights under the deed, unless she had deliberately hidden the existence of the deed, by expressly refusing to present it, or to acknowledge it's existence, when asked to do so, which she had not done. While not condoning her failure to record her deed, the Court determined that the failure on her part to record it was relatively insignificant, in comparison to the failure of the Bank to make any inquiry with her about her rights, since doing so would have had the result of fully revealing the situation, thereby easily accomplishing the very same objective that would have been accomplished through recordation. The Bank therefore had only the right to take the land that was still actually owned by Whitaker, the Court decided, as a consequence of his default. The ownership rights of Earnest stood clear of the assault upon her father's assets by the Bank, and she could not be adversely impacted by any action taken by the Bank against him, nor was it necessary for her to make any special or additional effort to distinguish her rights from those of her father, as that burden rested upon the Bank. The Court therefore reversed the decision of the lower court, upholding the validity and effect of the unrecorded deed from Whitaker to his daughter, and quieting title to the subject property in Earnest.

SCHOENHERR v HENSCHEL (1928)

In this case, the Court once again faced an adverse possession claim involving members of the same family, just as it had in the highly controversial Stoll case eight years before, which we have previously reviewed. A key difference existed between these two cases however, because in this case the family members that were involved were not in a cotenant relationship, and this difference would lead to a very different outcome here. An additional complication existed in this case however, because the family members involved here, being a sister and brother in this instance, were in a grantor and grantee relationship. As we will see, the Court here expresses it's view of the significance of such circumstances and reaches a conclusion that reveals what the Court sees as the true purpose of adverse possession, and indicates how the Court uses that doctrine to do justice, even when evidence of a potentially permissive use of land is present. The result of this case also amounts to an exception to the general inclination of the Court to protect the rights of innocent grantees, but in carving out this exception, it should observed and understood that the Court relies heavily on the acts, conduct and statements of the grantee himself, as the basis for the demise of his acquired rights to the land in question. And yet again we see the Court denying the right to rely solely on documentary evidence of record to a party who was well aware of physical conditions indicating the contrary, following the well established principle that no party is justified in shutting his eyes to observable physical reality, a principle that the Court has relentlessly applied down through the decades. Again here also, as in all of the adverse possession cases reviewed to this point, with the exception of the failed adverse possession claim made in the 1921 Morgan case, the fate of the ownership of the entirety of the tract in question is at issue, demonstrating that the Court continued to treat adverse possession solely as a title conflict resolution doctrine at this time, still entirely unrelated to boundary issues. This situation was about to undergo a very important material change in judicial thought and perspective however, as we shall soon see, making this the last adverse possession case that we will review decided prior to the era of boundary involvement in adverse

possession claims.

1899 - Schoenherr, a married woman, acquired a tract of land, as the sole owner, and recorded her deed. She and her husband moved onto the tract and began living there. The size and shape of the tract are unknown, but are not relevant to the issues or the outcome.

1900 & 1901 - Schoenherr's husband repeatedly mortgaged the subject property and Schoenherr became concerned that his behavior could someday cause the land to be lost to strangers.

1902 - In order to prevent her husband from mortgaging the tract again, she conveyed the property to her brother, by quitclaim deed. Her brother was Henschel's father. The Schoenherrs never left the land however, they continued to live on it just as they had previously. Schoenherr's brother never lived on the tract or made any use of it himself, although he presumably visited his sister there and obviously he was at all times fully aware that the Schoenherrs were still living there.

1905 - Schoenherr's brother mortgaged the subject property and never made any payments on the mortgage. Schoenherr began making the payments on this mortgage herself, and she was still in the process of paying it off more than twenty years later, at the time of the trial.

1907 - The subject property was offered at a tax sale, the taxes apparently having gone unpaid, but Schoenherr's brother stepped up and redeemed the property, saving the tract from being lost on this account. From this time forward however, all taxes on the tract were paid by Schoenherr herself.

1908 to 1917 - The Schoenherrs continued to maintain sole possession of the tract and they were the only parties making any use of it. During this period, they erected buildings and made other substantial improvements to the subject property, just as any typical land owner might be expected to do.

1918 - Schoenherr's brother died. None of his heirs asserted any claim to the Schoenherr tract at this time. Schoenherr and her husband continued to be the sole occupants of their tract, and Schoenherr took no particular action regarding any matters related to the ownership of

the land as a consequence of her brother's passing.

1925 - Schoenherr's husband died and she remained on the land as the sole occupant. Henschel claimed ownership of the tract, as the successor of his deceased father, who was still the owner of record of the land, by virtue of the 1902 quitclaim deed.

Schoenherr argued that she had been the true owner of the tract all along, ever since she purchased it, nearly 30 years earlier. She testified that her intention in giving the quitclaim deed to her brother was not to relinquish her interest in the land, but only to shield her rights and interest in the tract from the improvident behavior of her husband. She and her brother had decided, she testified, that putting the land in his name would prevent her husband from abusing the land, by using it as a tool to obtain cash, as he had previously done. Neither she nor her brother had ever intended for her brother ever to take actual control of the subject property, and she asserted that both his subsequent actions and her own subsequent actions bore that out. In essence, she argued that the quitclaim deed was intended solely for purposes of security and not as a conveyance. She or her attorney must have been aware that this argument might fail however, because they also argued that even if the quitclaim deed did operate to convey the tract, she had acquired it again, by means of adverse possession. Henschel argued that the quitclaim deed was a genuine conveyance of the subject property and that all use of the tract by the Schoenherrs since 1902 had been permissive in nature, through the grace and kindness of his father, as the true owner of the tract, and nothing that the Schoenherrs ever did could be portrayed as adverse to the ownership interest of his father or himself. The trial court accepted Schoenherr's testimony regarding her own intentions, and those of her deceased brother, regarding the purpose of the quitclaim deed, since her testimony was uncontradicted by Henschel, who was evidently too young to have any personal knowledge of what took place in 1902 and had apparently never discussed that matter with his late father, so the trial court ruled that the tract belonged to Schoenherr on that basis.

The Court first acknowledged that Henschel had a valid claim to the subject property, because a grantor cannot be allowed to provide testimony that completely destroys the effect of the grantor's own deed. For that reason, the Court took the position that all the testimony given by

Schoenherr, regarding the intentions of the parties and the circumstances in 1902, was ineffectual and counted for naught as evidence, with respect to the alleged meaning of the 1902 quitclaim deed. Since both her brother and her husband had died, and apparently no one else with any knowledge regarding the quitclaim deed was available to testify about it, Schoenherr was bound by the legal effect of the deed, which was to terminate her interest in the subject property. Henschel prevailed, to the extent that the quitclaim deed stood as a valid conveyance of the subject property to his father and Henschel was the legitimate successor to whatever interest his father had at the time of his death. But having established that Schoenherr had relinquished all her interest in the tract in 1902, the Court was then confronted with the question of whether or not the evidence of what had taken place since that time supported Schoenherr's claim of adverse possession.

Two general principles relating to adverse possession militated strongly against Schoenherr. First, relations between family members, and particularly blood relatives, are not presumed to be adverse in nature. Actions taken by such parties are presumed to be taken in the spirit of kinship, for the benefit of any family members or relatives who may be involved or impacted by such actions. Secondly, when a party who conveys land remains physically present upon the land after the conveyance, the presence of the grantor is presumed to be subservient to the grantee. In other words, the grantor, obviously knowing that they just conveyed the land to another party, is presumed to be occupying the land in the manner of a tenant, in recognition of the fact that the land now belongs to the party who it was conveyed to. The argument put forth by Henschel, that the Schoenherrs use of the land was made entirely by the permission of his late father, pointed to these factors and was supported by them. The burden was a heavy one upon Schoenherr, to present evidence persuasive or convincing enough to overcome these strong legal presumptions. But the Court was sympathetic to her plight, and decided that although her testimony could not operate to alter the force or effect of her deed, her testimony regarding what had happened over the ensuing years formed a valid basis for her claim of adverse possession. Speaking with reference to the evidence concerning statements made by the elder Henschel, Schoenherr's late brother, the Court found that:

> “Henschel's own statements and declarations .... constituted a recognition by Henschel that she was occupying the premises as her own under a claim of right. They did more than this; they were an acknowledgement by Henschel that the property was her property."

So because the testimonial evidence presented by Schoenherr, regarding the attitude taken toward the subject property by her brother, was in fact strong enough to overcome the powerful presumptions described above, that were in play and tended to the contrary, the Court agreed that the tract now, once again, belonged to her, through adverse possession. Her brother clearly had both actual and physical notice of the couple's continuing presence on the land and never did anything to clarify that he considered the couple mere tenants, if in fact that was his view of the situation. Importantly, the Court described the behavior of Schoenherr's brother as acquiescence, gradually forming and perpetuating the notion of linkage between acquiescence and adverse possession, as previously discussed in the review of the 1906 Nash case, which would have very significant consequences, as we will soon see in upcoming cases that we will review. The Court also emphasized the fact that the Schoenherrs had clearly treated the land as being exclusively their own, by making substantial permanent improvements to it, entirely at their own expense, as well as making tax and mortgage payments, all being things that an owner would typically do, and a non-owner would typically not do. The Schoenherrs had in fact done nothing that was meaningfully different from what the Gottbrehts had done in the Stoll case, in terms of their actual use and possession of their land, the key difference was the absence in this case of a clear cotenant relationship between the opposing litigants, effectively lowering the burden of proof of adverse use that fell upon Schoenherr, compared to the higher burden which the Court applied to Gottbreht, as a cotenant. Accordingly, the Court upheld the ruling of the lower court, quieting title to the tract in Schoenherr, since the Court arrived at the same result, despite the fact that the Court determined that the outcome was actually based on adverse possession, rather than on the nature of the quitclaim, as the lower court had decided.

Interestingly, in so ruling, the Court cited the 1919 case of Martin v

O'Brien, in which adverse possession also took place between a brother and sister, as illustrating that adverse possession between close relatives is possible, making it clear that the Stoll case had not served to eliminate the possibility of adverse possession among family members. If Schoenherr's brother actually intended to take full and outright ownership and control of the tract, and to pass that ownership on to his heirs, he should have documented that intention by requiring the Schoenherrs to acknowledge in writing that they were merely occupying the tract as tenants. His failure to do that, if that was his true intent and his actual view of the situation, proved fatal to the claim later put forth by his son. The ruling in this case also makes it quite clear that a grantor can acquire land that was once owned by the grantor, but which was conveyed by the grantor, by means of adverse possession against his own grantee. This case stands as a classic demonstration of the fact that a grantee cannot simply assume that any use or possession of the land that has been conveyed to him, which is subsequently made by his grantor, can never be used as evidence against his interest. We will see these same essential land rights principles applied again, consistent with this ruling, more than five decades later.

BERGER v MORTON COUNTY (1928)

As we have already seen, in earlier cases involving claims based on public use of roads, and assertions, both successful and unsuccessful, that a public right-of-way was created by means of prescription or otherwise, without the benefit of some or any of the procedures mandated for public road right-of-way creation by statute, evidence relating to location may or may not prove to be a decisive factor. In the Burleigh case of 1912 and the Rothecker case of 1918, both reviewed herein, the Court found what it considered to be slight variations in the route over the land in question to be of negligible significance, insufficient to prevent the accrual of the public rights to the roadway in controversy. This is the position taken by courts in a majority of the other states, in resolving cases involving similar conditions and situations, and amounts to judicial recognition of the fact that exact location is seldom the most critical issue in land rights cases, and is

therefore only infrequently the primary basis of the eventual outcome of such cases, which are decided based upon the application of legal principles, rather than upon details or minutia. Yet as we have also previously noted, a precedent had been established in North Dakota, making location a potentially significant factor in public right-of-way cases. As we have previously noted while reviewing the Rothecker case, in the Koloen case of 1916 dramatic variations in the location of an alleged public roadway had proven fatal to a claim of public rights through long use, and in the Semerad case of the same year, ambiguity in the location of a portion of the proposed route of a public roadway had likewise caused the Court to declare that alleged public right-of-way invalid. Furthermore, the rulings holding the location to be critical in both of these 1916 cases, and finding both locations to be legally unacceptable, had come despite the presence of legally authorized surveys of the routes in question, clearly demonstrating that even evidence of a properly performed survey is not always conclusive, and the survey itself does not make the surveyed location controlling. In the case we are about to review however, the Court put much of the uncertainty regarding the importance of precise location, in the process of determining the validity of public rights, to rest, and also answered the question of whether a deliberate relocation of a portion of a road, ordered by a land owner and carried out by a county, represents control over the land by the land owner, or by the county.

> 1904 - Berger owned the west half of a certain Section 24 in Morton County. A road known as the Black Hills Trail had already been in existence and been in use by the public for an unknown length of time, and a portion of it ran diagonally across his land. The frequency with which the road was used at this time by the public is unknown, but it was evidently in regular use, and the frequency of use increased with the passing years. A portion of the road was surveyed during this year, presumably by the county surveyor, but no further official action was taken by the county to improve the road, or to make it a county highway at this time.
>
> 1917 - Berger filed a request with the county, asking that a portion of the road be relocated, for some unspecified reason. The county agreed to his request and the road was moved 44 feet in one particular place on his land, with the adjoining portions being dovetailed into the

original route in both directions from that location. The length of the altered portion of the road is unknown, but the great majority of the road on his land remained in it's original location. There was no interruption in the public use of the road, and that use continued just as before, after the relocation. The county began maintaining the road on a regular basis at this time, and it was identified by the county as Trail No. 61, although no other action had ever been taken to legally document it as a county road.

1928 - Berger evidently became annoyed with the increasing flow of traffic on the road, which had resulted from the improvement of the road by the county, and he asserted the right to prevent the county personnel from entering his property any more, for purposes of maintaining the road. The road workers entered and performed their work on the road despite his protests however, so he filed an action against the county accusing them of trespassing and damaging his land.

Berger first argued that the road had never been officially adopted as a county road through any statutory process, and he had never been compensated for the public use of his land, so no county right-of-way legally existed over his land. He also argued that it was not possible for a public roadway to have been established by adverse or prescriptive means, because North Dakota had no statute providing for the creation of easements by prescription. In addition, he argued that since a portion of the road had been relocated, the location of the road was variable and was not well enough defined to be treated as a permanent road with a definite legal location. The county argued that the road had become a county road by means of prescription, and that the county had openly treated as a county road at all times, without objection from Berger until 1928, by which time he had lost his right to protest the use of it by the public, or to protest the right of the county to maintain and improve it as a county right-of-way. The trial court agreed with the county that the road had become a public right-of-way by prescription, and Berger no longer had any right to control or interfere with it's use or improvement in any way.

Although Berger was correct that the road in question had never been established as a public highway by means of the appropriate statutory

procedure, his reliance on the fact that no statutory means of prescription existed in North Dakota was misguided. As already discussed in the 1912 case of Burleigh County v Rhud, the establishment of public roads by prescription was banned in 1895, but the ban was then repealed in 1897. Since the repeal did not have the effect of reinstating the original law, which had been stricken in 1895, no statutory description controlling prescription existed in North Dakota from 1897 forward. Berger made the mistake of concluding that because no statute controlling prescription existed, with respect to public roads, it was not possible for the principle of prescription to operate to create a public road right-of-way in North Dakota, but we was about to learn otherwise. The Court stated that the mere absence of a statutory prescriptive procedure had no effect on the ability of the Court to apply the larger equitable principle of prescription, whenever it may prove to be appropriate to do so, because the principle of prescription emanates from common law, not from statute law. In other words, in the absence of any statute expressly banning the development of prescriptive rights and preventing the application of the common law principle of prescription, prescriptive rights were free to develop, and the Court was free to find that such rights had become binding, in any given situation. Since a maximum of 20 years are required for adverse or prescriptive rights to become binding in North Dakota, and 31 years had passed since 1897, prescriptive rights to many roads had potentially ripened and become permanent easements. The evidence was clear that the road in question here had been in steady use by the public at least since 1904, so it quite obviously met the prescriptive time requirement.

Having clarified that the principle of prescription was indeed in play, the Court turned to the issue presented by the deliberate relocation of a portion of the road. The Court had already addressed minor alterations and other small changes in the course of a road in previous cases, and had established that any differences or variations in the course of a road that are fundamentally immaterial have no impact on the development of prescriptive rights, regardless of the reason behind the change. Acts such as going around low spots to avoid puddles or ruts are merely incidental, and generally do not operate to destroy the consistency or uniformity of a given route, in the eyes of the Court, and this common sense rule is consistently applied in all other states as well. The fact that the same general route was

perpetually used is typically seen as satisfactory evidence allowing prescriptive rights to develop, only substantial variations, creating an entirely different route, can operate to destroy a prescriptive road claim for lack of certainty of location. This is true because the location provides the critical element of notice to the owner of the land, so only variations in the route that are substantial enough to prevent the owner of the land from observing that one definite route is being repeatedly used are sufficient to prevent the use from providing the requisite notice. In this case however, a different kind of change in the route was involved, because although the change resulted in a distinctly and permanently different route, the change had not been made by the parties using the road, it had been made at the specific request of the owner of the land. Because Berger had ordered the road relocation himself, he clearly had notice of the ongoing public use in that location, so the Court found that he was estopped from claiming that the relocation amounted to use of an entirely different route, destroying any prescriptive rights that had developed prior to the relocation and resetting the prescriptive clock. The Court fully upheld the ruling of the lower court that the road represented a public right-of way established by prescription, and Berger was therefore entitled to no compensation for the public use of his land, since the law does not provide for compensation to be awarded to land owners who have lost their right to complete control of their land due to the ripening of adverse or prescriptive rights, because such a loss is the result of negligence and a lack of proper vigilance on the part of the land owner, in the eyes of the law. Although Berger could have made a valid claim for compensation, if he had acted to halt the use of the road and made his demand within the statutory period, the passage of time had extinguished both his claim of control over the road and his right to claim compensation for it's use, since under the principle of laches, the right of the public to rely upon the availability of the road had been conclusively established.

Interestingly, although a significant number of public roads, such as the one at issue in this case, had been created by prescription and adjudicated by this time, the Court had not yet been required to address the question of right-of-way width. In 1932, in Kritzberger v Traill County, a case involving a dispute over the width of a public right-of-way running along a quarter section line, the Court decided that all county roads created or established by means of prescriptive use must be recognized as being 66

feet wide, regardless of the width of the actual roadbed. The Court thus approved and adopted the length of one chain as the default public road right-of-way width, which of course had always been the legal width of every section line right-of-way, in full accord with the relevant statutes then in effect, which had referenced 66 feet as the minimally acceptable width since 1875. The Court also held in that case, that when a county road right-of-way had come into existence pursuant to a petition which failed to specify any intended width, the default right-of-way width of 66 feet would be presumed to have been intended and could be legally enforced, regardless of how long any portion of that width may have been encroached upon by fences or used in any other likewise unauthorized manner. Land surveyors should therefore be aware that such roads created with no indication to the contrary, during the territorial period and the early days of statehood, were established with a width of 66 feet, and those roads legally retain that right-of-way width today, in the absence of abandonment, vacation, or other comparable evidence to the contrary, in any given instance or location. The 66 foot default width is no longer in effect for roads created by comparable means or by operation of law today however. With respect to prescriptive easements of all types that have come into existence in modern times, width is now determined either by the actual use made, or by the equitable principle dictating that any such easement shall be of whatever width is reasonably necessary to enable it to serve it's intended purpose.

BAIRD v STUBBINS (1929)

In this case we see the Court take a strong stance on the meaning and nature of tax deeds, explicitly distinguishing them from conveyances that come within the purview of the recording laws, again tightly limiting the application of the recording statutes to the narrow purpose for which they were put in place. In so doing, this case contributes to our understanding of why the first deed recorded very often proves to be inferior to a prior unrecorded conveyance, and makes it very clear that complete reliance upon information of record to determine ownership of land is both misguided and dangerous. In this case, the subsequent recorded deed is not invalidated by

the provisions of notice, as we have already seen in previous cases and will see again in the future, but instead by the operation of a separate process of law, creating a virgin tax title, not within the existing chain of title to the land in question. Although the plaintiff in this case ostensibly qualifies as an innocent party acquiring land without any form of clear notice that it's ownership status is no longer properly reflected in the public record, the absence of notice is not the controlling factor in the outcome, which is governed by another legal process that effectively renders the absence of notice a moot point. As can readily be seen, it's always essential to remember, in dealing with land rights, that the same land can simultaneously be subject to more than one distinct process of law, and this case illustrates what can happen when two such processes overlap in time and eventually reach a point of collision. In addition, we are again reminded here that the recording statutes cannot be treated as simplistic rules, independent of other legal principles and implications, dictating that the holder of a recorded deed must always prevail over the holder of an unrecorded deed, because that was neither the intent of the statutes, nor the spirit in which they were introduced into the law. The Court, in keeping with it's previous decisions interpreting the significance of recordation, here again points out that recording laws are fundamentally focused on preventing injustices resulting from secrecy and deception, and are therefore limited in their application to situations in which they operate to accomplish that purpose. The rule regarding the absolute and independent nature of tax titles, adopted here by the Court, is also one that would prove to be highly relevant in future cases, introducing further legal complications which the Court would eventually be required to sort out, as we will later observe.

> 1920 - The Stubbins Land & Loan Company owned an unspecified number of tracts of land. The taxes on these tracts were not paid.
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> 1921 - Stubbins, as an individual, purchased these tracts, when they were offered at a county tax sale.
>
> March 1926 - Baird obtained a judgment against the Stubbins Land & Loan Company, entitling Baird to the assets of the company, including the land owned by the company. The subject properties still stood in the name of the Stubbins Land & Loan Company, according to the record at this time.

September 1926 - Stubbins obtained tax deeds for the same properties that she had purchased in 1921 at the county tax sale, the tax redemption period having expired. These tax deeds were not recorded.

1927 - Baird investigated the status of the title to the subject properties and was informed by the auditor only that the record indicated that there were delinquent taxes due on these properties. Baird's investigation revealed nothing indicating that Stubbins had acquired the tracts herself, because she had not recorded her deeds.

1928 - A sheriff's deed was issued to Baird, based on the 1926 judgment, conveying the subject properties to Baird, which he recorded. When Baird discovered that Stubbins claimed to own the subject properties he filed an action against her, claiming that his deed was superior to hers.

Baird did not assert that the tax deeds to Stubbins were invalid because of fraud, or for any other reason, he argued only that they were void due to her failure to record them. He simply pointed to the language in the applicable statute, stating that every unrecorded conveyance is void against any subsequent purchaser whose deed is first recorded. Stubbins did not assert that Baird should be charged with notice of the tax proceedings, by means of which she had obtained her deeds, she simply stood upon the validity of her tax deeds and maintained that they were legally independent in nature and had not been voided by her failure to record them. The trail court upheld the judgment and the sheriff's deed over the tax deeds, thereby awarding the subject properties to Baird.

Once again here, as is so often the case in land rights conflicts, there was no factual dispute over what had actually happened, the controversy was over the proper interpretation of the meaning of the law, and how the existing law should be applied to the particular situation at hand, in which the two opposing parties both held deeds describing the same land. There was no question that Baird had initially been genuinely and innocently unaware of the existence of the tax proceedings relating to the subject properties, and whether or not he was still genuinely innocent of the true circumstances regarding the ownership of the land in question, at the time

he obtained his deed and recorded it, was unchallenged, so the concept of notice was not the dispositive issue in this instance. Instead, the resolution of this conflict would depend upon the Court's view and treatment of the tax foreclosure and sale process as an independent operation of law. The Court acknowledged the language of the applicable statute, which the claim made by Baird fundamentally rested upon, and upheld it's validity, with respect to transfers of land ownership resulting from judgments, as well as to more typical conveyances of land and land rights. However, the Court focused upon the reference made in the statute to a subsequent purchaser, finding that the meaning of this reference was pivotal to the outcome of this case, and therefore required judicial examination and interpretation at this time. The Court noted that it had already determined, in earlier cases, that taxes constitute a paramount lien upon land, that a purchaser of the land at a tax sale becomes the holder of that lien, and that the record owner of the land remains the legal owner of the land throughout the period of time that the land is subject to tax redemption. The Court also reiterated that the purpose of the recording statutes was to provide a reasonably convenient and reliable source of constructive notice, and they were never intended to either create or destroy rights, or to adversely impact rights that may come to exist by means of other operations of law. In this case, the Court decided that tax delinquency proceedings constitute the operation of law, in the form of another process, separate and distinct from the chain of title involving successive grantors and grantees, leading the court to take the position that tax deeds are neither contemplated nor governed by the recording statutes, since the purpose of the recording statutes is to prevent abuses perpetrated by grantors and grantees, within any given existing chain of title.

Key to this decision was the interpretation by the Court of the intent of the legislature in making reference to a subsequent purchaser in the relevant statute. Once again following and quoting Justice Cooley of Michigan, as it had done previously when confronted with such issues, the Court construed the reference to a subsequent purchaser as limiting the application of the recording statute to parties purchasing from the same grantor. In other words, not every purchaser who comes along after an earlier purchaser of the same land qualifies as a subsequent purchaser, within the spirit and context of the law, because recording laws fundamentally function as a means of restricting the ability of grantors to

perpetrate deception, or to conspire with one grantee to perpetrate a deception upon another grantee, so the presence of a direct grantor and grantee relationship is essential to the application of recording statutes. Recording laws serve to protect innocent subsequent grantees from claims by their grantors that the land was already previously conveyed to someone else, and therefore the grantor cannot be expected by the subsequent grantee to make the current conveyance good or whole. Recording statutes were created to enable the subsequent grantee to demand performance from such a grantor, unless the grantor can show that the subsequent grantee had some form of notice of the prior, but unrecorded, conveyance of the same land. The recording statutes therefore, the Court determined, were intended only to aid in resolving contests between parties who traced their titles back to the same grantor. Where a party presents a claim of title emanating from a different source, independent of the chain of title, there can be no such contest, and the recording statutes have no application. The Court quoted these passages, from two United States Supreme Court cases, as support for it's conclusion:

> “A tax deed .... does not purport to convey the estate of the former record owner. There is no privity between the holder of the fee and one who claims a tax title upon the land. The latter is not derived from, but in antagonism to, the former." "If the tax deed is valid .... it clothes the purchaser with .... a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances..."

So even though Baird had successfully obtained a valid judgment against the Stubbins Land & Loan Company, at a time when the company was still the owner of record of the subject properties, he could make no valid claim to the land, because by the time he obtained and recorded his deed, as a consequence of the judgment in his favor against the company, the company no longer had any interest in the land, that interest having been terminated by the tax proceedings, culminating in the tax deeds to Stubbins. Had fraud by Stubbins been charged or proven, the outcome could well have been to the contrary, but no such allegations were ever made, much less proven. The tax deeds were superior, although unrecorded, because they

represented a conveyance from the sovereign, and not merely a conveyance from the previous record owner of the land. The recording statutes had no application to the situation at all, the Court found, because the evidence disclosed that the circumstances involved genuinely adversarial land rights, and did not involve an attempt to execute a secret or deceptive conveyance, which would have brought the recording statutes, and the powerful principle of notice manifested in them, into play in Baird's favor. Baird's deed was worthless, although recorded, because it represented a conveyance of land that had already been lost by the Stubbins Land & Loan Company, by operation of law, by the time it was deeded to Baird, so the land in question was no longer within the scope or control of the judgment issued in Baird's favor at that time. Having thus announced that tax deeds cannot be attacked under the recording statutes, and that tax deeds need never be recorded to be effective, the Court reversed and remanded the case back to the lower court, to quiet title to the subject properties in Stubbins. Unscrupulous people are always closely observing such developments in the law however, and looking for opportunities to twist or pervert the law to their own personal advantage, so as we will later see, this ruling prompted at least one crafty individual to attempt to outwit and effectively corner the Court, by trying to use the Court's decision here as a device with which to justify a ruse of his own clever design.

HILLE v NILL (1929)

This case, which is unusually rich in detail, spans perhaps the widest spectrum of issues and legal principles relating to easement law of any case decided by the Court, and therefore provides very fertile ground for enlightenment on many of the most essential legal concepts and important aspects of the law, including easements, licenses, dedication, vacation, notice, laches, estoppel, appurtenance, necessity and more. In this case we will see how the Court distinguishes dedication and private easements, how the two can exist in continuity or independently, and the impact of vacation on a situation in which various types of access rights have been created, overlapping each other in effect, as the result of a development plan that

was partially successful and partially unsuccessful. Once again, as in the Cole and Ramstad cases on dedication, the creation of a subdivision plat sets the action in motion, and sets the stage for the controversy to come. In those earlier cases, as we have already observed, the Court had taken a particularly bold stance on the powerful effects of dedication, strongly upholding the fundamental right of all innocent grantees of platted lots, and the general public as well, to rely on the contents and appearance of a subdivision plat, which was shown to the lot buyers as an inducement to purchase their lots, and recorded to provide notice of the intent of the subdivider to the public. As will be recalled however, the Court also took the actions, conduct and statements of the subdividers in those cases into serious consideration, placing a very substantial burden of fair dealing upon them, which is in accord with the manner in which the Court has treated all grantors in general, both before and since. In this case, we will see the effects of the acts of both the subdivider himself, and the successor to his remaining interest in the failed portion of the subdivision in question, in the unusual context of a partial vacation of the plat, as well as in their more typical roles, as grantors and grantees. Here we also see the Court define the conditions under which acceptance of an offer of dedication may be deemed never to have taken place, providing a clear counterpoint to the Cole and Ramstad cases, in which conditions representing acceptance of the dedications were clearly shown. In addition, we learn how the rights of grantees of other lands owned by the subdivider, located outside the subdivision plat, and conveyed during the same period of time as the platted lots, interact with the rights related specifically to the subdivision itself, in the context of the changing conditions, including the partial vacation of the plat. Although the scenario is somewhat complicated, the reader who carefully follows the developments, and notes their implications, will emerge enlightened.

> 1909 - Schuldheisz owned the southeast quarter of a certain Section 26. The town of Kulm was situated in the northerly portion of the southwest quarter of that section, adjoining the land of Schuldheisz. Schuldheisz platted a subdivision in the west half of the southeast quarter, as an addition to the town. The addition was bounded on the west by the quarter section line and it ran the full length of the east end of the townsite, but it extended further south than the townsite,

reaching all the way to the south line of the section. There was a highway on the south section line, so the northerly portion of the addition could be accessed by means of the existing streets running through the townsite, and the southerly portion of the addition could be accessed from the highway. The plat of the addition depicted nine blocks of typical residential lots and several new streets and alleys, but was not yet recorded at this time. Shortly after platting the addition, Schuldheisz sold the southwesterly portion of his remaining land to Doering, so Doering's tract was bounded on the west by the addition and on the south by the section line highway.

1910 - Schuldheisz sold all of his remaining land lying east of the platted addition to Hille. Schuldheisz showed Hille the plat of the addition and told Hille that he would be able to use the dedicated public streets shown on the plat to travel through the addition, in order to go back and forth between the town and the land being conveyed to him. The deed from Schuldheisz to Hille however, was silent on the subject of access. Schuldheisz also sold some lots located in the northerly portion of the addition, but was unable to sell any lots in the southerly portion of the addition, so he decided to keep the southerly portion and live there himself. He ran a fence around the entire southerly portion of the addition, enclosing several blocks and effectively closing off several of the platted streets and alleys, none of which had ever been built. He placed gates however, in the east and west sides of his fence, so Hille could have the access across the southerly portion of the addition that Schuldheisz had promised him he would have. Hille built a ranch a short distance east of the addition and used this access route running between the gates on a regular basis, as his main entrance to his ranch. Although he had given up on trying to sell any more of the platted lots in the addition, Schuldheisz had the plat of the addition recorded at this time.

1914 - Schuldheisz sold the southerly portion of the addition, the same portion that he had fenced in four years earlier, to Nill. Schuldheisz told Nill that Nill could have the fenced portion of the addition formally vacated, to legally terminate the existence of the unused lots, streets and alleys. Schuldheisz did not inform Nill about the access agreement he had made with Hille, but Nill observed Hille

using the access route across the addition and Nill agreed to allow Hille to continue using it, just as Hille always had.

1917 - Nill successfully got the entire fenced portion of the addition plat legally vacated. The process was initially bungled, upsetting the existing lot owners situated in the northerly portion of the addition, but their concerns were addressed and the situation was then legally rectified, so the owners of the lots that Schuldheisz had sold were placated and were fully satisfied with the outcome of the vacation, since they did not care about the disappearance of the platted blocks and streets at the south end of the plat, which they had never needed or wanted to use anyway. This vacation action had no immediate impact on Hille, who continued to use the same access route, running across the vacated area between the east and west gates, just as he always had.

1923 - A public road was built connecting the highway located on the south section line with the town. This new road ran along the quarter section line that formed the west boundary of Nill's tract, from the south quarter corner of the section directly north to the southeast corner of the townsite. As a result of this construction, it became possible for both Hille and Doering to travel to and from town by following public roads around the Nill tract, rather than by cutting through Nill's tract. Doering never lived on his tract, so he had never driven across any part of Nill's tract, nor had he ever used the route running through the Nill tract between the gates built by Schuldheisz, although that route had been used regularly by Hille, pursuant to his original agreement with Schuldheisz, as previously noted.

1927 - Nill decided that Hille no longer had any legitimate need or reason to use the access route crossing Nill's land, so he installed smaller gates that would not allow Hille's vehicles to pass through. Hille and Doering, acting together, filed an action against Nill, to require him to keep the access route over his tract available to them, and to compel him to reverse his successful vacation of the platted streets inside the Nill tract, and make those streets available for use by Hille and Doering.

Hille and Doering argued that as grantees of Schuldheisz, they both

had the right to travel across the platted land formerly owned by Schuldheisz and now owned by Nill. They also argued that the streets dedicated on the plat of the addition should still be open to public use and the vacation of those streets that had been executed at Nill's request should be ruled null and void. Nill argued that the offer of dedication presented by the plat had never been accepted by the public, since no construction or improvement work was ever done on any of the platted streets by the public, and no use was ever made of any of them by the public, so the vacation that he had obtained should stand as valid. The trial court decided that the vacation was invalid and ruled that the platted streets must be made available for use by the public, as requested by Hille and Doering.

While acknowledging that a valid offer of dedication had been made by Schuldheisz, when he had the addition platted into lots, streets and alleys, the Court found no evidence that the dedication had ever been accepted by Kulm or by any authority at all. In fact, the boundaries of Kulm had not been extended to embrace any portion of the platted addition, and no one had objected when Schuldheisz fenced off the entire southerly portion of the addition, rendering the proposed streets useless as public roads. With respect to the claim asserted by Doering, this conclusion of the Court was fatal. Since he had never made any actual use of any portion of the addition, for access purposes or otherwise, either before or after the vacation, and he could not show that he had ever been promised the right to travel over the addition, or that he had any reasonable necessity to do so, he had established no valid claim, so his attempt to gain the right to cross the Nill tract ended in failure at this point. The Court held that although he may have once had a valid right to protest the vacation, he had lost any such right, by virtue of his failure to raise the issue promptly, because his delay of several years was indicative of the fact that he never had any real need to make use of any portion of the Nill tract for access purposes, particularly since the road connecting the highway to the town provided him with an equally useful access route. For that reason, applying the principle of laches, the Court declined to allow him to inflict what would amount to a new and unnecessary burden on Nill's tract, by demanding access over it, there being no basis upon which he could claim any private access easement, either by virtue of any prior use, or by any implication related to the acquisition of his tract.

The Court also elected to address the rights of the parties who had bought lots in the northerly portion of the addition from Schuldheisz, in reliance on the plat. Even though none of these parties were actively claiming or seeking the right to use all of the roads in the addition, as they had been originally platted, the Court felt it appropriate to take this opportunity to draw the important distinction between public and private rights of access. Citing both the Cole and Ramstad cases, which we have previously reviewed, the Court made it clear that any conveyance made with reference to a plat, whether recorded or not, creates private rights that are independent from the public rights created by means of dedication, and the private rights can therefore survive and remain in effect, even if the dedication is never accepted, or is subsequently vacated, declaring that:

> “When Schuldheisz sold lots with reference to the plat, he impliedly covenanted with those who bought the lots from him that the streets and alleys as shown on the plat would be used for no other purposes. As to these purchasers, he was estopped to deny the dedication .... vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat."

Finally, the Court turned to the core issue, which was the conflict between Hille and Nill, over whether or not Hille had any valid permanent right to use the access route created specifically for him by Schuldheisz, over the tract now owned by Nill, amounting to a private access easement. Since the Court had upheld the right of Nill to vacate his portion of the plat, Hille could only prevail if he could show that a permanent right of access for the benefit of his land had been established over the gated access route that had been created by Schuldheisz, when Hille acquired his tract. In this case, unlike the case of Johnson v Bartron, 17 years before, the Court determined that an easement could be created as a result of an unwritten agreement, without any violation of the statute of frauds, because in this instance the agreement in question was not a mere license, it was appurtenant to a written conveyance of land. Although the deed from Schuldheisz to Hille made no reference to any access route, the Court decided that Nill, as the successor to Schuldheisz, was barred by estoppel from claiming that Schuldheisz had not intended the gated access route to be

permanent. The Court ruled that Hille had acquired a private access easement from Schuldheisz, which Nill was powerless to deny, alter or obstruct, remanding the case to the lower court to confirm the actual location and extent of the easement in favor of Hille, burdening Nill's tract. In so ruling, the Court emphasized the fact that Nill had physical notice that Hille was using the gated access route at the time Nill acquired his tract, so Nill was presumed to have taken possession of his tract conscious and aware that it was subject to the access rights of Hille, since he had personally observed Hille exercising those rights over the land that Nill was then in the process of acquiring. In addition, since Hille had acquired his tract before Nill had arrived on the scene, and before the new road connecting the town to the highway was built, at a time when access over the tract that would later be acquired by Nill was legitimately necessary, the fact that it was no longer as necessary for Hille to cross Nill's tract was irrelevant. Because necessity is always judged solely at the moment of conveyance, and not at any subsequent point in time, Nill had been mistaken in presuming that the lack of necessity, which had developed subsequently, left Hille's access route subject to closure. The change in the access situation, created by the presence of the new public road, had no effect on the right of Hille to go on using the route that Schuldheisz had implicitly granted to him, as an appurtenant feature of his tract. Ironically, just as Doering had lost his claim against Nill because Doering had failed to promptly protest Nill's blockage of the dedicated streets, Nill himself lost to Hille for the same reason, because Nill had failed to raise the issue about Hille's right of access at the appropriate time, which of course would have been at the time when he acquired his tract from Schuldheisz.

BERNIER v PRECKEL (1931)

For those land surveyors with a genuine interest in understanding how boundary law functions, this will likely prove to be the most interesting case that we have reviewed so far, and it is nationally recognized as one of North Dakota's most pivotal land rights decisions. It's true however, as is so often the case, that here again we are left utterly without many of the potentially critical details relating to the surveys that were instrumental in creating this

controversy. Aside from the original survey of the urban residential subdivision in question, which created the lots that are involved, two subsequent surveys, both intended to retrace a particular block of that subdivision, are also in play and are specifically referenced by the Court, yet the myriad of survey details, which a surveyor would relish the opportunity to scrutinize, are absent. Nevertheless, the primary lesson of the case is one that is of significant value to surveyors, not because any principles relating to land surveying are announced, debated or struck down, but because the Court's treatment of the survey evidence provides us with great insight into what the Court sees as the appropriate role of such evidence. The outcome here also gives us a classic example of a situation in which no survey evidence, however detailed, could have had any effect on the resolution of the dispute, because the rights of the parties were ultimately controlled by their own acts, conduct and behavior, in the eyes of the Court, with the result that any lines arrived at by means of retracement surveys could be given no controlling force. The surveyor can benefit from recognizing that many such situations exist, in which even an acceptable survey, properly done, cannot control the boundary location, making it very unwise for the surveyor to make any statements concerning who actually owns any land or any objects, on one side or the other of any given line, since such statements can create liability issues involving the surveyor, if either of the parties subsequently take any action based on what they were told by the surveyor, such as tearing down or moving any objects. In addition, this case represents a typical manifestation of the Court's consistent desire and inclination to implement the law in a manner that supports the preservation of peaceful, harmonious and productive land use, by upholding the rights of innocent occupants who have never had any reason to doubt or question the validity of the boundaries that were represented to them by their predecessors, and who have never acted in a manner indicating that their beliefs regarding their boundaries are founded in anything other than complete good faith.

> 1880 - Roberts Second Addition to Fargo was platted. Block 13 contained four lots, with Lot 1 at the south end of the block and Lot 4 at the north end of the block.
>
> 1898 - Whitman owned Lot 4 and was living on it. Houses had been built on these lots and there was a fence, of unknown origin, between the house on Lot 3 and the house on Lot 4. This fence would become

the focal point of the controversy.

1899 - Sheridan purchased Lot 3 and began living there. She had some fill material added to raise the grade of Lot 3. She placed the fill material up to the fence. Whitman made no objection and there was no controversy at this time.

1904 - Preckel purchased Lot 4 from Whitman, by a contract for deed, and moved onto the lot. Sheridan and Preckel were both satisfied that the fence represented the lot line. After consulting Sheridan, Preckel had fill material added to her lot, up to the fence, raising it to match the grade of Sheridan's lot.

1909 - Preckel obtained her warranty deed to Lot 4. It was undisputed that Whitman, Sheridan, and all of their successors, held nominal title with reference to the lots as platted. Acceptance of the fence as the boundary, by all parties, was based on their mutual belief that it represented the platted lot line, and no one claimed any rights based on anything other than the plat.

1910 - Preckel moved the existing house on Lot 4, and added a second house and two garages to her lot, with the intention of subdividing it. The garages were built within a few feet of the fence in question.

1911 - Preckel replaced the fence, building a new fence in the same location. The fence line continued to be acknowledged by all parties as representing the lot line, and to serve as a de facto physical boundary, for all practical purposes, on that basis.

1918 - Preckel sold the eastern portion of Lot 4 to Currie, who occupied it and maintained the land up to the fence, just as Preckel had done. There was still no controversy of any kind regarding either the fence or the lot line.

1920 - Anderson, who had acquired Lot 3 from Sheridan at an unspecified date, conveyed it to Bernier. Preckel sold the western portion of Lot 4 to Carney and the middle portion to Campbell. Like Currie, each of these parties moved onto Lot 4 and used the same area that Preckel had maintained, up to the fence. Lucky, a civil engineer, performed a survey of Block 13. Who requested the survey, or what

it's purpose was, is unknown. In the course of the survey, Lucky found that the fence was about 3 to 4 feet north of the platted line between Lots 3 and 4. Stevenson, the county surveyor, also performed a survey, which was in disagreement with the Lucky survey. Stevenson found that the fence was about 11 to 12 feet south of the platted line between Lots 3 and 4. Who requested this second survey is also unknown.

1922 - Relying on the Stevenson survey, Bernier filed an action against Preckel claiming ownership of an 11 foot strip lying immediately north of the fence, on the basis that it was actually part of Lot 3. Bernier prevailed and Preckel appealed.

1925 - The Supreme Court heard the appeal, but remanded the case to the lower court with drawing any conclusions concerning the boundary in question, ordering that additional testimony and other evidence must be presented and considered, because in the view of the Court the evidence presented in 1922 was patently insufficient to support any definite conclusion regarding the true boundary location.

1930 - The case returned to the Supreme Court, again as the result of an appeal by Preckel, the lower court having again ruled in favor of Bernier again, after having taken and reviewed additional evidence, as directed by the Court in 1925.

Bernier had chosen to simply ignore the Lucky survey, and instead argue that the Stevenson survey was correct, asserting that the fence was not really on the lot line, and the lot line was actually several feet north of the fence, as indicated by Stevenson's survey, so the strip north of the fence, which included portions of the buildings erected by Preckel, was in fact part of Lot 3. Preckel argued that neither survey was correct, and the fence was in fact on the true original lot line. The Court did not engage in any examination of the specific details of the Lucky and Stevenson surveys, which it deemed unnecessary, but the Court did indicate that it viewed the Lucky survey as having been executed with at least reasonable competence, while describing the Stevenson survey as "very unsatisfactory", so it would prove to have been a foolish mistake for Bernier to rely on the clearly inferior survey, just because it appeared to present an opportunity to snatch some additional land, and Bernier would regret that decision in the end.

The Court began its analysis of the situation by stating that even if the original lot line was north of the fence, Bernier could potentially be barred from making any claim to that line by the twenty year statute of limitations, since none of the lot owners south of the fence had ever physically possessed any of the land north of the fence, even momentarily, or ever even attempted to take or claim possession of it, sending the signal that it was now prepared to address certain marginally adverse land rights situations from a new legal perspective. As we have observed however, in the Morgan case of 1921, the Court was very reluctant to expand the concept of adverse possession, which was intended only to settle claims to full tracts of land, by allowing claimants in boundary cases to use adverse possession to successfully claim a mere portion, fragment, chunk or sliver of an adjoining tract, rather than requiring them to prove that the record title to the entire adjoining tract was no longer valid. This concern was well founded, since adverse possession was developed as a means of quieting title, and was never intended to be used as a means of boundary creation or boundary resolution. Yet, other states had already taken that legal step, and had begun applying adverse possession in that manner, and although North Dakota was clearly resistant to that adaptation of adverse possession, justice had to be served, so an alternative legal tool or device, relating specifically to boundary establishment, resolution and settlement, by means of the acts of the parties themselves, would need to be adopted and invoked, in order to allow the Court to put such situations in repose in North Dakota.

Since the legal concept of practical location, widely respected and applied in most other states for boundary resolution purposes, with it's basis in acts evidencing a state of agreement between the relevant parties and their predecessors concerning their mutual boundary, was unacceptable to the Court, the tool that the Court chose to turn to, in order to accomplish this purpose, was acquiescence. The Court chose to view acquiescence at this critical juncture as plain silence and inaction, the absence of any protest or objection on the part of a land owner, in the face of an ostensibly adverse condition, carrying no connotation of agreement, simply evidencing no apparent concern over the boundary at issue, and representing a willingness to allow the boundary location to be dictated by the acts of the adverse claimant. A relationship between adverse possession and acquiescence had already been gradually forming for decades, in the language of prior

decisions in adverse possession cases decided by the Court, as we have already seen and previously noted, and the definition of acquiescence that the Court here adopted was clearly the product of the references that had been made to it in those earlier cases. But it was in this seminal case, that acquiescence finally came to the forefront and emerged as a potentially controlling force in it's own right, as the Court announced:

> “We are of the opinion that the boundary line between Lots 3 and 4 is established by acquiescence of the parties."

Citing decisions from several states, but relying principally upon two Michigan cases, which had just been decided in recent years and were very prominent and influential in 1931, the Court explicitly adopted the proposition that boundaries can be conclusively established by acquiescence. The Court decided that acquiescence becomes binding upon all interested parties when the twenty year statute of limitations has been reached, just as with adverse possession, and beyond that point in time, the technical correctness or incorrectness of the line acquiesced in ceases to be an issue open to question, debate or resolution by survey. Very importantly however, in establishing how acquiescence would be applied, and determining the role it would play in the future, the Court did not indicate that acquiescence was linked in any manner to agreement, either express agreement or implied agreement. Mutual agreement of the parties or their predecessors has always been the fundamental basis for the application of acquiescence in most other states, but the Court elected to adopt a more simplistic view of acquiescence, seeing it only as a basis for the placement of a bar against an acquiescing party, who might not otherwise be barred by laches or estoppel. Instead of focusing on the implication of an agreement at some earlier time, voluntarily settling a boundary, as the basis for acquiescence, the Court chose to treat acquiescence as an indication of the presence of an adverse condition, linked to adverse possession, to be applied in the absence of specific evidence of adverse intent, treating it simply as evidence of a lack of interest in contesting a visible physical boundary, rather than as evidence of any affirmatively established or intentionally agreed boundary. The doctrine of practical location, which operates to support boundaries developed through agreement in numerous other states, but which has never been employed or even acknowledged by the Court,

was permanently exiled from North Dakota by the Court's decision here to recognize acquiescence as an adverse indicator, rather than as an indicator of the presence of a state of agreement. The court concluded by stating nonetheless that acquiescence must be mutual and can be proven either by words or silence, or by inferences from the conduct of land owners, all of which were factors that were obviously present in this case. For those reasons, this case, as simplistic as it may seem, stands as a major milestone in North Dakota boundary law, and has been acknowledged, by a number of legal commentators, as being one of North Dakota's landmark decisions on land rights. In fact, another comparable landmark concerning boundaries would not be seen until another half a century had passed.

In addition, the Court took this opportunity to clarify that tacking of consecutive periods of possession, through privity of title, also known as privity of estate or privity of contract, does apply to both adverse possession and acquiescence, citing and following the 1906 Nash case, previously reviewed herein. This standard for privity would be consistently applied in the future, bringing North Dakota into alignment with most other states on this important land rights issue. Therefore, the three grantees of Preckel were fully protected by her period of possession, and Bernier was, by the same token, bound by the acquiescence of those who had previously occupied Lot 3. If Bernier had been truly or seriously concerned about the lot line location, in the view taken here by the Court, he missed his only legitimate opportunity to raise that issue, by failing to go to the trouble or expense to discover the issue at the appropriate time, which was when he was considering making the acquisition of his lot. Having acquired the lot, he now stood in the shoes of his predecessors, and was thus bound by their long silence, any option to protest the boundary based on a survey had been foreclosed. The Court ultimately ruled that the claim made by Bernier was without merit and dismissed the case, reversing the lower court and leaving the grantees of Preckel in possession of the land, without ever expressly stating whether the strip in question was actually part of Lot 3 or part of Lot 4. The Court's application of acquiescence to dispose of the situation made the true original lot line location moot and irrelevant, and it’s quite possible that the Court deliberately left the lot line location unknown, as a means of emphasizing that fact, and underlining the impact of it's decision upon the science of boundary location through technical means. As surveyors, we

may tend to feel deprived, in the absence of a clear statement as to which of the surveys was correct, or whether either of them was correct, in the eyes of the Court, but the essential lesson of the case is that the rights of the parties were no longer controlled by any survey, so it made no difference where any survey might indicate the line to be. As powerful as survey evidence may sometimes be, this case clearly shows that it has it's limits, which are imposed by the operation of higher and stronger principles of law, such as estoppel and laches, as we have already seen in previous cases and will see again, and in this instance acquiescence. The rights of the parties here were simply controlled by their own actions, and their own failures to act, working in combination, which is an elementary aspect of the foundation of boundary law that every surveyor should understand and learn to respect, just as the Court does in it's efforts to promote stability and security of land rights in our society.

McHUGH v HALEY (1931)

We have already seen, in a number of the cases reviewed so far, that the legal concept of notice is a very powerful one, which the Court quite frequently turns to and relies upon, in it's efforts to arrive at equitable conclusions in land rights cases of various kinds, and to produce decisions that are fully legally supportable and justifiable. In this case, we will see how the principle of notice can be applicable and play out in the context of an easement claim, and we will learn that notice is not only relevant when the controversy is centered on the creation of land rights, it is equally applicable when the controversy is one concerning the alleged termination or destruction of land rights. Just as in the Doran case of 1895, which we have previously reviewed, and several subsequent cases, the Court refused to allow inadequate or incomplete recorded evidence to solely control the status of the land rights at issue, here the Court consistently follows that same common sense course and logic, requiring all parties to any land transaction to play their respective roles with diligence, and with their eyes open to the significance of the physical conditions they observe on the ground. In the Doran case, the Court had adopted the position that a failure to record a document does not destroy, eliminate, diminish or preclude the

legitimacy of land rights acquired and held in good faith, because although recordation is one form of notice, it is not the only form of notice, and any form of notice fulfills the purpose contemplated by the recording laws, which is the critical objective. This position taken by the Court, that blind and complete reliance on information of record represents folly, if not outright negligence, had thus already been long established and repeatedly upheld, but here the Court employs that same line of thinking in the context of an easement abandonment claim, revealing how vast and broad the legal implications of notice can be. In this case, a right amounting to an easement is at issue, although not expressly described as such in the deed by means of which the right in question was created, leading to a failure, on the part of the recorder of deeds, to properly note that the right in question existed in the appointed location. Once again, confronted with a failure of the recording system, albeit a failure of a different nature, the Court turns to physical notice, as the ultimate source of protection for the rights that are under attack, making the burden of inquiry notice the dispositive factor in the outcome.

> 1918 - Ten platted lots in a certain block in the town of Devils Lake were owned by Bovey-Shute & Jackson (BSJ). The lots were located near a railroad track operated by the Great Northern Railway (GNR) and were evidently in commercial or industrial use, rather than being residential in character. BSJ entered into an agreement with GNR, under which a spur track connecting to the GNR line was built on the rear portion of these lots, which served the shipping needs of a number of businesses.
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> 1919 to 1926 - At an unspecified time during this period BSJ built a fence around Lots 7 through 10. The fence contained a gate where it crossed the spur track.
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> 1927 - BSJ sold Lots 1 through 6 to McHugh, by warranty deed, which included a clause granting McHugh the right to use the portion of the spur track located on Lots 7 through 10, which were still owned by BSJ. The deed expressly stated that BSJ would not allow the spur track to be removed, or allow it's use to be discontinued, without the consent of McHugh, so McHugh was assured of the right to require the spur track to be kept in service. BSJ had a lock on the gate that

crossed the spur track on the lot line between Lots 6 & 7, and BSJ gave McHugh a key to the lock. When the deed was recorded however, the fact that the conveyance had created an easement over Lots 7 through 10 was overlooked, so the county records gave no indication that those lots now bore that burden.

1928 - BSJ sold the remaining lots to Haley, by warranty deed, which was promptly recorded. Haley obtained an abstract, but it failed to indicate the existence of the spur track easement, as a result of the clerical omission noted above. McHugh had not been using the spur track on a regular basis and some portions of it had become partially buried beneath construction materials and debris, during construction work that was taking place on Lots 1 through 6. The fence on the lot line between Lots 6 & 7 had been knocked down and the locked gate was laying on the spur track. Upon observing these conditions, Haley concluded that the spur track was no longer in use and decided to build a new fence. Haley told McHugh that he would put a gate in the new fence and give McHugh a key to the lock on the gate, and he did so.

1929 - After having not used the spur track for several months, McHugh attempted to use it and discovered that the gate Haley had built across it was too narrow for railroad cars to pass through. McHugh immediately complained about this to Haley, but Haley took the position that McHugh no longer had the right to use the spur track, refusing to remove the new fence or alter the gate. McHugh filed an action against Haley to enforce his right to use the entire spur track.

McHugh argued that he had been granted an easement, and Haley, as a successor to the grantor of the easement, was bound to honor it. Haley argued that McHugh had abandoned any rights he may have once had to use the portion of the track located on Haley's lots, by allowing the track to fall into a state of disuse. The trial court found that the easement was valid, despite the fact that it was not indexed in the county records in a manner that provided any notice of it's existence, and ruled that it had not been abandoned by McHugh, so Haley was obligated to make and keep the spur track available for use by McHugh.

This case presented an excellent opportunity for the Court to examine the legal principles relating to abandonment of land rights in detail for the first time, and adopt a position on what does, or does not, legally constitute abandonment of an easement. An easement is fundamentally a permanent land right, comparable in terms of permanence to land ownership, distinguished from outright ownership in that regard, only by virtue of the fact that an easement is devoted solely to a certain use, or range of uses, and exists only to serve, facilitate or protect a specific purpose, activity or need. Therefore, an easement, like fee ownership of land, is not lost as a result of disuse alone. An easement can remain in place, utterly unused, even if it has never been used at all, for any length of time, and remain perfectly valid, as long as the purpose it was created to serve has not permanently ceased to exist, or become physically impossible to perform. Even in those situations where an easement was created by use alone, without any documentation, the easement remains in effect as long as the use that created the need for the easement still occurs, even if only with reduced frequency or great infrequency, because just as no land owner is required to use his land every day, no easement holder is required to use his easement every day, or with any degree of regularity, he retains the right to use it whenever it may happen to be needed. The Court acknowledged that easements, like fee ownership, can be lost as a consequence of adverse use, but loss by adverse means does not result from the absence of use, it results from a use of the servient land that effectively prevents the easement from being used at all for the full statutory period. Loss of land rights due to abandonment is completely unrelated to loss by adverse means, and has no regard for the passage of time, because abandonment results from the acts of the easement holder himself, not from adverse acts by the owner of the servient estate. Abandonment, the Court recognized, results from acts expressing the intention of the easement holder, known as the dominant party with respect to the easement, to deliberately and permanently relinquish any right to the easement in question. In making his abandonment claim therefore, Haley faced a most formidable burden, to prevail on that claim he would have to prove that the actions of McHugh had been sufficient to demonstrate that McHugh clearly intended never to use the spur track again.

Reaching the specific circumstances of this case, the Court noted that McHugh was a party to various leases with business owners, and all of the

leases involved the use of McHugh's lots by the various business owners, such as distributors of lumber and coal, to ship and obtain the raw materials required for their businesses by means of rail. It was impossible to imagine, the Court determined, that McHugh could have had any intention of relinquishing his right to continue making complete use of the spur track, to which he was entitled, since the availability of the spur track was absolutely vital to the conduct of his business. Although he had used the track only very infrequently, if at all, during the period of time when he was engaged in constructing new buildings on his lots, this was entirely understandable and could not represent abandonment. The mere fact that he had allowed the track to become temporarily unusable, by allowing various materials to be piled up on it, was also no evidence of abandonment in the eyes of the Court. Had McHugh actually removed any portions of the track, or allowed it to be so seriously damaged that it gave the appearance of being completely unusable, Haley might have had a legitimate claim of abandonment, the Court hypothesized. But since the track was never rendered permanently unusable, the Court decided that Haley was unjustified in concluding that McHugh intended never to use it again, and in fact the evidence conclusively showed that McHugh had always intended to clear the track, when the construction work was done, and resume his use of it.

Still, Haley insisted that he had the right to rely fully on the abstract that had been given to him, and on the official records upon which it was based. The Court agreed that he had been victimized, to the extent that the official records were incomplete and misleading, due to the clerical failure to properly index the easement in the county records, yet the Court determined that Haley was not truly innocent, because he should have known that he was not entitled to rely solely on evidence of record, since he had notice from what he was able to see on the ground with his own eyes. The evidence indicated that the tracks were visible, at least in part, at all times, including the times when Haley had viewed the lots, prior to buying them. He therefore had physical notice of an existing burden on the land, and he failed to carry his personal burden as a grantee, to inquire about the true nature and meaning of what he saw. His assumptions concerning the state of the spur track and it's intended future use were unjustified, the Court held, in view of the fact that an honest inquiry with McHugh would have

provided Haley with all he needed to know about the matter. His failure to proceed to make a prudent inquiry at the appropriate time, prior to conveyance, had robbed Haley of his status as a purchaser in good faith. If Haley supposed that the legal burden was on McHugh, to come to Haley and inform or notify him of the existence of the easement, he was mistaken in that regard, McHugh had no such legal burden, it was entirely Haley's responsibility to exercise whatever degree of diligence was required to discover the facts relating to the situation that Haley observed on the ground, when viewing the land as a prospective buyer. Therefore, the easement still existed, McHugh was entitled to make complete use of it, and Haley was barred from obstructing it. Quoting decisions from California, Illinois, Iowa, Minnesota and Washington, the Court concluded by fully upholding the lower court ruling and adopting the position that:

> “The purchaser of an estate that is charged with an easement which is discoverable upon examination, such as an open and visible roadway, takes his title subject to such easement .... if the way is in use and marked on the ground either by the effects of the travel over it or by fences or other bounds, so that it is plainly visible .... the purchaser is put on inquiry .... he is bound to take notice of that which a reasonably careful inspection of the land would disclose to him."

BICHLER v TERNES (1933)

Just two years after it's historically significant decision in the Bernier case, defining it's view of acquiescence and bringing that doctrine into prominence in North Dakota, the Court was confronted with another case that it could have used to extend and widen the concept of acquiescence, but instead the Court chose to use this case to limit the implementation of acquiescence. The controversy in this case was markedly different from the Bernier case, in both it's origin and nature, due primarily to the fact that this dispute took place between successors of parties who had been in a grantor and grantee relationship. Although the physical circumstances in these two

cases may appear to be quite similar, when viewed superficially, since once again here a fence was central to the conflict and buildings were again alleged to be over a boundary line, the Court took this opportunity to distinguish the circumstances, based on the factors and conditions that brought them about, and correctly drew a bright line distinction between the cases. In fact, the decision in this case was highly elementary, being facilitated and supported by the presence of an unambiguous description, and would normally have been set down with brevity by the Court, but because of it's concern over the effort to expand the application of acquiescence, that was implicit in this case, the Court chose to expound in detail at this time on what it saw as the true nature and purpose of that legal tool, that it had so recently adopted for boundary resolution purposes. In so doing, the Court also explained in this case what it saw as the appropriate legal limitations relating to claims of grantor misrepresentation, deed reformation and estoppel, again providing very substantial and meaningful insight into the judicial thought process relating to boundaries and land rights. If it was the intention of the Court to prevent a potential avalanche of claims based on allegations of acquiescence, or these related principles, that effort was successful, as more than three decades would pass after this case before acquiescence would resurface as an important aspect of North Dakota boundary law.

> 1915 - The southwest quarter of Section 11 was owned by the father of Ternes. There were highways running along both the south and west lines of the section. The father of Ternes conveyed one square acre to Braun. The acre was clearly described as beginning at the southwest corner of the section and being bounded by the section lines on the south and west.
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> 1916 - Braun fenced the north and east sides of his acre, but he placed the fence by measuring from the edge of the highway, not the center, so unknown to him, the entire fence was completely outside his deed boundary by an unspecified but substantial distance.
>
> 1917 to 1924 - Braun built a house in the middle of the acre, and also two barns near the north fence and a garage near the east fence. He also maintained a garden along the north side, which ran up to the fence.

1925 - Braun died and his grandson, who was married to a sister of Ternes, moved onto the property. Braun's grandson rebuilt the fence in the same location and erected additional barns close to it.

1926 - The father of Ternes built a house north of the fence and maintained a garden that ran up to the Braun fence.

1928 - The father of Ternes died and his property passed to Ternes. The Braun property was sold by Braun's heirs to Bichler, using the same original description of the acre in question. There is no indication that the Braun parcel was ever surveyed, but somehow the erroneous fence location was discovered and Bichler filed an action against Ternes to quiet title to the entire fenced area.

Bichler argued that the description in the Braun deed must have been mistaken, since the parties had accepted the fence as the boundary, and therefore the description in his own deed was subject to correction, to match the fenced area. Bichler did not argue that the father of Ternes had intended to convey more than one acre to Braun, instead he argued that the parties must have agreed that the acre conveyed to Braun did not include the portions of the Ternes property lying under or within the highway. In other words, he asserted that the true intent of the grantor was actually to convey one acre bounded by the highway right-of-way, rather than the section lines, and to retain the land within the highway right-of-way. He argued that the subsequent behavior of both the grantor and the grantee bore this out. He must have suspected that this would be a difficult idea to successfully argue, because he also argued that regardless of the deed language, he was entitled to the entire fenced area based on acquiescence and estoppel. Ternes simply argued that his father had not intended to reserve the highway right-of-way, the deed language correctly represented his father's intent, and his father had never agreed that the fence was the true boundary. The trial court found the argument of Bichler convincing and quieted title to the fenced area in him, revising the description in his deed accordingly.

After citing and reviewing cases from Wisconsin, Illinois and New York, supporting the concept of description control, the Court found no basis upon which altering either the deed to Braun or the deed to Bichler could be justified. The fact that both the grantor and the grantee of the

Braun deed were deceased made it particularly difficult for Bichler to prove that the deed language failed to express the true intent of the conveyance, which was his legal burden. His assertion that the grantor may have intended to retain the portion of the quarter lying within the section line right-of-way was unpersuasive and stood in direct contradiction to the deed language. He was forced to rely on the subsequent behavior of both parties, to show what he alleged to have been their true intent. Had either the Braun deed or his own deed been ambiguous in some way, this argument could have been successful, but since neither of them was ambiguous, the Court stood unconvinced, and upheld the deed language, as the best evidence of the original intent. Although subsequent acts of both grantees and grantors can have great significance, and a major impact on their rights, as we have already seen, reformation of a clearly written description requires very strong and compelling evidence of a mutual mistake. At this time, there was not yet any precedent for description reformation in North Dakota, and the Court was unwilling to allow this case to set such a precedent.

Having disposed of the deed reformation proposition, The Court next addressed Bichler's acquiescence claim. As we have seen, the concept and application of acquiescence, as a boundary resolution doctrine in North Dakota, had emerged from the Bernier case, just two years earlier. Bichler may have been encouraged by the result in that case, where a fence line was honored as a boundary, but if so, he was destined to be disappointed. The key difference was that in the Bernier case, the fence was of unknown origin, and may very well have actually been the best surviving physical evidence of the original lot line location, as it had been originally staked at the time the land was platted, decades earlier. No such situation existed in this case however, since it was known that the Braun fence was built by a grantee, who either misunderstood or ignored his deed, and that the fence in question here was therefore in direct conflict with the deeded boundary right from the outset. The Court reiterated the position it had taken in the Bernier case, indicating that acquiescence in North Dakota is merely the counterpart of adverse possession, and does not represent evidence of a boundary agreement, which could become binding upon all the parties even without the passage of any particular amount of time. The Court again maintained it's position that acquiescence, representing merely adverse possession without adverse intent in North Dakota, is equally as dependent as is

adverse possession upon the running of the statute of limitations to become binding, and since the fence had not been in existence for 20 years, it was not yet in repose, and was therefore still subject to removal.

The only way that the acquiescence which had taken place, for a length of time short of the statutory period, could overcome the boundary described in the deed, was if justice commanded that Ternes must be estopped from demanding that Bichler relinquish the strip lying beyond his deed boundary. It was impossible to know, with certainty, either why Braun built the fence where he built it, or why for several years no one pointed out his error and required him to move it. The Court therefore had to determine whether Ternes still had the right to insist that the fence be moved to the deed boundary, or whether he was bound, by the failure of his father to order it moved, to allow it to remain, as an established boundary. If the conduct of his father indicated that he had intended and decided that the fence should remain permanently, and by his conduct he had communicated that idea to Braun, causing him to rely on the fence as a permanent boundary, then Ternes would be barred from claiming the strip, by estoppel. Although the strip was not included in either the original description or the subsequent description, Ternes could not rely on the statute of frauds to recover it, because the statute of frauds is overcome by estoppel, as stated in the 1908 Engholm case, so the decision on estoppel would dictate the outcome. Importantly and quite logically, the Court indicated that it viewed estoppel and acquiescence as being analogous, and described estoppel as a means of preventing unconscientious or inequitable claims from being successfully made. To the extent that one party can cause damage to another party by simply remaining silent, estoppel can result from acquiescence which takes the form of plain silence. However, in this case, the Court found that Braun, as the grantee of a highly simplistic parcel, in the form of a one acre square figure, must be charged with knowledge of the content and meaning of his deed. Once again turning to Wisconsin for guidance on possession and occupation issues, and quoting a comparable case from that state, the Court decided that:

> "The terms of the deed were unambiguous, and the rights of the parties under it plain and evident. To the deed .... the parties were bound to resort for the purpose of ascertaining the extent

of the grant."

Braun had acted in a manner which indicated that he had read the deed and understood at least part of it, because he had measured out the distances recited in the description himself. He was not at liberty, the Court indicated, to employ one portion of the deed, while ignoring the other portion, which of course was the reference in the description to the section lines as his boundaries. There was no evidence that his grantor, the late father of Ternes, had misrepresented the meaning of the deed to Braun, or given him any mistaken ideas about the intended boundaries of the acre in question, at the time he was preparing to build the fence, so Braun, and not his grantor, was the original source of the mistake and the resulting boundary controversy. Ternes therefore, still had the right to discover the error made by Braun and insist that it be rectified, because his father still had that right at the time of his death, and the rights of the father had passed to the son. Ternes could not be estopped, the Court determined, until the statute of limitations had run. Bichler had exhausted his legal options and failed to carry his burden to prove that either the acts, or the failures to act, on the part of the father of Ternes, had been the proximate cause of any injustice to either Braun or himself. Bichler had acquired only what Braun could convey, and that, the Court decided, was the described parcel, and not the occupied parcel. If Bichler actually knew the true situation prior to the conveyance of the parcel to him, and deliberately ignored the description, with the idea that he could successfully claim the occupied parcel, he had done so at his own peril, and he could obviously qualify for no protection as an innocent purchaser, so no argument of that nature would have been of any avail to him. The Court reversed the lower court's decision and gave Bichler sixty days to completely vacate and relinquish all use of the strip in question. Following this decision, strictly limiting the application of acquiescence, that concept fell into disuse in North Dakota for many years, but it would eventually return to again exert itself in the land rights arena, and with very powerful effect, as we shall eventually see.

GOETZ v HUBBELL (1936)

As we have already seen well illustrated, the statute of frauds, much like the recording statutes, has been narrowly interpreted by the Court, when necessary to do equity and justice. Here again we will see a situation in which the Court finds it appropriate to tightly limit the application of that statute, to prevent a party from unjustly reversing his position in order to undo an agreement involving land rights which had been entered into without complete or proper documentation, in accord with the Court's consistent position holding grantors responsible for properly documenting their transactions and conveyances. As noted by the Court in the 1934 case of Heuer v Heuer, since 1913, the North Dakota statute of frauds, now found at 47-10-01, has expressly recognized the authority of the Court to mandate and compel both unwilling grantors and unwilling grantees to make good on their promises and agreements, regardless of the details relating to the form of the agreement, where it can be shown that an agreement actually took place. In the case of Ketchum v Zeeland Mercantile, in 1914, the Court sternly warned that the statute of frauds would not be allowed to serve as protection for a grantor who promised to convey land and then balked, upon being asked to complete the conveyance, after accepting payments on the land from the grantee and allowing the grantee to make substantial and valuable physical improvements to the subject property. That decision obviously followed fundamental principles of equity, which prevent unjust enrichment based on deception, particularly where any evidence of actual physical use of land by a grantee in reliance on an agreement is present. So it was already well established that the mere absence of a document of conveyance would not be treated by the Court as conclusive evidence that no conveyance had taken place, nor would any conveyance agreement made or left in a state of ambiguity by the grantor be subsequently construed in a manner that would be beneficial to the grantor. The Court had already made it quite clear that it's sole focus, in such situations, was upon ascertaining whether or not an agreement existed, from the totality of the evidence, written and unwritten, and emphasized that the subsequent conduct of the parties was always a highly relevant factor in determining the existence and the nature of any alleged agreement. In the case we are about to review, the written evidence that a conveyance had taken place was very scant, and the grantee had made no improvements to

the subject property to support his claim, yet despite those apparent obstacles, the Court would here again see that justice was done.

> 1934 - Goetz verbally agreed to sell his business, which included a store situated on three contiguous platted city lots, that were occupied either fully or partially by the building, to Hubbell. The size and dimensions of the building and the lots are unknown, but those details were not essential to the resolution of the controversy that developed over this agreement. Hubbell took possession of the store, began running the business, and began making monthly payments to Goetz, who gave Hubbell a receipt for each payment. Each receipt stated that it was for one payment made by Hubbell on the building and the fixtures, and specified both the amount and the lots being conveyed, by lot and block number, and each receipt was signed by Goetz. No other written evidence of their agreement existed. Goetz continued to pay the taxes on the subject property.
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> 1935 - After running the store and making regular and timely payments for nine months, Hubbell apparently questioned Goetz about when Goetz was going to deed the property to him and Goetz responded that their deal was only a lease agreement, not a sale agreement, and indicated that he did not intend to deed the property to Hubbell. Hubbell insisted that their agreement was a conveyance and that he was entitled to the subject property. Goetz filed an action, seeking to have Hubbell's claim silenced by means of the statute of frauds.

Goetz argued that receipts alone were insufficient to represent a conveyance of the subject property, and that Hubbell had made no significant improvements to either the building or the land, which was an indication that he had acted only as a leasee of the property, and not as a buyer or owner of the property would act. He argued that since there was no written agreement, specifically indicating that the parties intended to enter into a binding contract for the sale of the subject property, his earlier verbal offer to sell the property was void under the statute of frauds and he could not be forced to deed the subject property to Hubbell. Hubbell argued that the original offer made by Goetz, to sell the property, was unconditional, and that he had accepted that offer unconditionally, and that he had done

everything that he was obligated to do as the buyer of the subject property. He argued that the three receipts that he still had did constitute sufficient written evidence that an agreement to convey both the building and the land had been made, and had been put into effect by the parties, even though he had not yet made any physical changes or additions to either the building or the land. The trial court ruled that the three receipts produced at the trial by Hubbell were sufficient to meet the requirements of the statute of frauds and Goetz must honor his agreement to convey the subject property to Hubbell.

The Court began it's analysis of the situation with an overview of the manner in which it views the meaning and purpose of the statute of frauds. After noting that the language of the North Dakota statute of frauds expressly refers to a note or memorandum, as being required to satisfy the statute, the Court observed that it had already been established that such written evidence need not all be incorporated into one single document, nor do the relevant written words and terms of agreement need to be set down in any particular order or any particular form. The only essential items, that must be susceptible of being ascertained from the written evidence, are the names of the parties, the amount of the consideration or compensation to be paid, and a description of what is being conveyed. If all of these items are specified with reasonable certainty, the particular form or sequence in which they appear is irrelevant, and a complete agreement may be deemed to be in place. The underlying purpose of the statute of frauds, the Court stated, is simply to provide enough written evidence to show that an agreement was reached, and to provide enough information relating to the agreement to make it impossible for either party to deny that an agreement had been made, or to deny that any particular aspect of the subject matter of the agreement, such as the amount of money involved or the amount of land involved, had been addressed and settled. In other words, the written note or memorandum need not be a complete and self-announcing document, it merely needs to present facts amounting to undeniable evidence that all the essential terms of a valid agreement have been met. Further, following New York law, the Court decided that the signature of the grantee is not a necessity, the signature of the grantor alone is binding upon him, the grantee need only be identifiable.

The Court found that the lots themselves were clearly intended to be

within the scope of the agreement, since there was no evidence indicating that either party had any intention to treat the building as being separate and distinct from the land, and Goetz did not argue that the land itself was not part of either his original offer or the final agreement that had been made. The Court then made it clear that although it would not accept oral evidence for the purpose of describing land, nor would it accept oral evidence for the purpose of changing an existing written description, the description of these three platted lots, by lot and block number, was both valid and complete, and was therefore fully acceptable. Treating the plat in question as evidence that was extrinsic to the conveyance, which had been made a part of the conveyance only by means of reference, and citing two United States Supreme Court cases as support for its decision that a plat can provide a fully adequate external description, by means of documentary reference, the Court declared that:

> "...the vagueness, if any, does not deal with the description of the land .... external evidence, which does not contradict or add to the general conditions set forth in the memorandum, will be received for the description of the property."

Since all of the essential elements of a complete agreement were adequately expressed in writing in each of the receipts, including the identification of the parties, the amount of the consideration, and an acceptable description of the land, and each one was signed by the grantor, a valid and binding conveyance, which was in full compliance with the statute of frauds, had taken place, despite the complete absence of any document purporting to be a deed or a contract for deed. The Court upheld the lower court decision in favor of Hubbell, ruling that the fact that he had made no improvements to the building or the land could not be held against him, and did not prove that he must have believed he was only a leasee, because his payments, along with his occupation and use of the land, constituted all the performance that could be required of him and fulfilled his commitment under the agreement. In reaching this decision, the Court followed the same basic principles that it had followed in the Mitchell case, which we have already reviewed, a quarter century before, restricting the application of the statute of frauds, by allowing even very minimal written evidence of a conveyance to overcome and negate the applicability of that statute. Once

again, the rights of the party who innocently went into possession of the land and made productive use of it were protected, and the party who attempted to use the statute of frauds as a device, by which to escape a commitment to convey land, was not allowed to manipulate the law in his favor. As can readily be seen from decisions such as this one, the Court is quite conscious that strict or literal interpretation of statutory language can sometimes operate to facilitate injustice, by fostering the entrapment of innocent parties, and the Court therefore remains ever vigilant and prepared to prevent such injustice, by applying the statutes as a bar only when doing so is appropriate and justifiable, not when doing so would operate as support for a potentially intentional scheme of deception. With this ruling, the Court reinforced its stance as a reliable guardian of those grantees who set out to acquire and make use of land in good faith, a concept that forms a timeless and consistently material factor in land rights cases, as we will continue to observe, throughout the decades.

GARDNER v GREEN (1937)

Here we find the Court's development of riparian law beginning to move into the modern era, extending beyond the establishment of basic principles relating to navigability, and starting to deal with some of the more intricate aspects of riparian conflicts in a more detailed way. During the 1920s, the federal courts, including the US Supreme Court, had made a number of landmark rulings, which provided greater clarity concerning navigability issues, and provided more consistent direction to the states in so doing. However, issues relating to the existence of accretion prior to patenting, and issues relating to the division of accretion, were still relatively undeveloped and unclear, having been handled by a number of different methods in different parts of the country, depending upon both regional preferences and the specific circumstances of each particular case. In this case, which is the most detailed riparian case we have seen so far, although no survey evidence beyond the original plat is presented, the Court deals for the first time with the effects of gradual but substantial river migration upon government lots. In addition, we see the Court explain it's view of a situation involving a platted meander line that gave the

appearance of excluding a very substantial amount of land from the government lots involved in the case. Although this ruling was quickly contradicted, just months later, in one important respect concerning the interaction between riparian rights and section lines, by the very next case that we will review, this case still has considerable significance, since it would go on to exert an enduring influence on a number of cases decided decades later. For it's treatment of the issues relating to the validity of accretion prior to patenting, and the proportional division of accretion, this ruling remains legally sound and is therefore quite noteworthy.

1896 - Original GLO surveys were performed, subdividing townships in the area where the Missouri River passes through McKenzie County. The river was meandered and government lots were platted along the river. In a certain Section 27, government Lots 5 and 7 were shown on the southwestern side of the river, which passed through the section, flowing from northwest to southeast. Lot 5 represented the fractional north half of the south half of the part of the section lying west of the river, and Lot 7 represented the fractional south half of the south half west of the river. The GLO plat showed that a substantial sandbar, at least a few hundred feet wide, existed along the southwesterly edge of the river through this area, which was apparently frequently inundated, and showed that the meander line running along the east side of these lots had been run along the southwesterly edge of the sandbar, treating the sandbar as if it were part of the river, and leaving the meander line several hundred feet west of the water, at those times when the sandbar was not inundated. In addition to that, the river was apparently already migrating gradually to the east at this time, and that movement evidently continued over the intervening decades, and was still in progress in 1937.

1911 - Lot 5 was patented to Gardner.

1920 - Lot 7 was patented to Green.

1937 - By this time, the river had moved so far to the east of it's platted location that the parties evidently believed it had actually moved into Section 26 and was no longer in Section 27 at all. No surveys were involved in this case, so exactly how far the river had

> moved is unknown, but it had obviously moved far enough to expose a large area, which both Gardner and Green wanted to begin using, and both of them knew that as entrymen, they were each entitled to some portion of it, as accretion to their lots. These two adjoining owners evidently had different ideas about how the land that had accreted to the eastern side of both of these lots should be partitioned between them and they could not agree on what method to use to determine where their line of division should be. Gardner filed an action seeking a judicial declaration of the rights of the parties to the land lying east of the meander line, and to partition that land to resolve his with disagreement with Green.

Gardner argued that the river itself was the original eastern boundary of the lots, not the meander line, and that as the river migrated to the east it remained the boundary. Therefore, he felt that the line of division through the accreted area should be a prolongation of the original boundary between the two lots, which of course was a line running ostensibly due east. In other words, he argued that the original government lot line should simply be extended east as far as necessary to reach the river, the meander line should be completely ignored, and he was entitled to all the land lying due east of his lot, all the way to the river, however far that might be. Green argued that the line of division through the accreted area should begin at the eastern end of the original boundary between the two lots, which he believed was at the meander line. From that point, instead of running due east, as suggested by Gardner, he thought the line of division should run perpendicular to the course of the river through the accreted area, all the way to the river, which would be in a northeasterly direction, cutting into the area being claimed by Gardner. The trial court ruled in favor of Gardner, indicating that the platted lot line between Gardner and Green should be projected all the way to the river, regardless of whether the river was currently in Section 26 or Section 27, since the actual location of the river was unknown.

The argument made by Green was a hopeless one, since it was already well established that meander lines are not boundaries. But although Green could not get as much of the accretion as he hoped, it remained to be seen whether or not Gardner would get as much of it as he hoped to get. The Court indicated that the first key question was where the original eastern

boundary of the lots was. Citing several prominent United States Supreme Court decisions on riparian boundaries, the Court determined that the original eastern boundary of both lots was at the western edge of the Missouri river, at the low water mark, at the time of the original survey. In other words, the original eastern boundary of these lots was the western edge of the water, where the water was shown on the original plat. Two important factors converged to produce this result. First, the fact that the rights of riparian owners extend to the low water mark, rather than the high water mark, meant that the sandbar must be treated as dry land, because it was obviously shown by the plat to be above the low water mark at the time of the original survey, although it was evidently below the high water mark at that time, since the original surveyor had clearly considered it to be part of the river and had run his meander line accordingly, following the high water mark. Secondly, because in the creation of lots along bodies of water, the United States intended the water itself to be the boundary, the United States could not make any valid claim to any land left between the meander line and the body of water by the survey, such as the sandbar in this case. Therefore, the fact that the river had moved quite a bit further east by the time the land was patented did not operate to cut off the lot owners from the water. The accretion that developed after the original survey, but before the land was patented, was conveyed by the patent, because the principle of accretion began to apply, extending the lots eastward, from the moment the original boundary was created, which was at the time of the original survey, and not on the dates when the lots were patented.

Having fixed the original boundary of the lots at the low water mark of 1896, per the original survey and as depicted on the GLO plat, the next question was how far the accretion might extend before the lot owners were no longer entitled to it. On this point, the Court made a decision that must have seemed perfectly logical at the time, but which would prove to be highly controversial and which would precipitate many disputes that would play out under very different circumstances in future riparian boundary cases. The Court announced it's adoption of the position that section lines were intended to be absolute and therefore cannot be crossed by accretion as follows, speaking with reference to the platted dividing line between the two lots in question:

> “We are of the opinion that it was the intention that such survey line should be projected to the shore line of the river, unless before reaching such shore line it intersected the section line running north and south between Sections 26 and 27. If the shore line of the river was on the east side of such section line, then Lot 7 was not bounded by the river, but by the section line..."

This decision to impose an arbitrary limitation on accretion would have far reaching consequences in future cases, as we will later see. Ironically however, it may have actually had no impact at all on either Gardner or Green, and may have been entirely extraneous in this case, since there was never any definite evidence presented clearly proving that the river had migrated so far east that it had gone beyond the section line and moved completely into Section 26. It can only be concluded that the Court's sense of justice was somehow offended by the idea of accretion carrying on without limit, and it was envisioned at this time by the Court that employing section lines as absolute limits upon riparian rights would eliminate the possibility of an enormous windfall being bestowed upon one riparian owner, at the expense of others, should the mighty Missouri move gradually but dramatically in one particular direction, as it has been known to do.

Finally, the Court reached the ultimate question of how the accretion should be divided. On this point, Gardner would be disappointed, as his idea of simply extending the platted aliquot division line between the lots due east met it's downfall here. The Court ruled that the accretion division line would begin at the eastern end of the platted lot line, which was the point where that line hit the 1896 low water line, and not where it crossed the meander line, which Green had suggested since starting the new line further west would be beneficial to him. From that point however, the direction of the new line, across the accreted area, the Court ruled, must be controlled by proportional river frontage. In other words, the length of each lot's original 1896 river frontage must be preserved, by means of proportioning the present day frontage total against the original frontage total, and dividing it into portions perpetuating the original proportion. Applying this rule, the resulting line might cut into the area that would have been Gardner's, had the simplistic prolongation method been accepted. So to that extent, neither

party got all that they had sought. The Court, having put the rules in place, by the use of which the final outcome would be governed, then remanded the case to the lower court, with directions to allow further evidence to be presented, for the purpose of determining the exact location of the 1896 low water line and to determine whether or not the river was still at least partially within Section 27, and thus still constituted the eastern boundary of the two lots.

OBERLY v CARPENTER (1937)

Another key decision on riparian rights emerged from the Court in 1937, at least as important as the previous one, if not more so, which sought to further advance and clarify the riparian principles that the Court would observe and follow going forward. To fully understand and appreciate the respective rulings in these cases, it should be noted that three significant differences existed between this case and the Gardner case, just reviewed. First, the portion of the Missouri River that was at the heart of this controversy happened to have been adopted decades earlier as a county boundary, unlike the portion of the river involved in the Gardner case. Second, in this case it was positively proven that the river had crossed a section line during it's migration, while in the Gardner case it was merely suggested that the river might have moved into another section and nothing was ever proven in that regard. Third, in this case, the opposing parties where situated on opposite sides of the river and a house had been built by one of them on the area in controversy, making the outcome of this case far more consequential to the parties involved than the Gardner result had been to the parties in that case, where only vacant land was at stake. The fact that the land of the respective litigants here was located in different counties proved to be the most crucial difference, as it caused the Court to see the potential consequences of insisting that section lines should always be treated as absolute boundaries. Following the Gardner rule concerning the absolute nature of section lines, a party owning land in one section and in one county, could end up having either part or all of their land relocated to the jurisdiction of another county, due to river migration. The desire to

avoid this clearly absurd result evidently motivated the Court to correct itself by abandoning the Gardner rule on section line supremacy in this case. In addition to that development, this case also presents the Court's first consideration of evidence relating to alleged avulsion, providing a definitive statement regarding the need to show clear evidence of avulsion to overcome the presumption of gradual or accretive river migration, and this ruling is also in full accord with the position taken by the Court in the Gardner case on the inclusion of accretion prior to patenting in riparian lots that were originally conveyed without any explicit reservation of accretion.

1899 - Original GLO surveys were performed in an area where the Missouri River forms the boundary of Burleigh and Morton counties. Government lots were platted in the south half of Sections 23 & 24, in Burleigh County, and in the north half of Sections 25 & 26, in Morton County, in a portion of a certain township, through which the river flowed from west to east, because at that time, the river was running, for about one mile, along the line between these sections. The common corner of these four sections, and the section line for about half a mile to the east and to the west of the corner, was within the meandered river.

1918 - The lots lying north of the river in Sections 23 & 24 were patented to Oberly. The river had begun to move south, but no survey was done at this time, so how much it had moved is unknown. Oberly believed that the river itself was the south boundary of his land and did not concern himself with the question of where the river was in relation to the south line of Sections 23 & 24. There is no indication that Oberly lived on the land, cultivated it, or used it for any other purpose, it was vacant woodland.

1933 - The lots lying south of the river in Sections 25 & 26 were patented to Carpenter. By this time, the river had evidently migrated far enough south that it's north bank was approximately where the south bank had been in 1899. The river was roughly a quarter mile wide, so quite a substantial area existed between the river and the north line of Sections 25 & 26 at this time.

1934 - A survey of this area was performed. Whether or not it was ordered by Carpenter is unknown, but clearly he relied on it. During

this survey the section lines were located, the sizes and locations of numerous trees were documented, and the present location of the river was noted. In the belief that he owned all the land up to the north line of Sections 25 & 26, Carpenter built a house, roughly in the middle of this area, south of the section line, but north of the river. Oberly apparently did not discover the house until some time after it was built. He then filed an action against Carpenter, asserting that the house was on his land.

Oberly argued that the river was intended to be the south boundary of all of his lots, and therefore as the river moved gradually southward, by means of erosion and accretion, his lots expanded southward along with it, and the location of the section line could not have any limiting effect on his ownership, even though his patent stated that his land was in Sections 23 & 24. Carpenter argued that the river had not migrated gradually, but had moved in a series of avulsive events, at times when ice gorges had blocked the river, forcing it to repeatedly cut one new channel after another, each time ice blocked it's path. Carpenter did not specifically refer to the Gardner case, just discussed, but he did argue that since his patent identified him as the only owner of land in Sections 25 & 26, and Oberly's patent identified him only as the owner of land in Sections 23 & 24, Oberly could make no valid claim to any land in Section 25 or 26, and this argument accorded with the position that had been taken by the Court in the Gardner case. The trial court agreed with Oberly that the river had moved gradually, and ignored the presence of the section line, ruling that since the lands of the two litigants were in different counties, and the river was the county boundary, all of the land in this area north of the river belonged to Oberly.

The Court first examined the evidence relating to the movement of the river, because if that movement was avulsive in nature, the present location of the river would be of no importance in resolving this boundary dispute, since avulsion has no effect on boundary locations. Although several ice gorges were known to have occurred in this area, the witnesses who testified were consistent in describing the cause of the river's movement as erosion of the south bank. The Court found that even though the erosion had been rapid enough, on at least some occasions, that it had been observed happening, this process was not avulsion, because the river

had never jumped or vaulted around any portion of the land, it had worn or ground it's way over and through every bit of the land. The survey also contributed valuable evidence on this issue, since it showed that the trees in the northern part of the subject area were old and large, but going south they became steadily younger and smaller, providing a timeline effectively documenting the river's steady migration southward, as the land north of the river became exposed and the trees began to sequentially populate the northerly, middle and southerly portions of the former bed, in succession. If any old trees had existed in the southerly portion of the subject area, their presence would have served to indicate an avulsive event, supporting Carpenter's claim, but none existed there, so the Court determined that the movement of the river, and the creation of the land north of it, had indeed been accretive and not avulsive, regardless of whether or not it took place as a result of the ice gorges.

Noting that by the time Oberly acquired his land, 19 years had passed since the time of the original survey, and being cognizant that the river had obviously been moving southward during those years, the Court next considered the issue relating to the effect of a patent that is granted under a set of conditions that are materially different from the conditions that were in place when the plat, upon which the patent is based, was made. The Court once again, just as it had in the Gardner case, cited the Supreme Court of the United States for the proposition that the United States expressed no intention, in granting patents, to reserve any land located between any meander line and any body of water. The river, having been identified on the GLO plat as the true boundary of all the lots, carried the boundary along with it as it gradually migrated over the land, not only after patents were issued, the Court decided, but before any patents were issued as well. The boundary had come into existence at the time the original survey and plat were approved and published. If the government did not intend to honor and abide by the boundary created by the original survey and shown on the original plat, and desired to retain any accretion that had accumulated after the original survey, then the government bore the burden of resurveying the land, which it had the opportunity to do, at any time prior to selling the land, and clearly segregating any land that it did not intend to convey. The positions taken by the Court on these issues were fully consistent with those it had taken in the Gardner case. But the issue of the section line as an

absolute barrier to accretion, having arisen from the ruling in the Gardner case, remained to be dealt with. If Carpenter was aware of that ruling, he must have been quite confident about his chances of success, but if so, he was in for a surprise. Without making any reference to it's ruling, just four months earlier, in the Gardner case, upholding the absolute nature of section lines, as complete barriers to the ownership of accretion, the Court abandoned that position, announcing that:

> "...the law governing riparian rights has no regard for artificial boundary lines, whether between sections or their subdivisions, or between counties, states or nations .... where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line and conveys all accretion thereto."

Based on this new position, the Court ruled that the subject area was part of Oberly's lots, even though his lots now extended far into sections that were not recited in his patent. The trial court had reached the proper outcome, so although it had erroneously used the fact that the river was the county line as the basis for it's ruling, the Court upheld the result and Oberly prevailed. The Court never addressed the fate of Carpenter's house, presumably he was given the opportunity to move it, as in the Bichler case. The mistaken concept of section lines as absolute impediments to riparian rights had been corrected, but in so doing, the Court refrained from criticizing the mistaken position announced in the Gardner case. It's very likely that the Court had been informed that the position taken in the Gardner case was not in accord with the position of the GLO itself, with respect to section lines and riparian rights, and the Court naturally took the opportunity presented by this case to eliminate that conflict. But the failure of the Court to specifically indicate, in this case, that the position it had taken in the Gardner case was an erroneous one, would lead to unfortunate consequences in future cases, some of which, as we shall see, rely on the Gardner rule to elevate section lines and other aliquot lines to controlling status over riparian rights, thereby placing North Dakota among the minority of states on that issue, rather than following the rule observed by the majority of states, which was properly stated and established in this

case.

MITCHELL v NICHOLSON (1942)

In this case we find the Court dealing squarely with description ambiguity, as the central and dispositive issue in the resolution of the controversy at hand. The Court here provides us with a clear statement of it's objective in determining whether or not any given description is valid, and provides us with direct and valuable guidance regarding what can, and cannot, be done to render an ambiguous description valid and acceptable. Courts in general have always had a strong tendency to honor and accept all legitimate attempts to describe land for purposes of conveyance, even when those efforts are feeble and the language chosen by the author of the description is poorly suited to accomplish the true intent of the parties, as long as it appears that the description was written in good faith and no fraud was intended. In some instances however, an ambiguous description can be an indication that some type of fraud or deception may have been involved in it's creation, and when the Court encounters such a situation, it naturally becomes less inclined to take a constructive position with respect to the description, and more inclined to view the description in a critical manner, as we will see here. The circumstances of this case present the distinct possibility of nefarious intent and conspiracy, manifested by a quitclaim deed between family members, followed by construction of valuable improvements that appear to defy the intent of the deed, bringing fraud and bad faith into play. Yet, the fatal blow to the alleged boundary here comes not merely because it may have been intentionally poorly described, but because it had never been either surveyed or otherwise physically marked, defining it on the ground, which as the Court informs us, would have served to provide the clarity and certainty of location missing from the deed, and also would have provided the essential element of physical notice, of both the existence and location of the boundary in question, to all parties. This case therefore illustrates the high importance of any and all physical evidence of a survey on the ground, which is seen by the Court as the strongest and most reliable means of ascertaining the truly intended original location of any boundary, capable of overcoming and resolving even serious

description ambiguity or errors. In addition, this case also once again shows us that the Court is not pleased, and in fact experiences great consternation, when it observes a situation in which a conflict or dispute was clearly precipitated by the failure of one party to take any action for an extended period of time, and here again we see the consequences of both description failures, and failures to act, visited upon the unfortunate successor of two negligent predecessors.

> 1904 - The southwest quarter of a certain Section 18 was patented to Koestler.
>
> 1907 - Koestler conveyed two acres to Nather, who was his brother-in-law, by quitclaim deed, which was described only as being located "on the north west corner" of the quarter. There was no evidence that the two acre parcel was ever surveyed or defined on the ground in any way by either of the parties. Nather never attempted to occupy or use any of Koestler's land, but he did record the deed and pay the taxes on the two acre parcel.
>
> 1913 - Koestler erected a house, a barn and a granary, all of which were located on the two acres that were located in the northwesternmost corner of the quarter.
>
> 1916 - Koestler mortgaged the quarter. When obtaining the mortgage, he expressly indicated that he was the owner of the entire quarter and revealed nothing about the existence of the quitclaim deed.
>
> 1935 - The mortgage was foreclosed and the quarter was acquired by Mitchell at a foreclosure sale. Eighteen days later, Nather quitclaimed the two acre parcel to Nicholson, who promptly recorded her deed.
>
> 1936 - Mitchell obtained a sheriff's deed, conveying the entire quarter to her, pursuant to the foreclosure sale.
>
> 1938 - Mitchell discovered that Nicholson claimed to own the two acres occupied by the buildings and filed an action, seeking to have both the 1907 and 1935 quitclaim deeds declared void. Their parents apparently having died, some of the children of Koestler also claimed that they still had an interest in the subject property and they supported the claim made by Nicholson, evidently in the hope that they might be able to regain the subject property from Nicholson, if

Nicholson were to prevail and be awarded the two acre parcel, so they also became defendants, along with Nicholson.

Mitchell argued that the 1907 deed to Nather should be ruled void because it was unclear and it had never been used, and that the 1935 deed to Nicholson therefore conveyed nothing, since Nather had nothing to convey. Nicholson and the others on her side argued simply that both quitclaim deeds were adequate and should be upheld, even though no use had ever been made of the land, by Nather or by anyone else acting as a grantee of the two acre parcel. No argument was made that the foreclosure was defective or void, so the original interest of the Koestler family had been lost, the only question was whether it had passed to Mitchell or to Nicholson through Nather. Nather made no claim himself and took no part in the case. The trial court ruled that both of the quitclaim deeds were void, quieting title to the entire quarter in Mitchell.

The core issue was clearly the question of the validity of the 1907 quitclaim deed, so the Court began by acknowledging the widely recognized principle that a deed will not be held void for uncertainty of location or description if the location and boundary of the subject property can be made certain by means of extrinsic evidence. This powerful principle enables all interested parties to present any evidence that is relevant to the subject property in land rights cases, regardless of the specific form in which that evidence may appear, including verbal testimony and circumstantial evidence, as long as the evidence operates to shed light on the intent of the conveyance, and does not operate to expressly contradict anything that is clearly stated in the written language of the conveyance document. In this instance, since there was nothing specific in the description in question, aside from the call for two acres in the northwest corner of the quarter, there was little chance that any extrinsic evidence would contradict the deed, so any evidence of a two acre boundary, of virtually any shape, in the designated location, could have been sufficient to control the result, making the deed valid. The Court then also went on to adopt the well known and often repeated judicial maxim that any description which can be placed on the ground by a surveyor with reasonable certainty is a valid description, even if the surveyor is required to make use of extrinsic evidence in finding the boundaries of the subject property, because the surveyor is entitled to

rely on extrinsic evidence, just as are the property owners themselves. This concept is indicative of the Court's willingness to accept practically any boundary that is visibly supported by physical evidence of any kind, particularly when the only alternative is holding that no boundary was ever created at all, which the Court is always highly reluctant to do. The Court cited New York, Illinois and Oregon as examples of states which had applied these legal principles embracing physical boundary evidence not expressly called for in any deed, but in fact they have been applied and upheld in every state.

Turning to the specific language of the 1907 deed, the Court stated that it's goal in making a determination concerning any of the language contained in any given conveyance document, including descriptions, is always to discover and enforce the intentions of the original parties. This idea was not new of course, and was already well established and understood, but in this case the deed provided only two small fragments of information, which were the general location of the intended parcel and it's acreage. The only logical meaning, regarding the location of the subject property, that could be derived from the deed pointed to the very same area where Koestler had erected his own buildings. Obviously, Koestler had intended to convey two acres, but the shape of the two acres was unspecified, and the Court was unwilling to assume that it was intended to be in the form of a square, since there was no evidence whatsoever, either on the ground or in documentary form, to support that suggestion. Even assuming that the north and west boundaries of the quarter were intended to be the north and west boundaries of the two acre parcel, the absence of any physical evidence showing where either the east or south boundaries were intended to be, proved to be fatal to the 1907 deed. The Court emphasized that the failure of Nather to take any physical action, with respect to the parcel deeded to him, to occupy it or even to define it's location, was the dispositive factor in this case, stating that:

> “...there is nothing whatever to show that Nather ever claimed that the land was in the form of a square, or that the portion of the land upon which the buildings are situated was part of the land which he claimed under his quitclaim deed .... he made no attempt to defend his deed as conveying "two acres" in the

form of a square."

The Court found that the 1907 deed was in fact void, because the subject property was never described, and never defined on the ground, in any manner that would enable a surveyor to identify the location of either the east or south boundaries with any certainty, therefore the Court upheld the lower court's decision awarding the entire quarter to Mitchell. Since the northwest corner of the two acre parcel was identifiable, and the total acreage was provided, if even one other corner of the parcel had ever been identified, or even one dimension had been provided, the result could have been different, because the stated acreage would have made the east and south boundaries easily ascertainable. Since that was never done however, the Court ruled that the opportunity to define the two acre parcel had been lost by the inaction of Nather for 28 years, essentially invoking the doctrine of laches, which in effect amounts to an estoppel resulting from a protracted period of negligent inactivity, to extinguish any claim that Nather or his successor Nicholson might assert. The deed from Nather to Nicholson was worthless, since by 1935, despite having paid taxes on two acres for 28 years, Nather had no identifiable parcel to convey, and neither Nather, nor Nicholson, nor anyone else, could be allowed to simply select two acres of their own choosing. In conclusion, the Court intimated that it saw indications of bad faith in Nather's conduct, by expressly indicating that Nicholson might have a legal remedy against Nather, for her loss, even though his conveyance to her had been only a quitclaim. We will obviously never know exactly what Koestler and Nather intended in 1907, they may have simply been ignorant enough to think that no description of the two acres was necessary, because it would be assumed to be a square if not otherwise described, or they may have believed that by not inserting any description of the two acres in the 1907 deed they were leaving the location of the boundaries flexible and subject to subsequent determination. However, it’s also quite possible that they had hatched a scheme, which envisioned and anticipated risking the quarter by mortgaging it, as Koestler did, and they wanted to create a secret or hidden opportunity for the family to reserve a portion of it, by means of the quitclaim deed, as a way of escaping the effect of a mortgage foreclosure. The circumstances all pointed to this possibility and the Court was clearly cognizant that deceptive intentions may very well have been the root cause of the controversy, as it

had played out. The important lesson, once again on display here, is that whenever there is any evidence that a description may have been left ambiguous deliberately, in order to gain some kind of advantage at some later time, neither the party who created the description nor that party's successors will be allowed the benefit of the doubt, they will instead be required to bear the consequences of their failure to create a legitimately reliable description.

OTTER TAIL POWER v VON BANK (1942)

Returning to the subject of easements, here we reach the topic of utilities, and review a case that very well illustrates the Court's perspective on the use of a public right-of-way for utility purposes, which provides great insight into the Court's view of the legal interaction between public and private rights. The Court has always viewed utilities, constructed within an existing public right-of-way, as an additional burden on the land, and strongly upheld the right of the owner of the servient land to compensation for that additional use of the land, recognizing that the creation of a right-of-way does not strip the land owner of all control over the portion of his land lying within the right-of-way. Since a right-of-way typically represents an easement, and is legally presumed to be only an easement, the owner of the fee in the underlying land retains the ultimate control over the use of the area in question, limited only to the extent that no interference with the purpose for which the easement exists may occur. In 1902, in Donovan v Allert, the Court had first taken the position that utilities represent an additional burden, requiring that a land owner be compensated for the placement of telephone poles in a platted and dedicated city street right-of-way, upon which his platted lots fronted, noting that this was a controversial point of law, upon which a number of states, including Minnesota and Montana, had decided the contrary. Then in 1906, in Cosgriff v Tri-State, the Court had extended it's 1902 ruling to include rural highways, as well as city streets, holding that compensation was due to a rural land owner whose land lying within a section line right-of-way was used for utility purposes, as well as a city lot owner. Not surprisingly, in view of those decisions, in Gram v Minneapolis, in 1916, the Court held that a railroad spur track,

constructed within a platted and dedicated city street right-of-way, also constituted an additional burden requiring compensation to an owner of platted lots, since the lot owner held fee ownership to the centerline of the street. Thus had the Court established and consistently maintained a position strongly upholding the rights of servient owners, protecting them from efforts to make additional uses, without compensation, of an existing easement or right-of-way originally created and intended for purposes of public travel. In the case we are about to review however, the controversy centers not on the existing right-of-way itself, but on the use of a strip acquired to widen the existing right-of-way, bringing a wide range of fundamental conveyance issues relating to the grantor and grantee relationship into play, including the intent of the parties, description requirements and extrinsic evidence, making this one of the Court's most comprehensive and far reaching decisions on easement law.

> 1938 - Von Bank owned the entire east half of a certain section in Cass County, on which he grew hay. A section line road ran along the east line of the section, and Otter Tail had a power line running close to the west edge of the road, within the existing section line right-of-way. How Otter Tail had acquired the right to operate the power line there, and how long it had been in place, are both unknown, but there was no conflict concerning the existing power line location at this time. It was decided that this road needed to be widened however, so the existing right-of-way was widened from 66 feet to 100 feet, by acquiring an additional 17 feet on each side, from each land owner. The exact language of the deed signed by Von Bank is unknown, but it had the intended effect of extending the right-of-way over an additional 17 feet of his land. In response to concerns raised by some land owners, Cass County, as the grantee of the additional right-of-way, passed a resolution declaring that all the land owners would have the right "to sow and cut hay" within the right-of-way, right up to the shoulder of the actual roadway. Otter Tail obviously needed to move the power line several feet west, to facilitate the widening of the roadway, and this was done. Although the power line was completely within the widened right-of-way after being relocated, Von Bank objected to the new power line location, on the grounds that the relocated poles created an obstacle to his farming equipment,

effectively reducing the size of the area from which he could harvest hay, so Otter Tail found it necessary to commence a condemnation action against him, which it had the legal authority to do.

Otter Tail argued that the additional 17 foot strip had been acquired to serve all purposes related to the improvement of the highway, including the relocation of the power line, so Otter Tail was entitled to occupy that strip with it's line of poles. Otter Tail also argued that the need to relocate the power line was clearly known and understood to be one of the reasons why the additional 17 feet had been acquired, so since Von Bank had agreed to the widening of the right-of-way, without reservation, he now had no right to object to Otter Tail's use of any portion of the right-of-way. Von Bank argued that he had conveyed only an easement, therefore he was not legally required to completely cease all use of his land lying within the right-of-way. He argued that he still had the right to farm the portion of the right-of-way that was not part of the roadbed, and he was entitled to compensation, due to the fact that Otter Tail's relocated power line had deprived him of the opportunity to do so. The trial court ruled in favor of Von Bank, deciding that his ability to make use of his land had been damaged by the presence of Otter Tail's relocated power line, even though it was within the expanded right-of-way. The amount of compensation awarded to Von Bank was insignificant to Otter Tail, but the precedent established by this ruling meant that Otter Tail could be subjected to innumerable claims of a similar kind made by others going forward, so Otter Tail opted to seek a reversal of this decision.

The Court began it's analysis of the situation by stating that certainty and accuracy are as essential in the creation of an easement as those factors are in describing a conveyance of land in fee, because both the holder of the easement and the owner of the servient estate need to be fully aware of their relative rights and limitations, in order to prevent the development of controversies such as the one seen here. To that end, the Court looked closely at the content of the conveyance of additional right-of-way width made by Von Bank, and determined that he had conveyed no rights that were not expressly described in the deed. Easements can be, and in fact frequently are, created in the absence of specific or detailed language, whenever the totality of the evidence clearly indicates that the parties

intended to create an easement. In such situations, any omitted details, such as the location, dimensions or allowable uses of the easement in question, that were not specified in the process of creating it, become subject to judicial determination. While the absence of specific details in the description of an easement is typically not fatal to the existence of the easement, unless excessive uncertainty regarding the nature of the easement makes it impossible to uphold, the absence of details can have a profound effect on the usefulness of the easement, which this case illustrates particularly well.

In this case, the grant of additional right-of-way width signed by Von Bank failed to address the power line relocation, giving rise to the present dispute, so the fundamental question was where the responsibility for that omission should lie. Von Bank had merely signed the deed that was placed before him, he had not been involved in any way in the formulation of the language used in the document, so he was in no way responsible, the Court found, for it's content, or for any omissions of potentially relevant items. Von Bank was clearly an innocent party, in the eyes of the Court, and in executing the easement he was dealing with parties who were experienced in matters relating to the conveyance of land rights, a factor which operated strongly in his favor. The Court looked sternly upon the suggestion by Otter Tail that Von Bank had failed to fully and properly express his intention to reserve the right to continue to use a portion of the right-of-way for farming purposes, and by signing the deed had forsaken his right to use that portion of his land at all. The Court responded to that assertion by pointing out that the grantor of an easement need not specifically reserve any rights to the land covered by the easement, because he is presumed to have intended to convey only those rights expressly enumerated in the conveyance, and to have retained all of his existing rights to the easement area that he did not expressly grant. Since Von Bank had no control over the language of the conveyance and simply signed it in good faith, the Court deemed it most appropriate to determine the impact of the conveyance on him in a manner that protected his rights, which in this case meant holding that he could not be required to bear the consequences of the failure to address the relocation of the power line in the document conveying the additional right-of-way.

When land is conveyed in fee, the grantor is presumed to have

intended to convey all of it, and all rights that are appurtenant or legally attached to it, and the grantor bears the burden of expressly reserving whatever is not intended to be conveyed. That rule is not applicable to easement conveyances however, because in conveying an easement, there is clearly no intention to convey all of the rights of the grantor, the intention is to convey only a certain right, or only a specific and limited set of rights. For that reason, even though Von Bank was the grantor in this case, the Court recognized that he had legally retained his right to use the portion of his land lying within the right-of-way, to the extent that his use did not interfere with the use of the public highway. Even though neither he nor any of the other land owners burdened by the right-of-way had ever expressly reserved any specific rights to the area covered by either the original section line right-of-way or the additional right-of-way, they still had those rights, because nothing is conveyed by implication in an easement grant, except that which is necessary or required to make use of the easement for it's intended purpose. Here, the grant of additional right-of-way width, being silent as to the power line, failed to convey the right to install a power line without compensation for the additional burden imposed upon the land by the line's physical presence. Von Bank was able to prove that the productive value of his land had been reduced by the relocation of the line of poles, so the Court agreed that he was entitled to compensation for that loss. With regard to the county resolution concerning the harvesting of hay within the right-of-way, the Court found that although it could not control the rights of the parties, over the language of the conveyance, it did supply legitimate and relevant extrinsic evidence of the intentions of the parties at the time the additional right-of-way was acquired. Stating that the resolution served to clarify the true intent of the parties, and the relevant details of their agreement, the Court announced it's acceptance of the following powerful rule governing both the physical extent and the scope of use of any ambiguously described easement:

> “If an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necessary and convenient for the purpose for which it was created .... where a grant of an easement is general as to the extent of the burden to be imposed upon the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a

> particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed."

Consistent with it's previous rulings, the Court had again upheld the fundamental right of a servient owner to make the fullest possible use of the burdened portion of his land, and to defend it against additional burdens allegedly created by implication. The evidence was sufficient to show, the Court decided, that the relocation of the power line was not envisioned as being part of the agreement at the time of the conveyance of the additional right-of-way, the parties had intended that Von Bank would be allowed to continue to use the right-of-way productively and unhindered, and since the language of the conveyance failed to indicate that his use of part of his land could be blocked by the power poles, Otter Tail was not entitled to obstruct his use of the 17 foot strip without compensating him for that deprivation. Although Otter Tail had an established right to maintain a power line on Von Bank's land, in the original power line location, by virtue of the use and acceptance of the line in that location, Otter Tail had no right to unilaterally relocate the line, without Von Bank's consent. With it's adoption of the important principle quoted above, the Court had joined the majority of states, acknowledging that the actual use of an easement is valuable evidence of the intended character of the easement, potentially defining it's location, it's width, and it's approved use or uses. In addition, the Court had confirmed that even an easement with specific dimensions cannot be used to the full extent of it's length or width, unless the proposed use of the full easement area can be justified. In other words, even an easement with specifically described dimensions is not subject to complete control by the easement holder, who is required to respect the right of the servient owner to make use of the same area, meaning that the easement area can be used only to such an extent as can be justified, by being shown to be both relevant to the easement's purpose and genuinely necessary to accomplish that purpose. The Court has made reference to this ruling in numerous subsequent cases, such as Hjelle v Snyder in 1965 for example, in support of the rights of servient land owners to engage in reasonable and appropriate uses of that portion of their land lying within an easement held by others. In that case, a servient owner successfully defended his right to maintain a fence and a pole supporting a lighted business sign, that was located within the right-of-way of a state highway, as the Court held that no adverse impact

on the right-of-way resulted from the fence or pole's presence, and the state could show no right or need to exert absolute control over every bit of the right-of-way in question.

NORTHWESTERN MUTUAL SAVINGS & LOAN ASSOCIATION v HANSON (1943)

In this case we first observe the Court exercising the judicial remedy of after-acquired title, and doing so in a novel way, in accordance with principles of equity, to do justice and eliminate fraud. The doctrine of after-acquired title typically serves to prevent a party from recovering or retaining land, through deception, that the party previously expressed an intention to convey. It provides a means of compelling a grantor to convey land that he has made a commitment to convey, at such time as the grantor obtains the land, whenever the opportunity to legally convey the land presents itself. Under this rule, the grantor cannot choose to keep the land in question, it passes automatically and involuntarily to the grantee, as soon as the grantor obtains the right to convey it, essentially forcing the grantor to make good on his promise to convey it. Simply stated, one cannot claim ownership of land after promising to convey it, based on some legal defect, technicality or flaw that existed at the time of conveyance. In the 1909 case of Smith v Hogue, for example, the Court ruled that when Smith, who had deeded land to Hogue, acquired an existing mortgage on the land and attempted to use it to take the land back from Hogue, Smith had committed a breach of his warranty to Hogue. The Court held that Smith had been unable to complete the conveyance, due to the existence of the mortgage, but when Smith acquired the mortgage he became capable of completing the conveyance, so the title obtained by Smith, by means of the mortgage, had passed immediately from Smith to Hogue, in fulfillment of Smith's warranty to Hogue, effectively preventing Smith from implementing his scheme to deprive his grantee of the land. In that case, the after-acquired title doctrine operated in it's most conventional fashion, enabling the Court to prevent a grantor from victimizing his own grantee. The case we are about to review is also instrumental in developing a sense of the depth, breadth and power of the principle of estoppel. Although the Court reserves the right to apply a

strict and multi-faceted definition of estoppel in cases where it declines to invoke that principle, as we have seen in earlier cases, it sometimes employs a broad and sweeping definition of estoppel. For example, in Woodside v Lee, in 1957, the Court stated simply that the essential element of estoppel is representation, inducing another either to act, or to refrain from acting. In a similarly general manner, in Kunick v Trout, later that same year, the Court declared that estoppel should always be applied to "...accomplish that which ought to be done between man and man .... upon the principles of morality and fair dealing...". Then in 1958, in Aure v Mackoff, speaking with reference to the 1909 Smith case, the Court defined after-acquired title as a form of estoppel by deed. We will note the limitations on after-acquired title subsequently, when it next appears, four decades down the road. In this case however, we will see the Court demonstrate that where equity commands it, the doctrine of after-acquired title can also be applied to prevent a grantee from successfully perpetrating a breach of contract.

1935 - Northwestern acquired a typical city lot at a tax foreclosure sale.

1936 - A sheriff's deed for the lot was issued to Northwestern, but Northwestern did not record the deed at this time.

1937 - Northwestern agreed to sell the lot to Hanson, and a contract for deed was executed, in which Hanson agreed that he would pay all the taxes on the lot, including both the current taxes and all future taxes, commencing immediately.

1940 - The lot was taken by the county, because Hanson had not paid any of the taxes, and the lot was sold by the county to Sander, by tax deed. Sander promptly quitclaimed the lot back to Hanson. Hanson immediately mortgaged the lot to Hamm, so Hamm also claimed an interest in it. When Northwestern discovered what Hanson had done, the association recorded it's deed to the lot, and filed an action against Hanson and Hamm to quiet it's title to the lot.

Northwestern argued that it could not be deprived of it's ownership interest in the lot, even though it had failed to pay the taxes on the lot, because it had entered into an agreement in good faith with Hanson, which had placed the burden of making the tax payments upon him, and he had

knowingly accepted that burden. For that reason, Northwestern argued, the interest in the lot that was acquired by Hanson, as a consequence of his own failure to fulfill his agreement with Northwestern, should be treated as after-acquired title, because it was acquired in derogation of a valid existing agreement, and Hanson therefore should be compelled to concede that his acquisition of the lot was made in recognition of the interest of Northwestern, and acknowledge that his acquisition was equivalent to a conveyance of the lot to Northwestern. Hanson argued that, under the rule announced by the Court in the Baird case in 1929, which we have previously reviewed, a tax deed creates a new and perfect title, that is absolute in nature, emanating as it does from the sovereign, and not from the previous owner of the subject property. The Court, Hanson argued, had established and consistently applied this rule, in the Baird case and other cases subsequently decided, so his ownership, by virtue of the tax deed, was completely disconnected from the former ownership of Northwestern, his title was not dependent upon, or even related to, the title once held by Northwestern, and he could not be compelled to convey the lot. The trial court agreed with Northwestern and ruled that the quitclaim deed from Sander to Hanson effectively conveyed the lot to Northwestern.

We have already seen many cases in which the importance of good faith has been demonstrated, but this case provides perhaps the ultimate example of how the Court deals with actions that come within the letter of the law, if the law is viewed in a strict and literal manner, but which are clearly in violation of the spirit of the law. Laws, rules and principles need to be developed, and so they are developed, put in place, and applied, but the intention behind those laws, rules and principles must always be understood, observed and honored. Those who set out to find creative ways to manipulate the law in their favor, to the disadvantage of others, who have become innocently involved in deals, agreements or transactions with them, run the risk of being seen by the Court as having failed to carry their own most fundamental burden, to behave and operate in good faith. Hanson had come up with what appeared to be an easy way to cut Northwestern out of the picture, with respect to this lot, by using a premise established in a ruling handed down by the Court, in a manner that was unintended and unforeseen by the Court. He was essentially making the assertion that the only way the Court could deny his absolute ownership of the lot was by

reversing itself on the law relating to tax deeds, and striking down the ruling in the Baird case and subsequent cases. But the Court has both great wisdom and great resources, and it chose a different avenue to resolve the conflict presented here.

The Court found that the evidence made it clear that Hanson had acted in bad faith. He had first violated his covenant with Northwestern to pay the taxes on behalf of Northwestern, during the period of time when the contract for deed was in effect, and he had then acted in a manner which indicated that this failure on his part had been a deliberate one, targeted at placing Northwestern in a disadvantageous position and placing himself in an advantageous position. In other words, he intentionally set out to reap a benefit from his own deliberate failure. This behavior, the Court determined, was a legitimate basis for an estoppel against Hanson. The Court cited cases from California and Washington, in which those states had ruled that an otherwise valid conveyance or acquisition, in which some form of bad faith or deception by the grantee was instrumental, would not accrue to the benefit of the grantee. The court ruled that the doctrine of after-acquired title does apply to this situation, since it stipulates that if a party acquires land which is subject to a valid prior conveyance agreement made by that same party, the acquiring party cannot claim that they have acquired the land independently, exclusively or completely free of the prior conveyance agreement. In other words, the subsequent acquisition is deemed to have been made in fulfillment of the original conveyance agreement. After-acquired title, as has been noted, is typically applied against a grantor who attempts to use a subsequent acquisition as a tool with which to deny, defeat or overcome an ownership claim being made by his own grantee. In this case however, the Court makes it clear that the same principle can also be applied against a grantee, in the event that it is the grantee, rather than the grantor, who acted in bad faith. The Court explained it's view of what had transpired as follows, referring to Hanson as the vendee:

> "...the vendee failed to pay the taxes which he had agreed to pay. The direct result of this omission was the sale of the premises for taxes and the ultimate issuance of a tax deed .... to Sander .... which vested a paramount title in him. The vendee then acquired this title. To permit the vendee to thus take

> advantage of his own dereliction to the detriment of the vendor would contravene sound principles of equity. The title that had it's inception in the vendee's breach of covenant inures to the benefit of the vendor."

The trial court had gotten it right, the tax deed was valid and paramount, which was in keeping with the ruling in the Baird case, and this was also just as Hanson himself had asserted, but at the moment Hanson acquired the tax title, it immediately passed on from him to Northwestern, as after-acquired title, because he was still bound by the terms of his original agreement with Northwestern as his grantor. In other words, his acquisition of the lot could only serve to reaffirm the ownership of the lot by Northwestern, since he and Northwestern were, in effect, partners in an active agreement. In the view taken by the Court, the acquisition by Hanson from Sander merely saved the lot from being conveyed to someone else, and thereby served to keep the original agreement between Hanson and Northwestern in effect. Hanson, in the context of the outcome approved by the Court, by saving the lot from being acquired by a stranger, had actually done Northwestern a service, restoring the title to Northwestern and thereby correcting the ill effects of his own failure to pay the taxes in the first place. As to the rights of Hamm, the Court found that Hamm had notice of the situation, as it stood at the time Hanson mortgaged the lot to Hamm, so the estoppel against Hanson applied equally to Hamm. By this means, the Court dodged the snare that had been set for it by Hanson, upholding the ruling in the Baird case, while at the same time quieting title to the lot in Northwestern, subject to the right of Hanson to continue making payments on the lot, per the contract for deed, and obtain a deed to the lot from Northwestern, upon completion of his payments.

STATE v LOY (1945)

Here, we come to the first case in which the Court was asked to examine and rule upon the formation of an island in a river. As we have seen, the Court had already dealt with rights relating to islands, but those islands had been in lakes. The situation presented by this case involved a far

more volatile and dynamic island, located in the Missouri River, opening up a new range of issues regarding islands. In addition to that, the evidence available in this case was far more detailed and extensive than the evidence had been available in any of the previous riparian rights cases that had come before the Court. This was partly attributable to the fact that North Dakota claimed an interest in this island, and therefore brought it's considerable legal and investigative resources to bear on the matter. This proved to be crucial, as the scope of the evidence presented by the state essentially overwhelmed the testimony of the opposing group of riparian owners, which was lead by a man who had lived in this location on the river for over six decades. Although testimony is generally very powerful and influential, this case provides a superb example of how it can be overcome by truly superior documentary evidence. This case also reinforces the principle propounded in the last riparian case, the Oberly case of 1937, that accretion is always presumed, while avulsion must be proven. As we see here again, a claim based on avulsion is typically viewed with skepticism by the Court, and therefore has a large initial hurdle to overcome. We will see several later cases involving river movement, and the formation of islands, with circumstances even more complex than those described here, but this case provides a good initial encounter with river island issues.

> 1881 - Original GLO surveys, subdividing townships crossed by the Missouri River, were performed in Mercer County, and the land was platted. One GLO township plat showed that the river entered Section 6 from the north, flowed south through both Section 6 and Section 7, and then turned east in Section 18, exiting Section 18 flowing eastward. The plat showed that the river was about half a mile wide in this area, there were no islands, and the main channel ran near the west bank. The Knife River entered the Missouri from the west, in the north half of Section 6.
>
> 1886 - The exact date of Loy's entry is unknown, but by this time he, along with a group of others who joined him as claimants, had evidently acquired all the land lying west of the river in sections 6, 7, and 18, presumably by patent, and he was living on the land. His ownership of this land, his riparian rights, and his presence on the land from this time forward, were not disputed.

1887 to 1888 - According to Loy, an island was created when the river cut through a sandbar that projected from his land on the west bank, a short distance north of the river bend, and after this portion of his land was severed, the resulting island grew by accretion. Who owned the land east of the river is unknown, it may have been vacant and unpatented, but whoever the owner was, they made no claim to the island and did not participate in this case.

1889 - A topographic survey of the area was performed by the United States Army.

1891 - A map of the 1889 survey was published, showing that the river had expanded greatly in width to the east. It now covered parts of Sections 8 & 17, and an island, over a mile long, appeared where the east bank had formerly been, in the southeast quarter of Section 6 and the east half of Section 7. The map indicated that the main channel now ran between the island and the east bank. It also showed that there was brush growing on the west half of the island, indicating that the eastward shift of the channel had been avulsive and the west channel was now just a remnant of the 1881 channel. The entry point of the Knife River had moved south, and was near the middle of Section 6, west of the upper portion of the island. A flood of the Knife River had evidently shoved this section of the Missouri to the east, presumably either by sheer force of water, or by dumping debris into the west channel, tending to indicate that the island was actually a remnant of a portion of the 1881 east bank, that the Missouri had cut around.

1909 to 1911 - According to Loy, the west channel went dry at this time, reconnecting the island to his land. From this time forward, he and his fellow defendants claimed to have used the former island area, although the nature of their use is unspecified and there was no evidence that anything was ever built there.

1916 - According to other witnesses, the west channel went dry at this time, connecting the island to Loy's land for the first time. The state conceded that the former island had been used by Loy and others from this time forward.

1945 - The subject property, being the former island, had grown by

accretion to over 1000 acres and the state evidently decided that the time had come to claim ownership of it.

North Dakota argued that the island was the result of accretion within the bed of a navigable river, and had formed after statehood, and therefore, by statute, it belonged to the state, despite the fact that it had become connected to Loy's land and had been used by Loy and others for about 30 years, because the state owns the river bed and state land is not subject to loss as a result of use by others. Loy did not argue that the area had become his by virtue of use, he argued that it had always belonged to him, because the island was originally comprised of land that was a part of the west bank, which he and his fellow claimants owned at the time the island split off from the bank. He argued that the origin of the island was an avulsive event, which he testified that he had witnessed nearly 60 years earlier, and that since avulsion does not change boundaries, the land remained his, in the form of an island. He agreed with the state that islands can grow by accretion, but he argued that since the original island was his, all the accretion that had attached to it was his as well. He also agreed with the state that the fact that the former island was connected to his land was irrelevant, but in his view this was irrelevant because he had already owned it for decades by the time the west channel dried out. Lastly, he argued that the thread of the river was his true boundary, so he was entitled to any portion of any island lying within his half of the river, regardless of how it formed. The trial court ruled that the former island belonged to the state.

In view of the very substantial objective evidence provided by the 1891 map, described above, regarding the physical circumstances surrounding the formation of the island, the Court was justifiably skeptical of the testimony offered by Loy. His testimony was plausible, and the Court did not indicate that it had any suspicion that he was lying, or even that his memory must be incorrect, but in this case, the Court found that the documentary evidence of what had taken place was the most convincing evidence presented, and since it was contradicted only by Loy, it must control the outcome. The evidence presented by the 1891 map indicated that the island was already very large in 1889, which was dramatically at odds with the testimony of Loy that the island had just begun to form a few years prior to 1889. The Court was understandably unwilling to accept the idea

that the island had grown so large so quickly. The Court therefore rejected Loy's assertion that the island had sprung from his land on the west bank of the river, while accepting the contention put forward by the state that the island was the product of accretion, in the absence of any other testimony to the contrary.

Since it had already been established that the Missouri River is navigable, and that the rights of riparian owners on a navigable river extend only to the low water mark, Loy's claim to the thread of the river was to no avail, even though he had acquired his land prior to the time of statehood. Citing several landmark decisions of the United States Supreme Court, involving navigability, the Court ruled that prior to statehood, the beds of all navigable waters were held in trust, by the federal government, for the states that would be carved out of the land in the future, and such beds were never intended to be included in any patents for government lots that were issued to entrymen by the federal government. So even though Loy was right that avulsion does not change boundaries, and he was also right that he was entitled to any accretion that attached to the west bank, he still had no valid claim to the former island, because he could not prove that it had ever been part of the west bank. The accretion that took place after the west edge of the island became attached to his land was accretion to the east side of the former island, and was not accretion to his land, either directly or indirectly. The boundary between his land and the former island was established by reliction, and was the final thread of the west channel, which was the line where the last water ran before the west channel went dry. Even as a legitimate riparian owner, Loy could gain nothing by accretion or reliction beyond that line.

The Court quieted title to the former island in the state, but three additional items remain worthy of note. One is that if the topographic survey of the area had not been made in 1889, clearly illustrating the conditions at that critical time, Loy probably would have won, since there would have been no superior evidence to overcome his testimony that the island was originally part of the west bank. This demonstrates the fact that a survey, when properly and thoroughly done, can have great value, even many decades later, and can be used for a purpose that was never even imagined by the surveyor. A second point is the fact that the state could also very

easily have lost this case if the owner of the east bank had made the same argument that Loy made, regarding avulsion. Since the evidence strongly indicated that the island could have originally been part of the east bank, whoever owned that land at that time would have had a much stronger case than Loy had, and probably would have prevailed, if they had chosen to present a claim. Thirdly, the Court acknowledged, in it's concluding remarks, that the United States might have a valid claim to the island, if it could be proven that the island existed prior to statehood, which the 1891 map certainly tended to indicate, since the United States could argue that it was still federal land, that had been omitted from the original survey. Nonetheless, since the United States asserted no claim to the island, the Court was free to rule that the strongest claim presented was that of North Dakota.

ARHART v THOMPSON (1948)

This case provides particularly valuable insight into what constitutes a conveyance, and conversely, what does not constitute a conveyance, as it contains examples from both sides of that equation. Although this is not a statute of frauds case, it does once again illustrate the fact that no formal written document, proclaiming itself to be a conveyance, is required to satisfy that statute, and at the same time, it also documents an instance in which an otherwise legitimate deed turned out to be invalid. Two earlier decisions of the Court, related to the issues involved in this case, are worthy of notice at this point. In the 1916 case of Erickson v Wiper, a very frequently cited case, Wiper, a banker who had been engaged in numerous land transactions, was held by the Court to be bound by the terms of an agreement he had made with Erickson, even though portions of the agreement, as alleged by Erickson, were not in their written contract. The Court ruled in that case that since Wiper was a professional, familiar with land transactions, and Erickson was not, Wiper carried a higher burden than did Erickson, and therefore must make good on his contemporaneous verbal statements, which had amounted to promises, inducing Erickson to enter into the written agreement. Since Wiper had written the contract himself, the

Court would not allow him to escape his burden to fulfill all the aspects of his agreement with Erickson, simply because he had failed to include some of them in the written contract. As we will see, this serious burden on professionals dealing in real property, to follow through on their promises, would be applied again by the Court in the case we are about to review. Then in 1920, in Magoffin v Watros, a case from the other end of the spectrum, concerning the validity and effect of conveyance documents, the Court decided that even though deeds had been legally prepared and stored for safe keeping, no conveyance had taken place. Watros, a young mother of an infant, who was evidently in fear for her life, had deeds prepared conveying her land to her child, and had them stored in a bank vault, shortly before she died. The Court decided, in that case, that the deeds were invalid, because Watros never physically delivered them into the possession of the infant. Furthermore, the Court determined, even if a physical delivery of the deeds into the hands of the infant had taken place, there could have been no mutual intent to convey the land and to accept the conveyance, between mother and child, since the child was merely an infant, so no valid deed delivery, and no conveyance, had occurred. This particular aspect of deed delivery, emphasizing the importance of the mutual intent of the parties to transfer dominion and control over the land at the moment of conveyance, would also emerge as a major factor in the case we are about to review.

1944 - Thompson was the owner of a typical city lot with a house on it. She never lived on the lot herself, she owned it as an investment property and it was occupied by various renters. How or when she had acquired the lot is unknown, but her ownership of it at this time was undisputed. Thompson, who was planning to move to California, gave her sister a warranty deed for the lot, prior to departing from North Dakota. Thompson continued to act as the owner of the lot however, remaining in charge of the rental and upkeep of the property, and her sister had no involvement with the property at all. Both Thompson and her sister had been active as professionals in the real estate business for a number of years.

1945 - Arhart wrote a letter to Thompson, who was in California at this time, proposing to buy the lot, which adjoined a lot that was already owned by him. Thompson wrote back, stating the price at which she was willing to sell the lot and asking Arhart to let her know

if he found her price to be acceptable. Arhart sent Thompson a letter notifying her of his acceptance of her offer, along with an initial payment on the lot. Thompson returned the initial payment to Arhart, along with a letter stating that she had decided not to complete the transaction. He repeatedly attempted to pay the full price that she had quoted to him, in order to complete the deal, but she steadfastly refused to sell him the lot. About a week later, the deed that Thompson had given to her sister the previous year was recorded. Arhart filed an action against Thompson for breach of contract.

Arhart argued that all the essential elements of a binding conveyance agreement had been put in place by means of the correspondence between Thompson and himself, and therefore a binding contract existed between them, which Thompson must be compelled to perform, by conveying the lot to Arhart for the agreed price, even though no contract for deed had ever been signed, or even prepared, by either Arhart or Thompson. Arhart did not argue that the 1944 deed was invalid because it was unrecorded, he argued that Thompson had not actually given the deed to her sister in 1944, but instead she had given the deed to her sister only after deciding not to sell the lot to him, as a means by which to escape her commitment to sell the lot to him, so she was in fact still the owner of the lot at the time she offered it to him, and he had the right to rely on her offer as a binding contract. Thompson did not argue that the alleged agreement was in violation of the statute of frauds. She admitted that she had intended to sell the lot to Arhart and that she had agreed to do so, although she felt that no binding contract had been created. She relied completely on the deed to her sister, as proof that she was no longer the owner of the lot at the time she agreed to sell it to Arhart. She argued that the deed was valid, even though it had not been promptly recorded, and that it was therefore impossible for her to sell the lot to Arhart, since she had already conveyed it to her sister, over a year earlier. The trial court ruled in favor of Arhart, based solely on his assertion that Thompson had not actually given the deed to her sister until after she had decided not to sell to him, without investigating the truth about the date of the deed, since the deed had not been among the evidence presented.

This case came before the Court twice, first in 1947 and then again in 1948. The first time this matter came before the Court, after reviewing all

the evidence, the Court decided that the conclusion reached by the trial court, accepting the assertion of Arhart that the two sisters had lied about the 1944 deed, was not supported by the evidence and was unjustified. Thompson's sister had specifically testified that the deed was given to her, by her sister, in 1944. The Court was unwilling to accept the conclusion that Thompson's sister had committed perjury. Instead of reversing the decision however, the Court found that the evidence was insufficient to reach any definite conclusion, one way or the other, and remanded the case back to the trial court, with instructions to accept and consider additional evidence from both sides. The trial court, after documenting the additional evidence that was presented, returned the case to the Supreme Court, with the original decision in favor of Arhart still in place. Upon reviewing the additional evidence in 1948, the Court verified that the deed had in fact been given by Thompson to her sister in 1944. A certified copy of the deed showed the date and indicated that it had been duly notarized. The testimony of the sisters was consistent and they had not lied about the deed or perjured themselves. However, that was not enough to tip the balance in their favor.

Thompson testified that she had given the deed to her sister because she was unsure about whether or not she would ever return from California. She also testified that she trusted her sister to keep the lot for her so she would have a place to live if she did decide to return to North Dakota. Thompson's sister testified that she had not wanted the lot for herself and that she had not paid her sister anything for it. Both sisters testified that their agreement, at the time the deed was issued, was that Thompson's sister would either continue to rent the house and lot, or move into the house herself. Based on this testimony, the Court concluded that even though the deed had been physically delivered, directly from Thompson to her sister, no transfer of ownership had taken place, because none was intended. The moment of physical delivery of a valid deed is typically the moment of conveyance, but a conveyance must be unconditional, there is no such thing as conditional delivery of a deed. This testimony, when viewed in combination with the subsequent behavior and actions of the sisters, with respect to the subject property, made it very clear that Thompson had not intended the deed to operate as an absolute or immediate conveyance, but had only intended to give her sister the opportunity to take control of the lot at some time in the future, if Thompson should happen to die in California.

The sisters, by virtue of their complete honesty regarding their intentions, had effectively destroyed the effect of their own deed. This may be cause for some sadness or sympathy on their behalf, but the cold hard lesson to be learned is that one can destroy the effect of one's own written deed, with only one's own words and actions. Its also important to understand that the deed was not ineffective because it was unrecorded. It would have had full effect, although unrecorded, if it had been intended to signify an immediate and complete conveyance of the subject property. The deed had no effect because no valid deed delivery, with the intent to convey the land, had taken place. Physical delivery of a deed conveys the land only if accompanied by an intention to unconditionally convey the land.

The Court ruled that Thompson had never ceased to be the true owner of the lot, her agreement to sell the lot to Arhart was complete and fully binding upon her, her sister had acquired nothing by means of the 1944 deed, and Thompson must convey the lot to Arhart for the agreed price, upholding the decision of the lower court. The written offer Thompson made to Arhart included all the elements required by the statute of frauds, the subject matter was specified, the parties involved were specified, and the amount to be paid was specified. A binding contract had been created at the moment Arhart made his initial response to the offer and provided an initial payment to Thompson, accepting the offer, so no argument based on the statute of frauds would have been of any benefit to Thompson. Another major lesson taught by this case is that once again the Court ardently followed the rule that substance must triumph over form. The deed from Thompson to her sister was in the proper legal form, but lacked substance. Conversely, while the letter from Thompson to Arhart lacked the formality of a contract for deed, it contained all the substance necessary to give rise to justifiable reliance by Arhart, and for that reason he prevailed. Lastly, the Court emphasized that since the Thompson sisters were both professional career women, with experience in land transactions, they could not successfully claim to have been innocently ignorant of the legal elements of a conveyance. The Court determined that they bore a higher burden of knowledge and diligence than others, who were less familiar with land rights, when conducting negotiations and conveyances, and as professionals, they must be held accountable for both their actions and their lapses.

STATE v BRACE (1949)

In 1949, North Dakota, perhaps emboldened by it's victory in the Loy case four years earlier, claimed ownership of two small lakes and their beds, in separate cases, primarily on the basis that they were navigable. In both of these cases however, the Court would deny the validity of those claims, tightening it's definition of navigability in the process, to come into line with the ongoing development of federal case law regarding the definition of navigability. Interestingly, the state also attempted, in both cases, to assert that it's claims of land ownership were supported by certain language concerning water, and the use of water, found in the Constitution of North Dakota. The Court would summarily dispose of this effort however, by differentiating between land rights and water rights. In the case that we will review in detail, the Court was again confronted with a situation involving dramatic fluctuations in the water level of a lake, just as it had been in the Brignall and Roberts cases. In this case however, the source of the fluctuation was artificial, rather than natural. Unlike the Brignall case, the ownership of the entire bed of the lake was at issue here, there being only one private land owner involved, and unlike the Roberts case, the lake here was fundamentally insubstantial, being a typical prairie pothole, so this case was somewhat unique in those respects, and distinct from those previous lake cases. All of these cases, featuring lakes with fluctuating water levels, serve to foreshadow the long series of cases resulting from the well known changes in the water level of Devils Lake, the most relevant of which we will subsequently examine.

1872 - Townships were subdivided in the area drained by the Goose River. In Section 12 of one township there was a lake near the river, that would come to be known as Fuller's Lake. The lake was meandered during the original GLO survey, which showed that it covered about 170 acres.

1884 to 1902 - The various portions of Section 12 were patented. Eventually, Brace became the owner of the entire section.

1909 - A ditch was dug, connecting the lake to the river, which caused most of the water in the lake to drain out.

1934 to 1936 - The lake went almost completely dry, some water remained, but only in the drainage ditch.

1937 to 1949 - A highway was built, running between the river and the lake. During the grading of the highway, a portion of the ditch was filled in, where the road grade crossed the ditch. This blockage caused the lake to begin to gradually refill itself. By the time of the trial, the lake had completely refilled and may have actually been even larger than it's original size, since the meander line was reported to be under water in some places. The lake and the surrounding marsh began to be used for waterfowl hunting, but only on a limited basis, and it was never used for fishing or any other activities involving boats. North Dakota decided to condemn about 180 acres of Brace's land around the lake, to create a wildlife refuge. The state believed that it already owned the lake, so it proposed to compensate Brace only for the 180 acres lying outside the meander line, and not for the 170 acres lying inside the meander line. Brace believed that he owned the lake bed as well as the adjoining land and that he was therefore entitled to compensation for all 350 acres being taken by the state.

North Dakota argued that the lake was clearly navigable, both at the time of the original survey and at the time of statehood, based on the fact that it was meandered, so it belonged to the state. The state claimed that the lake had been illegally drained, and that this action had no effect on the rights of the state, which continued to own the land within the meander line even when the lake was dry. Brace argued that the lake had never been navigable, because it never had any commercial or public value for either transportation or recreation, since it was nothing more than a shallow pothole. Brace also argued that the mere fact that the lake had been meandered during the original survey was not a valid basis for a claim of navigability. The trial court ruled that the lake was navigable and Brace had no valid claim to it.

For the first time since the Roberts case, 28 years earlier, the Court was again required to resolve a controversy relating to the navigability of a lake. Relying on the guidance provided by the landmark 1935 United States Supreme Court decision in US v Oregon, the Court adopted the view that meander lines do not determine navigability, even if a state attempts to

declare through legislation that all meandered bodies of water are navigable. North Dakota had done exactly that, just as Oregon had done, but the Court summarily disposed of the statutes, stating that they could not have been intended to deprive riparian owners of their rights under their federal patents. The rights of federal patentees, and their successors are determined by federal law and cannot be abridged by state law, without just compensation. While the beds of all navigable waters did become vested in the state upon statehood, the state gained no title to any beds of waters that were not navigable in fact at the moment of statehood, and the state has no right to create any arbitrary law or rule that throws a blanket of navigability over all meandered watercourses. The Court reached the conclusion that:

> "...the state may not now successfully assert title, on the ground of navigability, to lands lying beneath non-navigable waters unless those waters were in fact navigable at the time of statehood..."

The Court had taken a bold step toward a progressive view of the public's right to make use of lakes for non-commercial purposes in the Roberts case in 1921, as previously noted, so state officials may well have been very optimistic about their chances of a favorable ruling from the Court in this case. The differences in the historic use of the two lakes, and the physical differences between the two lakes themselves, were dramatic however. Fuller's Lake was a mere pond in comparison to Sweetwater Lake, in terms of both surface area and depth. The Court also noted that access to Fuller's Lake was difficult, the surrounding ground being very marshy, due to the flatness of the terrain. Perhaps most importantly in the eyes of the Court, the historic use did not support a claim of navigability. The state was able to muster only one witness who testified that he had actually been on the lake in a boat, one time in 1908. The fact that for a quarter of a century the water was practically absent from the lake was also compelling evidence that there was no clear need for the lake to exist as a watercourse for transportation, no one had ever relied on it, and evidently no one had missed it during the protracted period of time that it was absent.

Lastly, the state pointed out the language in Section 210 of the North Dakota Constitution, indicating that all flowing streams and natural

watercourses are property of the state. The Court was unwilling to agree that Fuller's Lake came within the definition of a watercourse, and furthermore, citing it's own previous interpretation of Section 210, in the 1896 case of Bigelow v Draper, the Court's earliest decision on riparian rights, it reiterated that this language from the Constitution was focused on the water itself, and the use of the water, not on claims relating to land rights. The Court never addressed the assertion that the draining of the lake had been an illegal act, because that issue was not vital to the outcome. The Court did suggest however, that it viewed the refilling of the lake as an artificial condition, that had come about only as a consequence of highway construction. The Court found nothing unacceptable in anything that Brace had done, and fully upheld his ownership of all the land, including the entire area that was underwater, regardless of whether the lake happened to be full or dry at any given time, reversing the ruling of the trial court. If North Dakota desired Brace's land, for any purpose, he would have to be compensated for every acre taken.

Just three months later, the Court reinforced the key decisions that it had made in the Brace case, ruling upon a set of circumstances that were physically quite different, but very similar in their legal implications, in the case of Ozark-Mahoning v State. The legal battle in that case was over a lake with exceedingly high mineral content, which the Court described as malodorous and devoid of animal life, but which apparently held some mineral value. North Dakota claimed ownership of the lake and it's bed for two reasons, because it was meandered, and because of the language in Section 210 of the Constitution, which reserves ownership of water to the state for mineral purposes. Following it's ruling in the Brace case, the Court again determined that neither of these arguments had any merit, holding that meander lines do not conclusively indicate navigability, and the language of Section 210 of the Constitution applies only to water and was not intended to be used to justify taking private land that forms the bed of a lake or stream without compensation. Neither the presence of the meander lines nor the mineral character of the lake was relevant to the ownership of the bed, the Court found, so just as in the Brace case, the claim to the bed made by the state was vanquished.

CITY OF BISMARCK v CASEY (1950)

Due primarily to the presence of the public section line right-of-way in North Dakota, and various statutes concerning access, at least theoretically providing legal public access to every tract or parcel of land that is subject to acquisition in the state, cases involving claims that access to land is unavailable have been relatively rare in North Dakota. This seminal and frequently cited case however, serves very well to demonstrate one of the many ways in which land can be split or otherwise divided in unusual ways, creating potential access issues and conflicts. Generally, legal public access to all lands conveyed is always presumed to be intended, yet instances inevitably arise in which documents of conveyance result in confusion or controversy over access, typically due to accidental or unintentional omissions of language concerning access, or due to general carelessness or ignorance regarding the importance of properly documenting access rights. In addition, deliberate attempts to extort additional funds from a grantee are sometimes made by deliberately failing to include any language regarding access in a deed. Given the objective of the Court, and the judiciary in general, to protect innocent grantees from such negligence and chicanery, the law has been required to develop a means of addressing and rectifying such legal discrepancies in an equitable manner. Under the common law, an easement for access or other purposes, typically known as a "way of necessity" can legally arise in certain situations, where such an easement can be legally justified as a right appurtenant to any tract or parcel of land that has been created and either conveyed or reserved. The foundation of this policy lies in the principle that the creation and conveyance of land without access is fundamentally repugnant to society, since it renders the land potentially useless, hindering the development of society, and this policy has been adopted in some form, or to some extent, in every state. While it is of course possible to commit land to remain permanently undeveloped, where the intention to devote it to preservation in it's natural state is clear, the legal presumption is that land is intended to be conveyed for purposes of actual use, for the benefit of the grantee and society in general, and therefore cannot be treated as isolated or landlocked unless that intention is specified in the creation of the tract or parcel in question. Therefore, whenever any tract or parcel is created, by any form of land division, access to it is legally presumed to have been envisioned

during the land division process, whether it was actually considered by any of the relevant parties or not, resulting in a burden upon some portion of the divided estate, the location of which can be determined through adjudication, when left unspecified in any conveyance. In this case, we see a classic example of the application of the principle of necessity, resulting in the creation of a series of access easements, which having come into existence, are then conveyed and acquired, despite being entirely undocumented and undescribed, by virtue of the principle of appurtenance.

> Prior to 1950 - The Bismarck Land & Improvement Company (BLI) owned a tract of unspecified size and location, abutting on Boulevard Avenue in Bismarck. The right-of-way of Boulevard Avenue was 33 feet in width, but a plan was developed to widen it to 66 feet. Rather than widening it by 16.5 feet on each side however, the plan called for all of the additional 33 feet to be taken from the side owned by BLI. BLI decided to create and convey an unspecified number of residential lots from it's tract, each of which was described by metes and bounds. Whether or not the lots were actually surveyed or staked prior to being described is unknown, but since there was no dispute over the location of any of the lots, this was not a factor in the case. Evidently no plat was prepared at this time and no formal offer to dedicate the 33 foot strip was made. Since BLI was aware of the plan to widen the Boulevard Avenue right-of-way however, each of the lot descriptions ran only to the proposed 66 foot right-of-way line, and did not include the 33 foot strip that was expected to eventually become part of the expanded right-of-way. The size of the lots, their location within the tract, and whether they were all in one group or were in separate areas, are all unknown, but these items all made no difference to the outcome of the case, and were not discussed by the Court for that reason. The lots were all sold to various unspecified parties, but whether or not any of the lot buyers took actual possession of their lots and occupied them is unknown. Since these events took place in a relatively short period of time, the lot buyers may have not immediately attempted to make use of the lots, and since there was no evidence that the lots had been put to any use, they may have remained vacant. After having sold these lots, BLI sold the remainder of it's tract to Casey. Casey believed that since he had

acquired all of the BLI land that had not been conveyed to the lot owners, he had the right to exercise complete control over the 33 foot strip. Since the strip ran between the lots and the public right-of-way, Casey asserted that he had the right to prevent the lot owners from crossing the strip to reach their lots from the existing public right-of-way, and he informed the lot owners that he intended to do so, unless each lot owner bought a portion of the strip from him. Bismarck filed a condemnation action against Casey, to take control of the 33 foot strip and incorporate it into the existing public right-of-way, as called for under the aforementioned road widening plan.

Casey did not contest the right of Bismarck to condemn and take control of the strip in controversy for public right-of-way purposes, he disputed only the value of the strip. Bismarck argued that Casey was entitled to only the market value of the strip, and presented evidence showing the standard or typical value of comparable land in the vicinity, in order to establish the amount to which Casey was entitled. Casey argued that he was entitled to approximately ten times the market value of the strip. He arrived at this amount by factoring in the amount he expected to get for each portion of the strip that he intended to sell to each lot owner, in order to provide them with access to the existing 33 foot right-of-way of Boulevard Avenue. The trial court ruled that Casey was entitled only to the market value of the strip.

Casey's position was based on the presumption that the conveyances from BLI to the lot owners, which were all executed using metes and bounds descriptions as noted above, were not intended to include or convey any rights beyond or outside the limits of the area precisely described in each deed. The exact language of these descriptions is unknown, but the Court accepted the proposition that they did not explicitly convey any land or any specified rights lying anywhere outside the area described in each one of them. The exact language of the deed from BLI to Casey is also unknown, but the deed was introduced into evidence and examined by the Court, and the manner in which the deed described the land that Casey had acquired can be readily deduced from the Court's comments. Casey's deed evidently described the entire tract owned by BLI, prior to the creation of the lots in question, and then went on to recite each of the lots that had been

created as an exception. From the foregoing, it can be seen that the situation was one in which each of the lots created by BLI was recognized and treated, both by Casey and by the Court, as an isolated parcel with no described connection to a public right-of-way, and the land acquired by Casey was the remainder of the BLI tract, which completely surrounded the lots. Under these circumstances, it can be understood how Casey supposed that he had acquired the right to control the 33 foot strip, and the right to demand that the lot owners deal with him, in order to obtain the right to use any portion of that strip for access or for any other purpose. If the law was simply a literal, rigid and inflexible thing, then Casey would prevail, because the descriptions involved had all failed to specifically express any intention for the lot owners to have any rights beyond the precise and narrow limits of their boundaries, which were described in specific and unambiguous terms in their deeds. Casey was about to learn however, that the law is not governed by literal interpretations or by rigid and inflexible rules, it has the capacity to embrace and employ principles of equity, in order to do justice or prevent injustice, and the Court would use this case to introduce some important principles of that nature into North Dakota law.

After announcing that Casey had been operating under a false premise, in making the supposition that the lot owners needed to deal with him before they could legally make any use of their lots, the Court turned to cases from Illinois, Michigan and Nebraska to explain it's position on the matter, quoting from each of them to enumerate the relevant principles of law, which the Court found to be acceptable and applicable to the situation at hand. The Court formally adopted the following principles, with respect to access rights, incorporating them into the body of law relating to land rights in North Dakota:

> "Where a conveyance is made of realty separated from a highway by other realty of the grantor or surrounded by his realty or by his and that of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway .... A way of necessity is an easement arising from an implied grant or implied reservation, and is the result of the application of the principle that whenever one conveys realty, he conveys

> whatever is necessary for the beneficial use of the realty and retains whatever is necessary for the beneficial use of the realty he still possesses .... Where the owner of land conveys a parcel thereof which has no outlet to the highway except over the remaining lands of the grantor or over the land of strangers, a way by necessity exists over the remaining lands of the grantor .... One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, he has no greater right than his grantor to prevent or obstruct the use of the easement .... A way of necessity arises from an implication of law, from the principle that, where anything is granted, the means to attain it are granted, and by a grant of ground is granted a way to it .... If one grants a piece of land in the midst of this own, he thereby impliedly grants a way to reach it."

Thus the Court overcame the apparent hurdle presented by the failure of the descriptions to expressly state the intentions of the parties that the lot buyers were to have access to their lots. In the absence of a specific statement concerning access in a deed, the Court decided, the law presumes that access was intended, and that the failure to mention it was the result of negligence on the part of the grantor, for which the grantor, or in this case the successor to the remainder land of the grantor, must bear the consequences. Under this mode of document interpretation, any conveyance document that does not specifically address the question of access to the property conveyed or retained, burdens the land with a general right of access, the location and other details of which become subject to future resolution, by agreement of the parties themselves, by operation of law, or by means of adjudication. Having determined that the lot owners already had a legal right of access to their lots over the 33 foot strip, before Casey acquired the remainder land, the Court upheld the ruling of the lower court, agreeing that Casey had no right to require any of the lot owners to come to him in order to obtain access rights, and he therefore had no valid claim to any compensation for the taking of the strip, beyond it's nominal market value. Citing the McHugh case of 1931, which we have previously reviewed, the Court held that Casey, like Haley in the McHugh case, had plenty of notice, or the means to take notice, of the rights of the lot owners

to the land that he was considering acquiring, and therefore he could maintain no legitimate claim that he was an innocent buyer of the land, who had been victimized, and should not be charged with bearing the burden of the access easements found to exist by the Court. If Casey was genuinely unaware of the plan to widen the right-of-way, the Court indicated, he had the burden as a grantee, of inquiring about the conditions at the time he acquired the land, which would have revealed the full scope of the situation to him at that time, had he done so, but since he had failed in that regard, he was in no way an innocent victim. Casey had made the fundamental mistake, made by many others, as we have seen and will see again, of deliberately closing his eyes to the existing conditions and relying solely upon a literal reading of the documents of record, a serious error whenever questions concerning land rights of any kind are in play. The "way of necessity", which had already been widely recognized and applied in the form herein alluded to in most other states, had come to North Dakota. We will see how this doctrine, which has been a source of great controversy in some other states, would play out in North Dakota, many years in the future.

WILSON v POLSFUT (1951)

It was not until 1951 that the Court first adopted and applied the principle of description reformation, based on a mutually mistaken description of land conveyed. This fact alone confirms that successful description reformation cases are rare, since the evidence required by the Court to approve reformation must be quite clear and convincing. Where the evidence makes it clear however, that all of the parties were operating under a mistaken idea or notion, regarding the manner in which the content of the description relates to the land, reformation is a valid remedy, which can be a valuable means of conflict resolution. We have already seen, in the 1933 Bichler case, that the Court will not approve reformation where the evidence merely indicates that one party misunderstood the meaning of a description. It must be evident that all the relevant parties intended to convey a certain definite area, and simply failed to describe that definite area fully or properly, before reformation can become appropriate. In other words, an error made in the process of reducing the true intentions of the parties to

writing justifies reformation, but an error made when reading or using the description does not. This case also presents an exemplary application of the powerful principle that a grantor will be presumed to have intended to convey all of his remaining land, and will not be presumed to have intended to retain an undescribed portion or fragment of it. A grantor conveying a remainder must clearly express his intent to reserve anything that he actually intends to reserve, and where he fails to do so, he will typically be found to have intended to retain nothing. In addition, this case also demonstrates that where a grantor fails to order a survey, before conveying land, it is the grantor who bears the consequences of any mistakes or problems resulting from his failure to correctly indicate the boundaries of the land being conveyed to his grantee, and that burden of correctly marking and describing the boundaries cannot be passed on to the grantee. In the 1946 case of Larson v Wood, which involved lease and rental issues, the Court had adopted the position that in situations where either a mistake or an accident can be shown, in the preparation of a contract, the true intentions of the parties, once ascertained, must control, even where they are in contradiction to the explicit language of the contract, setting the stage for North Dakota's first successful description reformation case.

> 1943 - Five typical lots, numbered 1, 2, 5, 6 & 7, in a certain residential subdivision, were owned by Elizabeth Wilson. She died and the lots passed to her heirs. Lots 3 & 4 were owned by others and were not involved in this case. The dimensions of the lots are unknown, but the rear of Lots 1 & 2 adjoined the north half of Lot 5, which was the rear half of that lot, and Lots 5, 6 & 7 all had houses on them, all of which were on the front half of those lots, which was the south half in each case. Hankla became the administratrix of the Wilson estate.
>
> July 1944 - One of the heirs, Clyde Wilson, acquired sole ownership of Lot 1 and Lot 2 and the north half of Lot 5, from the other heirs. He acquired the north half of Lot 5 only because a building that was sitting on Lots 1 & 2 extended an unspecified distance over the lot line into the rear portion of Lot 5. Clyde continued to be a co-owner of the Lot 6, Lot 7 and the south half of Lot 5, by virtue of inheritance, along with his fellow heirs.

August 1944 - Hankla showed the three houses that were being offered for sale to Polsfut. Neither Hankla nor Polsfut knew where the lot lines were, and no survey was performed, but they reached an agreement that the heirs would convey the three houses, along with the lots upon which they sat, to Polsfut.

September 1944 - The heirs deeded Lots 6 & 7 to Polsfut, but not Lot 5, even though both Polsfut and the all of the heirs fully agreed and understood that all three houses were being conveyed to Polsfut. Polsfut immediately became the landlord of all three houses and all rent paid by the tenants living in the three houses was paid to him from that time forward.

December 1944 - Clyde Wilson acquired the south half of Lot 5, which contained one of the three houses, from the other heirs.

1946 - Polsfut built a house on the north half of Lot 5, which he believed he owned, since it was within the area that had been shown to him when he and Hankla viewed the property together at the time when he agreed to buy the houses and the lots that the houses were on.

1948 - The conflict regarding Lot 5 was discovered. Who discovered this, or how they discovered it, is unknown, and there is no indication that any surveys were ever done. Clyde insisted that he was the legal owner of all of Lot 5 and both houses that were now sitting on it. He filed an action to quiet his title to Lot 5 and sought confirmation of his alleged ownership of both of the houses on it.

Polsfut argued that the description in his deed had mistakenly excluded Lot 5, and that the mistake must be corrected by adding all of Lot 5 to his deed, since it was within the area shown to him by Hankla. Wilson maintained that his deeds showed that he was the owner of all of Lot 5 and the deeds controlled, despite any mistakes that might have been made. He maintained that he had not said or done anything to influence Polsfut, so he was not responsible for the consequences of any mistakes made by Polsfut, and therefore Polsfut had no right to either one of the houses on Lot 5. Neither party got all they were seeking from the trial court, which ruled that Wilson owned the north half of Lot 5, since he had acquired it before Polsfut arrived on the scene, but Polsfut owned the south half of Lot 5 and

both of the houses in question. Polsfut was satisfied and did not appeal, but Wilson appealed, asserting that he should be allowed to keep the house that Polsfut had built on Wilson's half of the lot.

Before looking into the specific circumstances presented, the Court was first required to address the general issue of description reformation. The Court had not previously approved reformation of an existing description based on an allegedly accidental or unintentional omission of a substantial area. The Court adopted the position held by most other states on this issue, which allows reformation in those instances where it can be clearly shown that a definite agreement existed, regarding the boundaries of the subject property, but the description created or used for conveyance purposes failed to properly express the true intentions of the parties, per their agreement, as the result of a mistake in the preparation or composition of the description language, if the mistake was mutual in nature. In accepting the concept of description reformation, as a means of rectifying such mistakes, the Court was simply following the logical extention of it's consistent policy of supporting and upholding agreements, wherever valid evidence of the existence of a legitimate agreement can be found, which we have already seen in action under diverse circumstances in previous cases. Capturing the essence of the role of reformation, the Court stated that:

> “Equity will grant remedial relief where justice and good conscience so dictates .... The object to be aimed at by the courts of equity in such cases is to place the parties as nearly as possible in the same position as they would have been had there been no mutual mistake made in connection with the matter."

Having established that it was open to the possibility of reformation, the Court proceeded to examine the specific circumstances. The Court found that when Hankla and Polsfut viewed the area together, neither of them knew the exact boundaries of the lots. Hankla and Polsfut were both focused only on the houses and neither of them gave any serious consideration to the lot boundaries. Their agreement upon the conveyance of all three houses, however, implicitly included the conveyance of all of the subject property that was still owned by the Wilson estate at that time, the Court determined,

since there was no evidence of any intent to reserve any portion of the remaining unsold area. The Court agreed that the area previously sold to Clyde could not be sold again, but Hankla had made a binding commitment to convey the entire unsold area to Polsfut. Neither the grantor nor the grantee was required to order a survey to reveal the boundaries, the grantor was bound by the agreement to convey all the remaining unsold land, regardless of where the boundaries might prove to be, and any consequences of the failure to survey the boundaries must fall upon the grantor. Polsfut, as the grantee, had the right to rely on the commitment made by his grantor to convey all the land, along with the houses. Since both grantor and grantee innocently believed that the deed conveying Lots 6 & 7 covered all of the land that was intended to be conveyed, the Court decided, their mistake was mutual. The description failed to capture their true intent and was therefore subject to reformation.

On that basis, the Court ruled that Polsfut was entitled to reformation of his description, to add the south half of Lot 5, as directed by the trial court. The acquisition of the south half of Lot 5 by Clyde gave the appearance of having been made in bad faith, especially in the light of his subsequent behavior, standing idly by as Polsfut built another house on Lot 5, clearly showing that Polsfut believed he owned that lot. The Court found that since Clyde, as one of the Wilson heirs, was a co-owner of the land conveyed to Polsfut, he was a grantor of that land himself, along with Hankla and all the rest of the heirs, so he was bound, just as they were, to honor the agreement made by Hankla to sell all the remaining land to Polsfut. Therefore, he could not attack or successfully challenge the claim of ownership of the south half of Lot 5 made by Polsfut, even though he had subsequently obtained a deed covering the same area himself, and even though the deed held by Polsfut had failed to include that area. By the same token, the Court indicated, Clyde could not claim that he was the owner of the house built by Polsfut just because it was on his land, since it was built there as a result of Clyde's own silence. In effect, the Court concluded that Clyde was not an innocent grantee, with respect to the south half of Lot 5, but Polsfut was, and Clyde's behavior was subject to estoppel, with respect to the house built by Polsfut. The Court fully upheld the ruling of the trial court, indicating that although Clyde owned the north half of Lot 5, he had no valid claim to the house, nor could he do any damage to it, only Polsfut

had the right to move it. An important precedent for description reformation had been established, and the Court had again demonstrated, just as in the Arhart case three years earlier, that even a deed which appears to be perfectly legitimate may not control, if an intention to the contrary can be shown. This same focus on accomplishing the intent of a conveyance has been consistently applied by the Court in subsequent cases, such as Zabolotny v Fedorenko in 1982, in which case land was once again accidentally omitted from an otherwise valid deed. The Court ruled that the land in question had been conveyed by the deed, despite it's absence from the deed description, because sufficient extrinsic evidence indicated that the grantor had intended to include it in the conveyance. Even though the deed in question in that case had been in existence for over thirty years, the deed had remained subject to correction, upon discovery of the omission, by means of reformation.

SILBERNAGEL v SILBERNAGEL (1952)

Continuing our study of the rulings of the Court relating to deeds, we come to a case that is very intensely focused on one major factor in establishing the value of any deed, which is the intent of the grantor, and we will see how important this factor is in the Court's determination of whether or not a given deed holds any value, as an operative document of conveyance. Before a description can have any significance, the deed in which it resides must be valid, so here we take notice of three earlier rulings of the Court that have been cited in subsequent deed cases with respect to this issue. In 1901, in the case of McManus v Commow, the question of whether or not a lost deed, that had never been recorded, could have any value, was addressed by the Court. Commow's father had allegedly sold some land, which McManus had subsequently acquired and occupied, but which was also claimed by Commow's daughter, on the basis that there was no evidence that her father had ever conveyed the land, and no description of what land was conveyed, because the alleged deed was lost. The Court ruled that the testimony of the grantor of McManus, who was the grantee of the lost deed, was sufficient to prove that it had existed, and further, the occupation of McManus and his grantor was sufficient to define the area

conveyed, in lieu of the lost description. In the 1939 case of Keefe v Fitzgerald, an elderly man deeded his land to his young girlfriend. He handed her the deed, in the presence of her mother, and she immediately handed it back to him. He then stored it until his death five years later, so she never saw it again until after he died. The Court ruled that this physical delivery, as described in the testimony of the mother, was a complete legal conveyance, that had taken effect at the moment of delivery, and the fact that the girlfriend had relinquished control over the deed did not operate to prevent her from successfully asserting that she had owned the land for over five years, since the moment of delivery, because there was no evidence that the grantor did not intend to convey full control and ownership of the land in question to the grantee at that moment. Then in 1944, in McDonald v Miller, the Court adopted the position that direct delivery of a deed to the grantee is not necessary to complete a conveyance, ruling that delivery of a deed by the grantor to a third party is sufficient to transfer ownership of the land to the grantee, as long as the grantor knowingly and voluntarily intends to part with the land at the moment of delivery. All of these decisions clearly illustrate the Court's focus on carrying out the intent of the grantor, regardless of the circumstances, and on declaring conveyances whole, whenever it is legally possible to do so. In the case we are about to review, we will see the Court continue to pursue that goal, under an even more challenging set of circumstances, involving deliberate destruction of a deed.

> 1935 - Margaretha Silbernagel was a widow with twelve children who owned and operated a large farm, covering several quarter sections. Her adult daughter Adelheid lived with her, the rest of her children lived elsewhere. Margaretha grew old and became unable to run the farm any longer, so she and Adelheid moved off the farm and into a house on a lot in a nearby town.
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> 1939 - Margaretha visited the County Register of Deeds and asked him to prepare deeds dividing her land among her children. He did so, describing each aliquot tract in accordance with her instructions. She signed all of the deeds and instructed him to hold onto them and distribute them when she died. In one of the deeds, she conveyed a certain quarter section to Adelheid.
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> 1940 - Margaretha returned and asked the Register to produce the

deeds. He got them out and she read three of them, the one to her son Adam, the one to her son Jacob, and the one to Adelheid. She had the Register remove a quarter-quarter from Jacob's deed and add it to Adam's deed. She then gave Adam's deed back to the Register, and he put it away along with all the others, except the deeds to Jacob and Adelheid, which Margaretha took with her. She then delivered Jacob's revised deed to him and destroyed the deed to Adelheid. She never made out another deed to Adelheid.

1950 - Margaretha died intestate. The Register delivered the deeds to all of her children, as she had instructed, and he explained to them everything that she had done. Since she had destroyed the deed to Adelheid, the fate of the quarter that had been deeded to Adelheid was in limbo and became a matter of controversy. Adelheid wanted it, but the other children wanted it too, and they insisted that it should be divided equally among all of them. Adelheid filed an action against her siblings, claiming that the quarter belonged to her alone.

Adelheid argued that the quarter was conclusively conveyed to her at the moment that her mother handed her deed to the Register, along with all the other deeds, after having signed all of them in his presence, and whatever happened to it after that moment was of no significance. The other heirs argued that their mother had the right to change her mind about what she wanted to do with her land as long as she was alive, and the only intention on her part that was relevant was the intention she had at the time she died, and her destruction of the deed to Adelheid clearly represented her intention to revoke her grant to Adelheid. The trial court was sympathetic to Adelheid and quieted title to the quarter in her, upholding the destroyed deed and rejecting the claims made by her siblings.

The Court had dealt with lost and destroyed deeds previously, as has already been noted, but here it was faced with a situation in which a deed had been duly prepared and signed, but then deliberately destroyed by the grantor herself, without ever having been presented to, or even seen by, the grantee. This situation clearly called into question the true intentions of the grantor, but of course the grantor was deceased, so no direct and absolute testimonial evidence of her intent was forthcoming. It seems clear enough that Margaretha must have believed that she had the right to change her

mind, and undo or change the conveyances that she had proposed, for whatever reason she may have had, but the question for the Court was whether or not she actually had the power or legal authority to reverse or strike down her own solemn act of conveyance. The Court began it's assessment of the situation with the observation that there is no need for a grantee to take actual possession of either the deed, or the land itself, in order to complete a valid conveyance. Land can be conveyed by presenting a deed to a third party, who can be anyone that is trusted by the grantor to accept and hold the document on behalf of the grantee or grantees, in which case the third party becomes in effect the legal representative of the grantee. If it is the intention of the grantor, at the moment the deed is presented to the third party, that all control over the land shall pass to the grantee, then the conveyance is complete and binding, and cannot be reversed or undone. The knowledge, consent or intention of the grantee, regarding the conveyance, is of no significance in determining it's validity or finality, the intention of the grantor, as the owner in control of the land, is all that matters, so the physical presence of the grantee at the moment of conveyance is not an absolute requirement. If proof were to be presented that Margaretha actually intended to reserve the right to change or even eliminate any of deeds however, then no binding conveyances had taken place, so the question was whether her behavior at the time the deeds were created, or her behavior when she returned to the Register and ordered changes to the deeds, was the best evidence of her true intent.

The Register evidently had a full and very clear memory of what Margaretha had said and done in his presence. He was the sole party that she had chosen to deal with, and there were no allegations that he was anything other than completely objective in serving his role in this matter, so his testimony would be essential to the outcome. There was no indication that Margaretha's mind or judgment were either unsound or under any influence, either at the time when she first visited the Register or at the time when she returned to alter the deeds, so it appeared that all of her actions were rational and legitimately represented decisions that she had made herself, in a deliberate and reasonable manner. Perhaps most importantly, the Register testified that she had expressed no reservations whatsoever about creating and signing the deeds during her first visit to his office, and he had presumed at that time that she understood the solemnity and gravity of this

action on her part, so there had been no discussion of the legal implications of the deeds. When she had left after that first visit he indicated, he was left with the impression that she considered the matter closed, and that he would not see her alive again, since she had said nothing indicating any intention to reserve any interest in any of the land, or any right to distribute it in any different way. Yet clearly, when she did return, over a year later, she evidently believed that the deeds were all still subject to any changes that she might choose to make, since she ordered them changed without any question or hesitation. Upon that return visit, the Register made no objection to her implicit suggestion that she still had the right to control and alter the content of any or all of the deeds, he simply complied with her wishes, as she expressed them to him. She offered no explanation or justification for her desire to make the changes that she wanted made, nor did she ask the Register for permission to make the changes, she simply communicated the changes to him, and her attitude in so doing was evidently as calm and composed as it had been during her first visit to his office. So her subsequent behavior was at odds with her earlier behavior, she had performed an act that is treated as a most solemn one under the law, yet she evidently felt that she was at liberty to treat her own original act as if it had been merely tentative, rather than final or conclusive.

The Court decided that it could not allow the solemn act of executing a deed to be dismissed, ignored or treated as a mere proposal subject to withdrawal, by a grantor. The Court had always treated the choice of specific language used in any deed as a burden that fundamentally rests upon the grantor, as the motivating party typically responsible for the selection of the appropriate language needed to make the conveyance in question a clear and complete one. As we have already noted, the Court has also always been disinclined to allow any grantor the right or opportunity to deny the validity, force or effect of any reasonable interpretation of any aspect of the grantor's own conveyance document, and had consistently upheld the fundamental right of reliance that a conveyance bestows upon a grantee. In accord with those long held inclinations, the Court here adopted the position that no words or acts of a grantor subsequent to the delivery of a deed, can ever operate to diminish the effect of the deed, even in the face of circumstances such as these, under which the grantees had no real opportunity to rely on the deeds in question before they were altered,

because the grantees were not aware of the content of the deeds, nor were they even aware that the deeds existed. The controlling intent, the Court decided, is the intent at the moment of conveyance, and no changes of heart that may occur at any later time can interfere with the accomplishment of the grantor's originally intended purpose, so regardless of what Margaretha may have believed that she was capable of doing, after signing and presenting the deeds to the Register, she no longer had any legal right or authority to make changes of any kind to any of them. The land had been conveyed at the moment when the signed deeds passed from her hands into the hands of the Register, and after that moment the fate of the land was no longer within her control, therefore neither her deliberate destruction of the deed to Adelheid, nor her alteration of the other deeds, were of any legal consequence or effect. The Court agreed with the ruling of the trial court, the quarter had been deeded to Adelheid and nothing that had happened subsequently could change that.

CITY OF GRAND FORKS v FLOM (1952)

Returning to our review of cases involving dedication, acceptance and vacation issues, we come to a case that addresses questions relating to all of those topics, and which particularly well illustrates and explains the way in which the Court views the legal significance of the statutory vacation process. We have already seen the effects of dedication, both in combination with acceptance and in the absence of acceptance, in a number of cases, and observed an instance in which a successful vacation was accomplished by unconventional means, in the Hille case of 1929, but here we will see how problematic the vacation process can be. In this case, due to the involvement of multiple jurisdictions, resulting from the gradual expansion of the city limits over time, a group of platted lot owners eventually find themselves in an unfortunate position, having relied on a declaration made by one jurisdiction, that leads them into a conflict with another jurisdiction. One conundrum the Court is implicitly required to decide in such cases is whether the lot owners are truly innocent victims, or whether they are simply parties who have acted in violation of the law and must therefore

bear the consequences. In this case, the lot owners attempt to invoke estoppel, a potentially very powerful form of defense, as we have already seen amply demonstrated and will see again in future cases. Yet the Court, in striving to achieve the fine and delicate balance between private and public rights, as it inevitably must do to fill it's role in our society, typically uses the principle of estoppel in an especially judicious manner, with respect to the government and the public in general, and this is a policy that is widely followed in all states. In general, estoppel can be successfully applied against government officials, resulting in the diminution or elimination of public rights, only when it can be clearly shown that the victimized party asserting estoppel had a clear and specific right to rely on the statement, declaration or act of the government official in question. If the erroneous, mistaken or otherwise bogus statement in question, which was the cause of the problem or conflict, was made by a government official or group of officials having no authority or jurisdiction over the matter at issue, then estoppel will generally prove to be inapplicable, as is the case here. In other words, the story that plays out here can be summarized as a warning to all parties, including surveyors, that they need to be very careful to insure that they are dealing with the appropriate government official or body, before acting in reliance on any legal proceedings conducted by the government, such as the vacation of streets and alleys.

1916 - A subdivision was platted as an addition to the city of Grand Forks, and the recorded plat included a statement of unconditional and absolute dedication of "all streets, avenues and alleys" shown on the plat of the addition, signed by the owner of the land. The plat created several blocks, but only Blocks 4 & 5 were involved in this case. These blocks were bounded on the north by 13th Avenue South, which was then the southerly boundary of Grand Forks, and on the south by 15th Avenue South. Linden Street, which was 60 feet in width as platted, ran between Blocks 4 and 5 on the plat, and an alley ran parallel with Linden Street through the middle of Block 5. This portion of Linden Street and this alley would become the focus of the controversy.

1928 - The city limits were officially extended southward in such a manner that the platted portion of Linden Street was brought within the city limits. Block 5 however, remained outside the city limits.

1929 - The extention of the city limits that had been approved the previous year was recorded and a revised plat showing the extended city limits was also recorded.

1934 - A petition, signed by an unspecified number of owners of lots in Blocks 4 & 5, requesting that the alley in Block 5 be vacated, and that both the easterly 20 feet and the westerly 20 feet of Linden Street also be vacated, reducing the right-of-way of Linden Street to 20 feet in width, was accepted by the county, and a county resolution officially approving the vacation was recorded.

1935 - Seese, who was an owner of a group of lots in Block 5, recorded a document entitled "Rearrangement of all of Lots 9 to 24...." in that block. This drawing was prepared upon the presumption that the vacation was legal, and therefore did not show the original alley in Block 5 and showed Linden Street as only 20 feet wide. Shortly after this plat was recorded, the city limits were again extended, and the entire area came to be within the city limits. Whether or not any of the lots shown on this plat were ever sold or otherwise occupied as reconfigured is unknown.

1946 - One lot owner in Block 5 filed an action against another lot owner in that block, as a result of a dispute over the legal status of the original alley running through that block, and the trial court ruled that title to the alley was still held by Grand Forks. That case was not pursued any further by the parties however, so it never reached the Supreme Court and evidently had no impact on the existing conditions in Block 5.

1952 - By this time, the owners of lots in Blocks 4 & 5 abutting Linden Street, including Flom, had been making use of the portions of Linden Street that they believed had been vacated, as indicated on the 1935 plat, for many years, without any objection from Grand Forks or anyone else. Some of these lot owners had planted and maintained flower gardens and ornamental bushes within the original right-of-way of Linden Street, while others had fenced in portions of it, including it within their enclosed yards. The original alley in Block 5 however, had never been physically closed off and had remained in regular and continuous use as an alley, primarily by city garbage

trucks collecting refuse. In addition, the Linden Street roadway had been regularly maintained by city personnel, although no attempt had ever been made to physically oust any of the encroaching lot owners from the portions of the right-of-way that they were occupying. At this time, for an unspecified reason or reasons, Grand Forks decided to file an action requiring all of the lot owners to clear the area and make the entire original 60 foot right-of-way of Linden Street available for improvement by Grand Forks.

Grand Forks argued that the original 1916 plat of the addition was still fully in effect, because it represented a valid offer of dedication, which had been accepted, and no portion of it had ever been legally vacated, so the right-of-way of Linden Street was still 60 feet wide. Flom and his fellow lot owners argued that the offer of dedication made on the 1916 plat had never been fully accepted by Grand Forks, the vacation of portions of Linden Street in 1934 was legal, and Grand Forks should be barred by estoppel from maintaining that the Linden Street right-of-way was still 60 feet wide. The trial court ruled in favor of Grand Forks on all of the issues presented.

The Court first addressed the question of whether or not the original offer of dedication, made by the land owner at the time of the creation of the addition, had ever actually been legally accepted by Grand Forks. It was quite clear that the original owner had intended to make an unequivocal dedication, as indicated by the statement to that effect on the 1916 plat, and the offer was clearly made to Grand Forks, since the plat was intended to become an addition to the city. The lot owners asserted however, that the dedication had to be completely accepted by Grand Forks, not just partially accepted, and they maintained that the evidence of acceptance by Grand Forks was incomplete and was therefore legally insufficient. The lot owners pointed to the 1929 Hille case, which we have previously reviewed, for the proposition that an offer of dedication can be negated by the absence of acceptance. While acknowledging that dedication is not automatic and does require evidence of acceptance, the Court declared that the evidence of acceptance need not be complete or total, and in fact can be quite minimal. In the Hille case, the Court stated, the conditions were distinctly different in at least two important respects, there was never any improvement whatsoever of the dedicated streets, and the party who closed off the streets

was the same party who had made the offer of dedication. The situation on Linden Street was entirely distinguishable, because Grand Forks had developed a roadway within the dedicated right-of-way, and the parties claiming portions of the right-of-way had not been involved in making the original offer of dedication. Therefore, the Court determined that the work done on Linden Street by Grand Forks, although minimal, did constitute acceptance of the original dedication, and because the lot owners had not made the offer of dedication themselves, they could not claim to have the right to retract that offer. The original land owner who made the dedication offer was the only party who could potentially retract it, prior to any acceptance of it, and that had not happened, so the offer had remained in effect and been legally accepted by Grand Forks. In addition, quoting a California Supreme Court decision, the Court held that the original dedication could not have been withdrawn or denied, even by the dedicating party, and even if no formal dedication statement had ever been made, once the original platted lots were sold, because a binding dedication:

> “.... results from the acts of the owner of the land .... it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets."

Having found that the dedication had been legitimately accepted, the Court was next confronted with the issue presented by the 1934 petition for vacation and it's acceptance by the county. Citing the City of La Moure and Ramstad cases, previously discussed herein, the Court indicated that since vacation is a formal legal process, it must be controlled strictly by statute. Just as the process of tax foreclosure is rendered defective and void by even a seemingly small or minor discrepancy or failure to comply with statutory provisions, the process of vacation is likewise ineffective and devoid of meaning or value, unless the relevant statutory provisions are fully observed and complied with. This is true because in both of these instances the law mandates the protection of existing land rights, both public and private, from the consequences of negligent or otherwise illegitimate governmental procedures, which may damage those existing rights if not conducted and carried out properly by government officials. Because the city limits were

legally altered in 1928, the subject area had already come partially under city jurisdiction by 1934, so the county had no authority to approve the requested vacation, and Grand Forks had never approved the vacation, so it was utterly void. Therefore, the 1935 plat, reflecting the results of the vacation, was likewise void, since Seese, the party who had the plat prepared and recorded, had no authority to ratify the vacation, and in fact no plat that ignores, disregards or attempts to rearrange valid existing land rights can be given any legal effect. The litigation adjudicated in 1946 had confirmed that Grand Forks still held it's legal rights to all of the dedicated streets, avenues and alleys, by virtue of the dedication shown on the 1916 plat, at the time that case was decided, so both the 1934 vacation and the 1935 plat had no value as evidence and no effect on the rights of Grand Forks, which were still controlled solely by the 1916 plat.

Finally, with regard to the claim made by the land owners that Grand Forks should be estopped from enforcing the originally platted right-of-way of Linden Street, because the city had done nothing to prevent them from openly developing substantial portions of the right-of-way, effectively abandoning those portions of the right-of-way, again citing the Ramstad case, the Court ruled that Grand Forks was not required to use every foot of the platted right-of-way in order to maintain a valid legal claim to the entire right-of-way. Just as dedication itself can occur by means of implication, the full acceptance of a dedication can also be accomplished entirely by means of implication. In this case, Grand Forks had accepted the dedication, and by implication, it had accepted all of it, despite the fact that not all of the dedicated area had been put into public use. The lot owners had the benefit of using portions of the Linden Street right-of-way for as long as Grand Forks chose or needed to make no use of the entire right-of-way, but they remained bound to cease their use of it at any time, whenever Grand Forks elected to require them to vacate it. It's important to note that no buildings had been erected by any of the lot owners within the Linden Street right-of-way, had construction of such a patently permanent nature taken place, the case for estoppel against the city would have been elevated to another level, and might have been successful. But since Grand Forks had made no promise to any of the lot owners that their use of the right-of-way would be allowed to continue permanently, the city was not estopped from making use of the full right-of-way at any time. Having disposed of all of the

allegations made by Flom and the other lot owners, the Court approved the lower court's ruling in all respects.

The Court had followed the precedents established in the Cole, Ramstad and Hille cases, upholding the principle of dedication in it's broadest sense, and confirming that both dedication itself and acceptance of a dedication can occur by implication, even in the absence of legal formalities, because these are affirmative acts, which operate to create and bestow land rights that are appurtenant and essential to a functional modern society, while vacation must be strictly construed and tightly controlled, because vacation is fundamentally nugatory and destructive in nature, rather than affirmative. In addition, the Court had also confirmed that attempts to retract or withdraw a dedication prior to acceptance must be narrowly limited, for the same reason, expressly adopting the position that the opportunity to terminate an offer of dedication made by means of a plat passes away as soon as any platted lot adjoining the dedicated area in question is conveyed. This is the acknowledged rule, because when lots are sold with reference to a plat, they are acquired on the basis of the benefits shown on the plat, so each lot buyer essentially performs an acceptance of the dedication when buying a platted lot, and enters a mutual covenant to that effect with any and all other buyers of the other platted lots. Under this rule, a dedication can become accepted and binding even without any improvement of the dedicated areas by any authorities, because the lot buyers have executed a mutually binding acceptance of the dedication themselves. Lastly, on the controversial issue of whether or not a right-of-way can always be used by it's holder to it's full width, regardless of historic use of portions of the right-of-way by servient parties, the Court here took a position that is indicative of it's strong inclination to uphold and protect public rights, forming an elegant legal and philosophical balance, when viewed in relation to the Otter Tail case, that we have already reviewed, wherein the Court guarded private servient rights with equal forcefulness.

STATE v OSTER (1953)

This case provides a good example of a situation in which mineral rights can become intertwined with land rights and have a major impact on land rights. Generally speaking, mineral rights are conveyed along with land, when not expressly reserved. However, mineral rights can be completely severed from the land, either knowingly and deliberately, or by operation of law, and can then be treated as entirely separate and distinct from the land. In this case, certain statutes relating to the rights and responsibilities of the state to make a determination as to the existence of certain minerals on state owned land, created a situation that had the potential to put the land rights of innocent holders of land patents granted by the state at risk. The Court, seeing the need for proper interpretation of the intent of the relevant statute, and other statutes of the same type, came to the rescue of one such innocent patentee who was threatened with eviction by the state, after more than two decades of presumably productive use and occupation of his land. In so doing, the Court again declined to allow any burdens related to the conveyance of land, that naturally rest upon the shoulders of the grantor, to be shifted to the shoulders of the grantee. The Court also took this opportunity to emphasize the sanctity of patents in general, equating state patents to federal patents. In addition, the Court once again here drives home the importance of clarity and thoroughness in expressing any conditions or reservations that are intended to apply to any conveyance of land, and makes it clear that such items will not be upheld by the Court, unless expressed to the grantee by the grantor in a manner that insures that grantee is fully aware of them. Although this is not an adverse possession case, it does also illustrate that even though the government is generally immune to the loss of any rights due to the passage of time, the government can put itself in a position where the passage of time can become a factor, by setting in motion a process culminating in a particular event, such as the granting of a patent in this case, which can have the effect of terminating certain rights associated with the land previously held by the government.

> 1916 - North Dakota, as the owner of lands set aside for school purposes, entered into a contract for deed with Fuerst, agreeing to convey an unspecified school section or sections to him. The contract

contained a clause which indicated that if the subject property should subsequently be discovered to contain coal deposits, the state would be required, under the State Constitution, to revoke the contract for deed and retain ownership of the land.

1928 - Fuerst assigned his contract for deed to Oster, who was granted the subject property by means of a patent issued by the State Board of University and School Lands. The patent contained a clause stating that North Dakota, in making this grant, reserved all rights and privileges related to such lands held by the state under the North Dakota Constitution.

1950 - Coal was discovered on the subject property and North Dakota filed an action demanding that Oster relinquish ownership of the land and vacate the premises.

The state argued that it's right to enforce the constitutional reservation of coal lands was in fact an absolute obligation, requiring it to take control over any state lands found to contain coal, whenever such a discovery might be made. The state further argued that it had no obligation or burden to discover the presence of coal by any particular date, or within any particular period of time, so the discovery of coal on former state land at any point in time operated to make the reservation effective at the time of the discovery, regardless of how long the patentee had been occupying the land or what use the patentee had made of the land. Oster argued that the patent issued to him was absolute in nature and the general reservation regarding rights and privileges of the state was not intended to allow the state to take the land from him and conclusively terminate all of his interest in it. He further argued that the state was obligated to make the determination of whether or not the subject property was coal land before the completion of the conveyance to him, and since the state had failed to do that, the land was his, regardless of whether it was coal land or not. The trial court agreed with Oster, quieting title in him and denying that the state's claim had any validity.

The issues in play in this case were all controlled by various statutes, relating to the ability of the State Board of University and School Lands to dispose of lands in state ownership, and the burdens associated with such

land transactions. There was no question that The Board was legally authorized to enter contracts for the sale of state lands and to issue patents. It was also clear that the Board was not authorized to convey land of a certain character, such as coal bearing land. The Court noted that one statute directs the state geologist to determine which state lands are coal bearing lands and to keep a schedule indicating that such lands are not available for disposal. In general, the Court observed, numerous statutes intended to serve as safeguards have been put in place by the state legislature, to prevent sales of land that should be kept by the state for the public benefit. The issue to be resolved in this case related to the timeframe within which corrective action can be taken by the state. The controversy arose from the fact that the statutes made no specific reference to any date, or period of time, or length of time, that might operate to limit corrective action by the state.

Generally, the passage of time does not adversely impact land rights that are held by the public for a purpose or use that is beneficial to the public. In other words, the passage of time alone, is typically not a factor in cases dealing with public land rights, unlike cases involving only private property owners, because public and private owners are subject to fundamentally different burdens, with respect to their land, under the law. However, in this case, the state had taken a specific action, by granting a patent, which resulted in the creation of legitimate privately held land rights. A distinct act, such as issuing a patent, taken voluntarily by any government agency, creates a fundamental right of reliance on the part of the grantee, and can therefore serve as a marker of the point in time when the public rights, and the government itself as the grantor, became subject to the same principles of land rights that operate in transactions conducted by private grantors. The decision in this case would turn upon the position taken by the Court with respect to the sanctity of patents.

The Court decided that, despite the absence of any explicit statutory timeframe limiting the state's opportunity to investigate the character of the land, or to act to retain the land, the state had the obligation to make it's determination of whether or not the land was subject to legal disposal before granting the patent to Oster. The failure of the state to make a proper determination, with respect to the true character of any given parcel of land, prior to issuing a patent conveying the land, cannot become a burden upon

the grantee. That fundamental burden, imposed upon the state by statute, must remain with the state, the Court concluded, since the state occupies the position of the grantor, in control of the transaction. The grantee has the right to rely upon the determination that the land is in fact subject to disposal, which is implicitly made by the state at the time the patent is issued. In essence, the issuance of a state patent gives rise to an estoppel by deed against the state, preventing the state from revisiting any issues that should have been addressed prior to the approval of the patent. The state bears the burden to fully inspect the land and review the results of the inspection before approving the patent, and the granting of the patent is a legally binding representation, made by the state to the grantee, that the subject property is of a character suitable for conveyance and can be legally disposed by the state. The Court noted that the federal government acknowledges that it is solemnly bound by it's patents, quoting the position taken by the United States Supreme Court that:

> “After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals."

The Court upheld the ruling of the trial court, stating that North Dakota was conclusively bound by the action of it's Board of University and School Lands, in granting a patent to Oster, and he had an absolute right to rely fully and completely upon his patent, without ever questioning whether or not the Board had met it's statutory obligations with respect to investigation or inspection of the subject property for the presence of coal. The Court found that the patent had foreclosed any opportunity that the state might have had to further investigate the character of the land conveyed, pointing to the absurdity of the idea that patents can be overturned by subsequent discoveries of facts about the land that can remain hidden by nature for decades. The relevant statutes, the Court stated, were never intended to diminish the sanctity of a government patent, nor did they provide any basis upon which to question a decision of the Board, that was intended to be final, and that was represented to the grantee as being final. The Court thus upheld patents, and the rights of patentees, not obtained through fraud, as being immune to any form of subsequent attack by the

government, even in those cases where either statutes, or deed reservations expressed only in sweeping general language, may appear to indicate the contrary. Once again, just as in the 1951 Wilson case previously reviewed, the Court applied the principle that a grantor bears the burden of knowing exactly what is being conveyed, the burden of describing it fully and properly, and the burden of clearly stating any intended exceptions or reservations, and the consequences of any failures in that regard reside with the grantor, not with the grantee, even when the grantor is the government.

MORRISON v HAWKSETT (1954)

In the 1950s, the Court again found itself confronted with questions relating to claims of adverse possession involving cotenants. Two cases arose at this time, which provided the Court with the opportunity to further clarify it's view of the relationship between parties who are legally cotenants of land, but who are not all present on the land, or who are not all making any actual or physical use of the land personally. As we have seen, the Court had wrestled mightily with a claim of adverse possession involving cotenants in the Stoll case, one third of a century before, but this time the Court would speak in unison, providing clearer guidance. In 1953, in Ellison v Strandback, one of ten siblings had made sole use of the land in question, which was a typical farm, for well over twenty years after the passing of his father, leading to a claim that he had become the sole owner of the farm, by means of adverse possession against the other nine siblings, who all lived elsewhere, since none of them ever had any active role in the operation of the farm. Following the ruling in the Stoll case, the Court denied the adverse possession claim, emphasizing that a cotenant bears a particularly heavy burden to make it clear to all that his possession stands in defiance of the rights of his cotenants, and is not being made in recognition of their rights. However, the Court also made it clear in that case that it was definitely possible for a cotenant to successfully complete an adverse possession against his fellow cotenants, given a set of circumstances in which it could be shown that the adverse claimant had met that elevated burden of proof. The case we are about to review, coming less than six months later, brought before the Court a situation which it found well suited to illustrating it's

concept of a legitimate adverse possession between cotenants. As we will see, the presence of a document representing color of title to the entire tract, emanating from other cotenants, was key to the different result that was reached in this case, since it served to introduce the critical element of good faith on the part of the adverse claimant. In 1984, in Nelson v Christianson, the Court would again uphold this same view, regarding the requirements for a successful adverse possession between cotenants, making it clear that under certain circumstances cotenants can be just as vulnerable to losing their land rights as any other absentee owners.

1925 - Margaret Hawksett, who was a wife and mother, acquired a quarter section. There is no indication that the land was ever used by the Hawksett family, it may have been vacant land acquired as an investment, or intended for some other future purpose.

1930 - Margaret died intestate, so fractional interests in the quarter passed to each of her heirs, which included one son, one daughter and her husband.

1938 - Margaret's son died intestate, so his fractional interest in her land passed to his heirs, which were his son and his wife. He had evidently never told his wife or son about his interest in the quarter, he may have forgotten about it, or kept it secret for some reason, or he may have never even been aware that he had any interest in it himself.

1940 - Margaret's husband and daughter quitclaimed their interests in the quarter to Morrison and he took possession of it, although he evidently did not record his deed. The quitclaim deed described the entire quarter and it did not indicate that the interests being conveyed were only fractional interests in the subject property. Margaret's daughter-in-law and grandson did not participate in this transaction, in fact they may not have even known about it, but unknown to them, they continued to hold a legal interest in the land at this time, by virtue of inheritance. Morrison was the sole occupant of the land from this time forward and he paid all the taxes on it. Whether or not he was aware that he had not acquired all of the existing interests in the land is unknown, but his behavior and actions indicated that he believed he was the sole owner of the entire quarter.

1953 - Margaret's daughter-in-law and grandson somehow

> discovered, or were informed, that record title to the quarter occupied by Morrison still stood in Margaret's name. They evidently recognized or suspected that they might still have some interest in the land, so they confronted Morrison about it. Morrison elected to file an action against them to quiet his title to the quarter.

Morrison argued that since his quitclaim deed indicated that the entire quarter was conveyed to him, and it did not expressly inform him that any other parties held any interests in the land, the deed provided him with full color of title to the entire quarter. Since his occupation of the subject property had met all of the requirements for adverse possession, for a length of time that was in excess of the statutory period, under color of title, he maintained that he had become the sole owner of the entire quarter in 1950, ten years after the date of his quitclaim deed, and the Hawksetts no longer had any legal interest in the subject property. The Hawksetts did not specifically argue that they were unaware of the possession of the quarter by Morrison. They argued that since he had acquired only the interests of the other members of their family, they were cotenants of the land, along with Morrison, throughout the duration of his occupancy of the quarter. They argued that as a cotenant, nothing Morrison had done could be viewed as being adverse to their interests in the land. The trial court agreed with the Hawksetts that they were cotenants of the quarter along with Morrison and his use of the land had no effect on their rights, so the Hawksetts still held legal interests in the subject property, which Morrison would either have to buy from them, or relinquish to them.

We have already seen, from the Stoll case in 1920, that the Court had historically been conflicted over the controversial issue of how to deal with the rights of cotenants, in cases where some of them were in possession of the subject property and some of them were absentee owners, not in possession of it. In the Stoll case however, all the cotenants had been relatives or family members, while in this case, one cotenant was a stranger to the family. The first question for the Court in this case was whether or not the Hawksetts truly were cotenants of the land, along with Morrison, even though they apparently never visited the quarter or even knew of their own interest in it. The Court tacitly accepted the Hawksetts proposition that they were legal cotenants of the quarter, by inheritance, regardless of whether or

not they knew that they had any such rights, or even knew that the subject property existed. This must have appeared to the Hawksetts to put them in an advantageous position, comparable to the position of the Stolls in the earlier case, but it also lead the Court to next consider the value of the Morrison deed, as color of title.

Despite the fact that the deed to Morrison was only a quitclaim, which could potentially have given him legitimate cause for concern and given him a reason to suspect that the title he was acquiring might be incomplete, the Court found that he had acquired color of title to all of the subject property in good faith and he had no reason to suspect that any other interests in the quarter might exist. The innocence and good faith of Morrison was key to the outcome, since his lack of knowledge that any other parties had any interests in the land distinguished his situation from that of typical cotenants in possession, such as the Gottbrehts in the Stoll case, who were aware of the existence of other cotenants. Citing cases from several other states to the same effect, the Court adopted the position that any document which appears to convey any complete tract of land in it's entirety, executed by one or more cotenants of the land in favor of a stranger, in which one or more other cotenants do not participate as grantors, provides the grantee with full color of title to the entire tract, making his subsequent use of it adverse to all those cotenants who did not convey their interests to the grantee. In so deciding, the Court adhered to it's consistently broad view of what represents color of title, and upheld the concept that a third party, who is unrelated to any of the cotenants, as an innocent grantee, has no burden to investigate the internal affairs of the family from which he acquires the land, to ascertain whether or not any other family members may have some interest in it.

Since Morrison was an innocent grantee in the eyes of the Court, his lack of knowledge, regarding the interests of the other members of the Hawksett family, operated to his benefit, reinforcing the innocence of his occupation of the quarter. The lack of knowledge on the part of the Hawksetts however, regarding the possession and use of the land by Morrison, was of no benefit to them. Their ignorance, regarding the existence of their own rights to the land, the Court determined, represented exactly the kind of negligence on the part of land owners that the adverse

possession statutes were intended to address and eliminate. Morrison had been openly in sole possession of the quarter for over ten years, so the Court ruled that the Hawksetts had ample opportunities to discover his occupation and use of their land, and their failure to discover it, or to take any action to defend or protect their rights, for the statutory period, barred any claim they might now seek to make. Even if they were genuinely unaware of their rights, due to having been uninformed of the existence of the quarter by their fellow family members, that fact could not operate against the rights established by the use and occupation of Morrison. He had provided them the opportunity to observe his use of the subject property, which is all that an adverse claimant is required to do. The consequences of the Hawksetts failure to discover either his claim or his use of the land in a timely manner, the Court decided, fell entirely upon them. The Court reversed the decision of the lower court, quieting title to the quarter in Morrison, ruling that the rights of the Hawksetts had been extinguished in 1950.

HOGUE v BOURGOIS (1955)

Following the progression of riparian law in North Dakota, we come to another case that features greater complexity and greater detail than any of the previous riparian cases argued before the Court. This case touches upon and confirms a number of basic aspects of riparian law that the Court had previously established or adopted, such as the navigability of the Missouri River, the extent of riparian ownership on navigable bodies of water, and the general riparian principles relating to islands. But this case also presented a situation that required the Court to examine and determine the effects of massive erosion and reformation of land for the first time, in a context that involved both an island and government lots. While there was no dispute that the island in this case had arisen from the river after statehood, so it was owned by the state, the extreme growth of the island, along with the destruction of extreme amounts of the original river bank in the same area by erosion, created a situation where the ownership of an extensive area came into question. The Court was therefore required to look more deeply at the interaction between riparian rights connected with

islands and those connected with government lots, when the forces of nature bring the two into direct conflict. In this case, the Court continued to take the view that all GLO boundaries were intended only to divide the land as the GLO surveyors found it, and were not intended to become obstacles to the development of riparian rights in the future. For that reason, the Court here took the position that the complete and permanent destruction of entire government lots by natural forces was possible, and that the growth potential of an island, subsequently coming into conflict with government lots, was unlimited. And further, with regard to the additional complication introduced by the subsequent disappearance of the island, due to the complete reliction of one channel, the Court again ruled, consistent with it's decision in the Loy case ten years prior, that the land which had constituted the former island was of a fundamentally different nature that the land that had originally occupied the same physical area. In this case, unlike the Loy case, this view taken by the Court regarding the growth of islands not only had the effect of sealing off a former riparian owner from access to the water, it also had the effect of completely negating the value of patents held by owners of riparian government lots that had been effectively consumed by island expansion. Finally, this case also provides a very good example of the high value and importance of a survey based on proper knowledge of riparian principles, since such a survey was instrumental in defining the extent of the claim that eventually prevailed in this case.

1876 - Original GLO surveys were performed in Burleigh and Morton counties, in an area where the Missouri River, flowing southward, forms the boundary of those counties. Government lots were platted in several sections, and a number of those lots, lying east of the river in Burleigh County, primarily in Sections 27 & 34 and also in some adjoining sections, would become the focus of this controversy. These lots had all been patented to Bourgois and others, who evidently owned all the land along the east bank of the river for several miles to the north and the south. No islands were platted in this area and none were known to have existed at this time.

1904 - An island began to form as a sandbar, midstream in the northerly portion of Section 34.

1905 to 1922 - The east bank of the river moved steadily eastward, as

a result of erosion, while the west channel and west bank remained intact. The erosion progressed far enough eastward that some of the platted lots in Sections 27 and 34 were completely eroded away and fully submerged. Bourgois and his neighbors each lost substantial amounts of their land to the river during this time. The island extended itself to the north and the south, stretching through Sections 27 and 34 and beyond. At the same time, the island grew and expanded in an eastward direction, as the east channel moved steadily farther away from the west channel. By the end of this time period, the island had grown far enough eastward that it covered several hundred acres that had been platted as government lots along the east bank. In other words, the island had come to occupy a large area that had once been part of the mainland, and several mainland lots were now embraced within the island. Neither Bourgois nor any of his neighbors ever made any use of the island.

1923 to 1928 - The river stabilized and was no longer moving to the east, it flowed with roughly equal force in the east and west channels during this period. North Dakota took control of the island, leasing it to another rancher, who was not otherwise involved in this case, and who used it for grazing purposes.

1929 to 1942 - The east channel gradually silted up and by the end of this period it had gone completely dry in times of low water, although a modest flow remained in times of high water. In practicality, the conditions were once again just as they had been forty years earlier, with no island and only one channel, the channel still being essentially right were it had always been.

1950 - North Dakota conveyed the island to Hogue. The island was surveyed and it became clear that the land acquired by Hogue sat in the same location where some of the government lots originally patented to Bourgois and his neighbors had originally been. The survey showed the east boundary of the land conveyed to Hogue as being the thread of the dry former east channel. According to the survey, the land east of the former thread had attached to the mainland by reliction, as the east channel dried out, but the land west of the former thread had attached by reliction to the island. Some of the remaining land owned by Bourgois and some of his neighbors had

become completely cut off from the water, by the disappearance of the east channel. In order to regain access to the water, Bourgois and the others who were thus cut off believed that the lots, having re-emerged from the river and become dry land once again, still belonged to them. Hogue filed an action to quiet his title against them and all others who might have any similar claim to any portion of the former island.

Hogue argued that he was an innocent purchaser who had relied on the opinion of his grantor, the North Dakota Board of University and School Lands, with respect to the ownership status of the island. North Dakota entered the case as an intervenor and argued, on his behalf, that the state had become the owner of the sandbar at the time it arose from the river in 1904, and that the island merely represented the original sandbar expanded by accretion and reliction, and therefore the state was the true owner of all the land comprising the island at the time it was sold to Hogue, regardless of how large it had become or what former platted lands it had grown to include or cover. Bourgois and his fellow defendants argued that they were all either original patentees, descendants of patentees, or legal successors to patentees, who had legally acquired all of the government lots involved, and that although the river had destroyed the original lots by eroding and submerging them, the river had also recreated the lots, by depositing accretion and building new dry land in the same location where the original lots had been. Therefore, Bourgois and his neighbors asserted, North Dakota never had any valid claim to any portion of the island that was within the platted boundaries of their lots. The trial court found the argument made by Bourgois convincing and ruled in his favor.

The Court began by reiterating some relevant points that had been developed and established in the earlier riparian cases that we have already reviewed. The Missouri River was navigable and the rights of riparian owners on navigable waters run to the low water mark, because limiting them to the high water mark would have the effect of denying them access to the water at times of low water, which would be an absurdity that was never intended and would benefit no one. All the basic riparian principles, such as accretion, reliction and erosion, operate mutually, as benefits and burdens, upon both riparian owners and the state, including island owners.

Any land the river takes by erosion and submergence is immediately lost to the riparian owner and comes under state ownership, having been joined with the bed of the river under state control. Most notably, the Court quoted from the opinion presented in the Oberly case of 1937, reiterating that riparian rights exist independent of any artificial boundaries, including section lines, as well as lines between original divisions of land within any given section, so riparian rights are not controlled by such boundaries.

The issue that was before the Court in this case was one that would become a massive thorn in the body of riparian law all across the west, since western rivers often migrate dramatic distances, and which would become a major source of controversy in federal cases as well as state cases, the question of re-emergence. The Court would have to decide how to deal with lands that have been washed away, but then restored in the same location, all by gradual processes playing out over a great length time. But since this case involved an island, which had clearly originated by accretion to an underwater bar in the middle of a navigable river, after North Dakota had become a state, the decision of the Court here could be founded upon the existence of the island. In later cases, under circumstances involving rivers that migrate and then reverse direction, where islands are not involved, we will see the Court take a different position with respect to the effect of section lines and aliquot lines within sections. In this case, the Court ruled that since the island was a new and distinct entity, unformed at the time of the GLO survey, the lines of that survey had no control whatsoever over the island. Many cases of this kind had already been ruled upon in Iowa, Missouri, Kansas, Nebraska and South Dakota, and the Court followed those states in adopting the principle that:

> “Where an island arises in a navigable river apart from riparian owners land .... such owners cannot claim title thereto by reason of their riparian rights, though the island is afterwards joined to their land, since it did not become part thereof by gradual accretion to, or reliction from, the shore."

The section lines and government lot lines that had been established by the original survey of the mainland had never included, or even imagined, an island subsequently forming in the river, so those lines could

operate only upon the mainland and could not be extended onto or across the island. The island was a unique entity unto itself, virgin land utterly free of any artificial boundaries that had been previously created for the sole purpose of partitioning the land that was in existence at that time. Once created, by natural forces in the middle of the river, the island was free to grow without limit and consume as great an area as nature should see fit to allow it to consume. Those GLO lines entirely washed out by the natural processes evident here could not reappear as a burden upon the island. The lands lost by Bourgois and the other defendants to the river were not restored by the river, they were replaced by a newly formed independent body of land. In electing to acquire riparian lots, the Court felt that the riparian owners were obliged to know that under the law they ran the risk of losing any or all of the land they had acquired. The survey performed in 1950 was upheld in all respects, and the new boundary it had established, following the line where the last thread of water had run between the mainland and the island, before the east channel had ceased to exist in times of normal water levels, was adopted by the Court as the true boundary. Reversing the lower court, the Court quieted title to the entire island, as outlined by the 1950 survey, in Hogue.

NESET v RUDMAN (1956)

Here we find the Court again dealing with a land rights claim involving the statute of frauds and again demonstrating the powerful role played by the principle of estoppel in such situations, consistent with the Court's earlier decisions in cases of a similar nature. A few other relevant rulings of the Court that took place in the twenty years since the last statute of frauds case that we have discussed, the Goetz case of 1936, are worthy of note here. In 1945, in Brey v Tvedt, the Court rendered a decision that serves well to show the conditions under which possession and use of land is of no benefit to a party seeking to compel a grantor to convey land. Tvedt went into possession of land owned by Brey, but only after being told by Brey that she was unwilling to convey the land in question to him. Tvedt then raised and harvested crops on the land, over the protest of Brey, and

then attempted to claim that she was legally compelled to convey the land to him, based on his performance. The Court denied his claim of course, stating that the performance required to compel a grantor to convey land must clearly support the existence of an agreement between the parties, and performance that is not the result of an agreement has no force to negate the statute of frauds, being in effect an incipient adverse possession. The 1955 case of Syrup v Pitcher also represents an important limitation on the performance exception to the statute of frauds. In that case, after reiterating that performance alone, even without either written evidence or evidence of payments, can be sufficient to remove an alleged conveyance from the statute of frauds, and again maintaining that the Court has the authority to treat the statute as inoperative in such cases, in order to do equity, the Court simply found that the performance shown was insufficient. Syrup, the alleged grantor, was killed in an accident, very shortly after negotiating a land transaction with Pitcher. Pitcher had just begun to make use of the land in question and claimed that his clearing of trees and grubbing of brush from the land was sufficient performance on his part to conclusively prove that Syrup had agreed to sell him the land. The Court ruled that clearing and grubbing alone, not representing valuable improvements to the land, was insufficient to serve as conclusive evidence of a completed conveyance agreement. Then in 1956, in Hoth v Kahler, the Court again upheld a series of letters and telegrams as evidence of a complete and binding conveyance, the statute of frauds notwithstanding, much as it had in the Mitchell and Arhart cases, previously discussed. Kahler had agreed to sell a tract to Hoth and to give him a warranty deed for it, but then changed her mind and decided to sell it to another party. Since there was ample evidence that an agreement had been reached between Kahler and Hoth, and Hoth had fully performed everything required of him under the agreement, the Court ruled that Kahler was legally compelled to complete her proposed conveyance to him. In the case we are about to review, the elements required to invoke an estoppel are again present, and we see that they are operative even when members of the same family are involved.

1908 - The Nesets, husband and wife, entered a quarter section as homesteaders.

1913 - The quarter was patented to Neset, and at the same time, under the homestead laws, his wife acquired an interest in it as well, by

virtue of being the spouse of a homesteader.

1914 to 1947 - The Nesets lived on the quarter, had one son, and acquired two adjoining quarter sections, which they farmed throughout this period.

1948 - The Nesets decided to retire from farming and let their son take over the farm. Neset conveyed the two additional quarter sections that he had acquired to his son, by deed. He also verbally agreed to convey the homestead quarter to his son, but he did not convey that quarter by means of any written document, so that quarter remained in Neset's name and he continued to pay the taxes on it himself.

1949 - Rudman was in the oil and gas business. Burbridge, an employee of Rudman, seeking to obtain oil and gas leases in the area, spoke with Neset about the Neset property. Neset told Burbridge that he no longer owned any of the land, so Burbridge would have to deal with his son, if he wanted to lease the land. Neset then introduced Burbridge to his son and his son also informed Burbridge that he was now the owner of all of the Neset land. Neset's son then executed an oil and gas lease to Rudman, covering all three quarters.

May 1954 - Neset and his wife left the farm and moved into a retirement home in a nearby town.

October 1954 - Rudman attempted to begin using the subject property, under the terms of the lease, but Neset filed an action to prevent him from doing so, claiming that the lease executed by his son was null and void, because he was still the owner of the homestead quarter and he had not agreed to lease it.

Neset argued that even though he had agreed to convey the homestead quarter to his son, and he had told several people, including Rudman's employee, that he had already conveyed it to his son, he had never actually conveyed it in writing, so under the statute of frauds, he was still the legal owner of the homestead quarter. He also argued that, under the homestead laws, his wife was also the holder of a legal interest in the homestead quarter, and she had never agreed to convey her interest in it, so it would have been impossible for him to have legally conveyed that quarter to his

son, without the participation of his wife in the conveyance. Neset further argued that the documents of record clearly indicated that he was the owner of the homestead quarter, and Burbridge was obligated to check those documents of record and rely upon them, so Burbridge had no right to rely upon what Neset or his son told Burbridge about the subject property. Rudman argued that he and his employee had dealt with the Neset's in good faith and acted as innocent grantees, on the basis of information obtained directly from Neset and his son, and therefore Neset should not be allowed to invoke the shelter afforded by the statute of frauds and should be estopped from denying that his own admitted verbal declarations had any meaning or effect. Neset's son sided with Rudman against his father, maintaining that he had become the sole owner of the homestead quarter in 1948, by means of his father's verbal conveyance of that quarter to him, so the lease that he had executed to Rudman was fully valid and should be upheld. The trial court ruled that the statute of frauds did apply, and that Rudman's employee should have relied solely upon the documents of record, which proved that Neset owned the subject property, so the lease was null and void.

The Court first addressed the issue presented by Neset's claim that he was incapable of conveying the homestead quarter without his wife's written consent. The Court stated that although Neset's wife did have the legal interest held by a homesteader's spouse, under the homestead laws, at the time he verbally granted the homestead quarter to his son, she had no title to the quarter. Her interest, the Court determined, was merely a right to occupy the land as Neset's spouse. Furthermore, the Court noted, Neset's wife had subsequently voluntarily abandoned any right that she had in the homestead quarter, when she moved away from the farm with her husband in 1954, intending never to reside on the subject property again. Nevertheless, the Court agreed with Neset that it was impossible for him to legally convey the rights of his wife to their homestead against her wishes, or without her consent, in 1948, since she was still residing there at that time. Therefore, the trial court was correct that the oral grant from Neset to his son was void under the statute of frauds, with respect to the interest of Neset's wife. However, since she had subsequently relinquished all of her interest in the homestead, any rights that she once had were now irrelevant and could have no impact on the rights of either Rudman or Neset's son.

The dispositive issue, the Court indicated, was whether or not the combined words, acts and conduct of Neset himself were sufficient to support the assertion that he had conveyed his interest in the subject property to his son, despite the fact that the alleged conveyance was never reduced to writing in any manner, and therefore undisputedly failed to satisfy the statute of frauds. The Court found that although there was evidence that Neset's son had performed as the owner of the subject property, that evidence was insufficient for the Court to rule that Neset's son had become the owner on the basis of his performance of his part of the oral conveyance agreement. But the Court decided that it was not necessary for Neset's son to prove that his performance was sufficient to overcome the statute of frauds, because the statute of frauds was not the most powerful factor in play in the case, and therefore it could not control the outcome. The Court agreed with Rudman that the evidence indicated that an estoppel against Neset was the controlling legal principle and the appropriate means of resolving the question of whether or not Neset had conveyed the subject property. Stating that the codification of estoppel into the statutes had made it substantive law, the Court quoted the applicable statute, which is still in effect today, as follows:

> “When a party, by his own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission."

In essence, the Court found that Neset had knowingly lied about his own interest in the land, and in so doing he had created a condition that was detrimental to those parties who had attempted to deal with him in good faith, including both Rudman and his own son. Quoting from the 1908 Engholm case, in which in the Court had established the power of estoppel to overcome both the statute of frauds and the homestead laws, under similar circumstances, the Court ruled that Neset must be bound to honor his conveyance to his son, since he had openly acknowledged it with his own statements and conduct. Because he had openly disclaimed his own interest in the subject property, no law could operate to shield him from the consequences of his own decisions and actions. The trial court had erred in

finding that the failure of Burbridge to note and rely upon the ownership status of the land, as indicated by the documents of record, was the cause of the controversy. The Court reversed the ruling of the lower court, holding that Neset had relieved Burbridge of his burden to take notice of Neset's ownership of record, by explicitly disavowing his ownership, so Neset was solely responsible for the controversy. Neset had conveyed all of his interest in the homestead quarter to his son, despite the absence of any written evidence whatsoever, and the lease executed by his son was therefore valid and binding upon all parties. Importantly, this case illustrates the fact that estoppel can take place, and have controlling force, even between family members. We will see these same fundamental and timeless principles of equity applied again with respect to land rights, and extended to cover the creation of a new boundary, three decades down the road.

WILSON v DIVIDE COUNTY (1956)

In this case, the Court again held firmly to it's well established position that absentee land owners have the burden of learning and knowing what is taking place on their land, even when the land has been used through a landlord and tenant arrangement, and importantly, even after that relationship has been terminated. Five earlier decisions that were also made by the Court in connection with adverse possession claims are notable here. In Blessett v Turcotte, in 1910, the Court ruled that an incorrect description in a tax redemption notice renders it utterly invalid, triggering adverse possession, even where the mistake is a mere typographical error, in that case, the section number being given as "2" instead of "20". Similarly, in 1948, in Star v Norsteby, the Court found that the abbreviation "SWME" in a description, although clearly intended to read "SWNE", was meaningless, again rendering a tax deed void and resulting in an adverse possession claim. Yet again, in Strom v Giske, in 1954, a description typo proved to be a fatal defect, as that time the number of the range was incorrectly stated as "95" instead of the correct "96", bringing adverse possession into play. These decisions should not be interpreted as an indication that the Court is obsessed with details, since that is not the case, the common thread linking these decisions is the great emphasis placed by the Court on the significance

of providing the land owner with full and completely correct notice that his rights may be subject to imminent loss. In the case of Stewart v Berg, also decided in 1954, the Court upheld the validity of the legal concept of quieting title against all parties who may have any type of claim to the land in question, regardless of who they are and where they are, even if the identity or the existence of any such parties remains unknown throughout the proceedings and is never determined, provided that legally acceptable notice has been served to any such parties. That position serves to show the concern of the Court with enabling land to become useful and productive, and shows it's general support for all those attempting to initiate such use in good faith. Then in 1955, in Wittrock v Weisz, as a logical extention of it's many prior rulings involving the numerous adverse possession claims related to tax foreclosures, the Court declared that the time during which land is under the control of a county, for failure to pay taxes, pending a tax sale, cannot be considered adverse to the owner of record. That position, which is based on the fact that the record owner is legally entitled to retain the subject property by paying the back taxes during that period of time, meant that adverse claimants could count no time during which they used the land toward their adverse possession, until the county acted to convey the land to the adverse claimant. That decision would have a significant impact upon many innocent holders of tax deeds that proved to be bogus for one reason or another, as illustrated in the cases cited above, such as the claimant in good faith under color of title in the case we are about to review.

1926 - Rand, who lived in Minneapolis, acquired a quarter section of unimproved cropland in North Dakota. Rand never visited North Dakota, he was an absentee owner who acquired and held this land only as investment property.

1937 to 1939 - Wilson leased the quarter from Rand through an agent, who was in North Dakota and was acting on behalf of Rand, and Wilson began cultivating the land. During Wilson's third year farming the quarter under the lease, Divide County initiated proceedings to take the subject property for delinquent taxes.

1940 - Divide County obtained a tax deed for the quarter. The county then leased the quarter to Wilson and he continued to use the land just as he had previously.

1941 - Divide County offered the quarter at a tax sale and Wilson was the successful bidder.

1942 - Divide County executed a contract for deed to Wilson and he began paying the taxes on the quarter.

1945 - Wilson completed his appointed payments under the contract for deed and the county deeded the quarter to him. He had been using the land in just the same manner as he had when he was a tenant, and he went on doing so henceforward.

1950 - Rand died, leaving his widow as his sole heir.

1952 - Rand's widow somehow discovered the existence of the quarter in North Dakota, that had been acquired by her late husband, and she claimed ownership of it as his successor. Wilson was informed that his tax deed was invalid, because proper notice of the tax delinquency had not been provided to Rand during the tax foreclosure proceedings conducted by the county. Wilson understood and accepted the news that his deed was void. The county itself had never legally taken ownership of the quarter, so it was obviously not possible for the county to have legally conveyed it to him. Nevertheless, Wilson filed an action against Divide County, Rand's widow, and any other parties who might claim any interest in the subject property, to quiet his title to the quarter. The county made no claim to the quarter and had no rights at stake, so it declined to argue against Wilson and conceded that Wilson was the owner of the quarter, leaving Rand's widow to engage Wilson alone.

Wilson argued that his possession of the quarter was adverse to whoever legally owned it, and his use of it met all the requirements for adverse possession under color of title, since he had held the subject property in good faith by virtue of two void documents in succession, first his contract for deed and then his deed from the county, which he had no reason to suspect were void until after the full ten year statutory period of adverse possession had elapsed. Rand's widow argued that Wilson's use of the quarter had commenced by virtue of a lease agreement between Wilson and her husband, so Wilson's presence on the subject property was always understood to continue only through her late husband's permission, being subordinate to the legal ownership of her late husband and herself, and

Wilson's possession had never been adverse to the ownership of the Rands. The trial court ruled that Wilson's use and possession was adverse and Rand's widow had no valid claim to the quarter.

Since the basis for Wilson's claim was adverse possession, the first order of business for the Court was naturally to establish when, if ever, the use or possession of the subject property by Wilson had become adverse to Rand, the acknowledged owner of record. If the use by Wilson was adverse for less than ten years, then his claim would not fly, regardless of the character or nature of the use. The Court first found that the lease agreement had expired in 1939 and Wilson had no further contact of any kind with either Rand or his agent after that time. The Court adopted the position that once any such existing agreement involving land rights expires or is otherwise terminated, adverse possession can commence. The mere fact that the parties once participated together as partners in a valid agreement, of any kind, does not mean that an adversarial relationship cannot subsequently develop between them. Wilson, the Court decided, had no burden to inform Rand that he no longer intended to lease the quarter from Rand or that he intended to continue using it, his continuing use of the subject property, beyond the lease term, was all the notice that he was legally required to provide. The expiration of the lease itself, served as legal notice to Rand that any subsequent use of the quarter by Wilson was not in accord with their agreement, and the burden fell upon Rand, as the owner of the subject property, to learn by his own means, whether or not Wilson was continuing to make use of the land beyond that time. Quoting from a relevant statute concerning the subject of notice, which it applied to this situation, the Court said:

> “...actual notice of an adverse holding need not be brought home to the landlord. Notice may be constructive, and may be shown by a variety of acts clearly indicating a holding by the tenant, hostile to that of the landlord .... and inconsistent with the existence of title in others except the occupant..."

This decision marks a milestone in North Dakota law relating to landlord and tenant relations, placing a serious burden on absentee landlords to monitor activity on their properties, but the question of exactly when

Wilson's adverse possession began remained to be determined. The Court found that when Wilson began cultivating the quarter for the fourth year, in the spring of 1940, he was no longer functioning under the terms of the lease issued by Rand, which had expired the previous year, but he was now functioning under the authority of the lease issued by the county, so he was still merely a tenant. His use of the land was still through an agreement which gave him permission to be there, so he was still not acting as the owner of the quarter. If he had begun using the quarter without any lease at this point, his presence would have become adverse to Rand at this time, but since he was merely a tenant, put upon the land by the county, and the possession of the quarter by the county could not be adverse to Rand, Wilson could not include his time on the subject property as a tenant of the county in his adverse possession claim. Since he could not show that his use in 1940 or 1941 was adverse, what took place in 1942 became the decisive factor in the case.

It had long been established that a void deed, of any kind, including a void tax deed, bestows the color of title, required by the adverse possession statutes, upon the adverse claimant, provided that the adverse claimant holds the void document in good faith, meaning that the adverse occupant is unaware that the document is invalid. In the 1947 case of Robertson v Brown, the court had made it clear that a void contract for deed holds the same value, as color of title, as does a void deed. Consequently, from the time Divide County issued the void contract for deed to Wilson, in March of 1942, his possession had been completely independent of his former relationship with Rand, and had become genuinely adverse to the ownership interest of Rand. The conveyance of the subject property by the county, operating as it did to foreclose the opportunity for Rand to recover the quarter by tax redemption, marked the beginning of Wilson's adverse possession. Since Wilson had filed his action against Rand's widow, and others as noted above, in April of 1952, less than one month after the completion of the ten year statutory period, he had fulfilled his burden to hold the subject property as the owner for the mandatory length of time, as of the time when the initiation of the litigation stopped the running of the clock for adverse possession. Had Rand's widow discovered the situation sooner, and promptly filed an action against Wilson, within the ten year window, she may well have prevailed, but her discovery came too late, by

just a matter of days as fate would have it, so her claim was barred. The Court affirmed the decision of the lower court, quieting title to the quarter in Wilson. In Tarnovsky v Security State Bank of Killdeer, a similar adverse possession case, decided just two months later, the Court reinforced the significance of color of title, adopting the position that an adverse possessor who has color of title can acquire the entirety of the tract occupied, even if only a small fraction of it was put to actual use.

WELSH v MONSON (1956)

Returning once again to our review of the Court's treatment of issues stemming from dedications made in the process of platting land for development, we here encounter a case that introduces us to the potential complications involved in another aspect of the vacation process, with significant implications relating to the ownership and conveyance of land. As we have seen, it was already well established by this point in time, that dedications made by means of a plat create land rights, which become legally binding upon acceptance, of any form or kind, of the offer of dedication, but which can also be legally vacated, when the statutory process for completing a vacation is diligently followed. The vacation process is fundamentally designed to provide that the intention to vacate can be legally carried out, when the appropriate conditions exist, while also protecting all existing rights, by insuring that those rights cannot be legally nullified, destroyed or otherwise lost, without due process of law, which allows all parties who benefit from the rights being vacated to understand what is taking place, and have an opportunity for input on the matter at hand. In short, the spirit of the law, driving the statutes that create the opportunity for a legal and binding vacation to take place, simply requires that no vacation can be allowed to damage or injure the rights of any parties holding the right to rely on the dedication, without their consent. In that regard, the law recognizes that all occupants of platted lots certainly have a vital legal interest in any proposed vacation of any streets or other public areas within their own platted area. In any given case, certain lot owners might stand to gain, while others to lose, from any proposed vacation,

depending upon the subject area, their proximity to it, and their personal needs or desires, so vacation is always potentially quite controversial. Although it has been legally recognized and generally understood, since the early days of statehood, that all owners of lots conveyed with reference to a plat have a legal interest in some portion of any streets abutting their lots that are vacated after those lots abutting the street in question have been sold, questions involving a vacation prior to the sale of any lots remained unaddressed at this time. In this case, we see the Court wrestle with the consequences of such a vacation, and interpret the law as it stood at this time, resulting in the creation of a distinct and independent parcel, where a platted street had once been.

1882 - A large subdivision located in Bismarck was platted and recorded. Certain portions of that subdivision evidently remained unimproved for several decades, including at least one platted street, which would become the focus of this controversy.

1947 - Monson, who had evidently acquired several blocks of the 1882 subdivision at an unspecified time, recorded a subdivision plat covering a portion of the 1882 subdivision. Whether or not any of the lots, blocks or streets were shown any differently on the Monson plat than they had been shown on the 1882 plat is unknown, but there is no indication that Monson had altered anything shown on the original plat, so his plat may have been essentially just a duplication of a portion of the 1882 plat. Blocks 82 & 87 of the original subdivision were shown on the Monson plat, Block 82 lying south of Avenue F and Block 87 lying north of Avenue F. Shortly after the Monson plat was recorded however, Bismarck passed and recorded a resolution vacating this portion of Avenue F, at Monson's request, since he was evidently the only owner of any property adjoining the relevant portion of Avenue F at this time, and therefore he was the only party holding any legal interest in the existence of this portion of Avenue F. There is no indication that the recorded plat was ever revised to reflect this vacation.

1950 - Monson conveyed Lot 6 in Block 82 to Ogan, by warranty deed, describing the lot only by means of reference to the 1947 plat, which in turn referenced the 1882 plat. The deed was silent with

respect to the vacation of Avenue F, and whether Ogan had any knowledge of the vacation or not is unknown. There is no indication that any of the other lots in Block 82, or anywhere else on the plat, had yet been conveyed by Monson at this time. There is also no indication of whether Ogan ever physically occupied or used this lot in any way or not.

1951 - Ogan conveyed Lot 6 to Welsh, also by warranty deed, presumably using the same description by which Ogan had acquired it. There is no indication that Welsh ever actually occupied or used this lot in any way either.

1952 - Lot 12 in Block 87 lay directly across Avenue F from Lot 6 in Block 82, and all of the lots in both blocks were evidently of identical dimensions. Whether these lots were on the corner or in the middle of these blocks is unknown, but be that as it may, the controversy resulted solely from the fact that both lots abutted upon the identical segment of Avenue F. Monson conveyed, again by warranty deed, that portion of Lot 12 in Block 87 that abutted Avenue F to Wadeson, along with the entire portion of Avenue F lying directly between Lot 12 and Welsh's lot, describing that portion of Avenue F by metes and bounds. The right-of-way width of Avenue F is unspecified, so the size of Wadeson's parcel is unknown, but this conveyance, as it was described, made Welsh and Wadeson adjoining land owners, with the boundary between them being at the edge of the vacated right-of-way, rather than at the center of that right-of-way. There is no indication of whether or not any roads existed in this area, so by what means these parties accessed their lands, or intended to access them, is unknown. There is no indication that any private access easements were ever created or granted, but this matter was never addressed during the litigation, since access was not raised as an issue by any of the parties in this case, the sole issue being the ownership of the portion of the vacated right-of-way in question.

1953 - Wadeson conveyed the identical parcel that he had acquired to Hindemith, who erected a building on that parcel within the vacated right-of-way of Avenue F, which allegedly extended an unknown distance into the southerly half of the vacated right-of-way. How the location of the building was determined is unknown, since there is no

indication that any surveys were ever done, and no evidence that any lot corner monuments were ever located by anyone. Nevertheless, Welsh either believed or determined that the building was over the centerline of Avenue F and he objected to it, claiming that he had acquired that same portion of the south half of the vacated right-of-way, by means of his acquisition of Lot 6 in Block 82. His protests were ignored, so he filed an action against Monson, Wadeson and Hindemith, seeking to have the building removed and his title quieted, up to the centerline of Avenue F.

Welsh argued that any conveyance of a platted lot is presumed to automatically convey title to the centerline of any public way or ways adjoining that platted lot, in the absence of a specific reservation in the document of conveyance indicating the contrary. Since no such reservation appeared in his deed, he asserted his ownership of half of the portion of the vacated right-of-way adjoining his lot. Monson and the other defendants argued that because Monson had successfully obtained a formal vacation of Avenue F, prior to conveying any of the platted land, the vacated right-of-way had become separate and distinct from the individual lots at the moment of vacation, so Welsh had not acquired any portion of it. The trial court found Welsh's argument convincing and quieted title in him per his request, directing Hindemith to move the building that he had erected.

The Court began by acknowledging the validity of the concept put forth by Welsh. In general, conveyances of platted lots, like all other conveyances of land, typically do convey all of the rights, title and interest in the subject property that is held by the grantor. This principle places the burden on the grantor to fully and properly represent exactly what is being conveyed to the grantee, in such a manner that the grantee can easily and readily understand what is being conveyed and what is not being conveyed. To that end, and in order to prevent grantors from deliberately introducing ambiguity or obfuscation into their conveyances, grantors are required to explicitly set out any reservations from a conveyance that they intend to make. Were this not the case, grantors would be free to use obscure, convoluted and complex language in their deeds intentionally, then later inform the innocent grantee that under the interpretation placed upon the language by the grantor, it actually meant something different than what the

grantee thought it meant, after the grantee has begun occupying or using the land, in an effort to extort additional money from the grantee, or to claim that some portion of the land, or some right associated with the land, was not actually included in the conveyance. To preclude such situations from developing, common law mandates that all ambiguities are to be construed against the grantor and in favor of the grantee, provided of course that the grantor was in fact responsible for the language used in the document of conveyance, which is typically the case, making it clear to grantors that neither efforts at deception, nor simple negligence or lack of clarity, will be rewarded by the law. Applying this legal maxim to Monson, as the grantor here, the dispositive question would obviously be whether or not Monson had described the land that he actually intended to convey to Ogan, Welsh's predecessor, adequately and with sufficient clarity, to make his intention to convey only the area labeled on the plat as Lot 6 in Block 82, and no part of the vacated portion of Avenue F, completely clear.

Citing the Bichler case of 1933, which we have previously reviewed, and an earlier South Dakota Supreme Court decision involving a controversy of the same nature, the Court again agreed with Welsh on the general principle that a conveyance carries title to the centerline, noting that all of the relevant statutes also supported that concept. As is always the case however, in order to properly understand and interpret the law, the reason that any given principle or legal concept exists must be considered, before it can be legitimately applied. The principle of centerline conveyance exists only to prevent the creation of isolated parcels of land, held as useless remainders by parties who actually intended to convey all of their land, and all of their rights attached to that land. In the absence of this principle, parties would frequently continue to own fragments of land in locations from which they long ago departed, where they never intended to reserve any rights, merely because they failed to expressly state, for example, that they intended to also convey their rights to adjoining roadways. In other words, the concept of conveyance to the centerline exists because it facilitates the conveyance of all the land and rights that were truly intended to be conveyed, and prevents successors from making stale claims to lands and land rights that their predecessors never intended to retain. The concept was intended to be beneficial to society, by supporting the efficient conveyance of land, it was never intended to deprive a grantor of his

fundamental right to retain whatever he truly intends to retain, or to force him to convey any land he does not intend to convey. The concept is therefore a secondary principle, subject to the primary applicable principle, which is that a conveyance is ultimately controlled by intent. Since public ways are typically easements, which can be vacated, leaving the land within the right-of-way free of the burden of public use, the need for the centerline conveyance rule to exist is clear. But like every such legal rule, it can be applied only to do justice, and not when applying it would do injustice. Once land adjoining a public right-of-way has been conveyed, as an individual parcel, rights to the portion of the right-of-way adjoining that particular parcel are created, and the parcel owner typically also owns the portion of the right-of-way adjoining the parcel, to the centerline. But since the rights to a platted lot are created by the conveyance of the lot, at the moment of conveyance, and not by the creation of the plat itself, the lot carries no appurtenant rights, such as the right to extend to the centerline of an adjoining right-of-way, until the moment the lot is actually conveyed. Until that time, ownership and control over each platted lot, and the platted right-of-way itself, remains unified in the owner of the subdivision, who is free to treat the right-of-way as a unique, separate and distinct parcel, should he choose to do so.

As can be seen from the foregoing, the key element in the outcome of this case was the timing of the vacation. Because the vacation preceded the sale of any of the platted lots, the Court found that the recorded vacation document provided notice to all prospective lot purchasers that no right-of-way existed, so the land identified as Avenue F on the plat was simply a strip of land adjoining the platted lots, from which any such lot buyers could expect to obtain no benefit, and in which they were granted no rights by means of any legal implication. None of the lots ever extended to the centerline, because none of the lots was ever conveyed during the time when the right-of-way was in existence. If even one lot had been conveyed prior to the vacation, Monson would have no longer had the opportunity to request vacation of the right-of-way at his own discretion or on his own behalf, and the centerline conveyance rule could have been legitimately invoked, but that was not the case. Monson had obtained the vacation at an appropriate time, the Court decided, while he still had the opportunity to do so alone, because he intended to treat Avenue F as a regular or normal

unburdened parcel of land, and by so doing he had accomplished that goal, it was no longer a right-of-way beyond that moment, and he was free to subdivide it and convey it, just as he had done. The Court determined that Monson had met his burden to clearly and completely describe exactly what he intended to convey to Welsh, by identifying the intended lot by means of reference to the plat that he had recorded. Pointing once again to the great legal significance of taking physical notice from existing conditions, the Court ruled that despite the fact that the plat itself gave no indication that Avenue F was no longer an existing right-of-way, the fact that no actual roadway existed there, put Welsh on notice that the right-of-way could have been vacated, and he failed to carry his burden as a grantee, by failing to discover that it had in fact been legally vacated, and therefore no longer existed as a legal appurtenance to the lot he was about to acquire. Since there was no suggestion that Monson had mislead Welsh about the status of the former right-of-way, Welsh was mistaken in concluding that his deed had conveyed any part of it, or that he had any rights to any portion of it. Citing rulings to the same effect from California, Minnesota and Washington, the Court struck down the lower court's decision to require Hindemith to move his building, and remanded the case with directions to quiet title in Hindemith to the full width of the former right-of-way adjoining Welsh's lot, as that area was described in Hindemith's deed. The current language of statute 47-10-10 however, could very well lead to a different result today.

NYSTUL v WALLER (1957)

The Court continued to work it's way through a substantial number of cases dealing with the consequences of tax foreclosures during the late 1950s, clarifying some important issues relating to land rights in the process. In 1955, in Smith v Mountrail County, the Court upheld the effect of an action to quiet title on successors of unknown parties. Smith's parents had acquired a tract of vacant land by means of an unrecorded quitclaim and never occupied it or paid taxes on it, so it was sold at a tax sale to a party who then successfully quieted his title by means of a legal action against all unknown parties. Smith later obtained a deed from his parents and claimed

that he owned the land because the title had never been quieted against him. The Court took that opportunity to state that a quiet title action against all unknown parties precludes any such claims by successors of unknown parties, since it terminates the rights of the unknown parties themselves, so Smith's deed was worthless and he had acquired nothing from his parents. That case represents a perfect example of a situation where a failure to record a deed proved to be disastrous, since the Smiths would not have been unknown parties if they had recorded their deed. In 1956, in Bilby v Wire, the Court made two important points clear, regarding mineral rights and quitclaim deeds. First, the Court ruled that once mineral rights have been legally severed from the surface estate, nothing that happens on or to the surface has any effect on the mineral rights, so even if the surface area is subsequently lost due to non-payment of taxes or adverse possession, the mineral rights are not lost. Second, the Court also held that a quitclaim deed does not convey any after-acquired title, because a quitclaim conveys only the rights of the grantor at one moment in time, so the grantor can later acquire the same rights that he allegedly conveyed by means of a quitclaim, regardless of whether or not the quitclaim had any effect or value, and those rights do not pass to the grantee of the quitclaim. The case we are about to review involves these same issues relating to tax foreclosure, quieting title, adverse possession and mineral rights as well, but in the context of a situation where the mineral rights were not reserved or otherwise severed before all of the issues relating to taxation had come into play. As a result, we will see the Court distinguish the fate of the mineral rights in this case from the independent status of the mineral rights in the Bilby case.

> 1931 - Wold, who was a mother of several adult children, conveyed a certain quarter section that she owned to one of her sons, reserving an 80% interest in the oil and gas rights. Shortly thereafter, the quarter was taken by the county for delinquent taxes, which Wold had failed to pay during the time that she owned the quarter. There is no indication that there were any improvements on the land, or that it was ever used at all by Wold, presumably it was vacant.
>
> 1932 to 1937 - At an unspecified time during this period, Wold died.
>
> 1938 - Wold's son evidently had no desire to own or make any use of the quarter that had been conveyed to him by his late mother, since he

never made any attempt to retain his ownership of it by paying the unpaid taxes, so the county conveyed it by tax deed to Waller. Wold's son eventually abandoned his interest in the quarter and disappeared from the area. He did not participate at all in any of the subsequent litigation involving the subject property.

1948 - Waller filed an action to quiet her title to the quarter, including the oil and gas rights, against all parties who might claim any interest in it, without specifically naming Wold or any of her heirs as defendants. What use, if any, Waller made of the land is unknown, but Waller was successful in this action, and title to both the surface rights and the oil and gas rights was quieted in her. Wold's heirs did not participate in this action, because they were not aware of it at this time, since they had not been directly informed that it was taking place.

1957 - Shell Oil had commenced, or was about to commence, operations to extract oil and gas from the quarter, through an agreement with Waller. The heirs of Wold, lead by Nystul, who was one of Wold's daughters, somehow discovered the Shell operation and claimed that the 80% interest in the oil and gas rights reserved by their late mother still belonged to them, by inheritance. They filed an action against Waller and Shell, seeking a share of the oil and gas royalties resulting from Shell's use of the subject property.

Wold's heirs argued first that the 1948 quiet title action, which had completely silenced their interest in the subject property, was void, because Waller had failed to provide sufficient notice of the legal action to any of them, with the result that they had no opportunity to assert their rights at that time. Secondly, they argued that even though Waller had valid and complete title to the surface of the quarter, she did not have full title to the oil and gas rights, because their late mother had deliberately and intentionally severed a portion of the oil and gas rights from the surface rights, making the two sets of rights completely independent of each other. Waller argued that she had no legal obligation to seek out any of the Wold heirs in 1948, and that they were properly and legally identified only as unknown parties at that time. She also argued that she was entitled to the entire estate in the subject property, regardless of the reservation made by Wold in her deed to her son,

because she had not acquired the quarter from Wold's son, she had acquired it from the county, so her acquisition was unburdened by any reservations appearing in the deed to Wold's son. The trial court agreed with Waller on both points, and found that title to the entire estate had been properly quieted in her in 1948, and none of the heirs of Wold had any valid interest whatsoever in the subject property.

The Court was called upon to examine the circumstances in 1948, in order to determine whether or not sufficient notice of the quiet title action filed by Waller, at that time, had been provided. If the notice provided was insufficient or defective in any way, the outcome, in favor of Waller, could be overturned. Because Wold had died, it was obviously unnecessary for her to be served with notification. The dispositive question therefore, was whether or not Waller was legally required to identify Wold's heirs and specifically name them as the parties she was seeking to quiet her title against. The Court upheld and quoted from the applicable statute on the subject of notice in quiet title actions, which clearly indicates that a party seeking to quiet title has no obligation to conduct an investigation or hunt down any parties whose names do not appear of record in connection with the subject property. In so ruling, the Court noted that if any of the Wolds had been occupying or using the quarter, Waller would have been able to identify them without difficulty, and she would then have had the burden of naming them as specific defendants in her action. But since none of the Wold heirs had ever manifested any physical presence on the land, Waller was freed of the burden of tracking them down and figuring out which of them might have a valid interest in the quarter. The burden was placed squarely upon the Wolds, as claimants out of possession, to be vigilant enough to take notice of any events, such as Waller's legal action, that might have a legally binding effect on them. Waller's 1948 quiet title action, the Court determined, was properly conducted and adjudicated.

Still, the Wolds may have felt confident that they could recover their interest in the oil and gas production, although their rights to the surface of the quarter were clearly lost, since the Court had ruled, in the Bilby case noted above, that once a mineral estate is legally separated from a surface estate, by any type of instrument severing the mineral estate, either by conveyance or by reservation, nothing that happens on the surface can have

any impact on the mineral rights. Even a successful adverse possession of the entire surface estate has no effect on mineral rights that were legally severed before the adverse possession commenced, unless the adverse possessor made actual use of the minerals, along with the surface, for the full statutory period. Wold's deed to her son clearly indicated her intention to legally separate the oil and gas rights from the surface estate, and she had executed the conveyance to her son before the county had taken the land, so the Wolds must have expected the Court to declare that their late mother's reservation of a share of the mineral rights was valid and had not been lost, either to the tax foreclosure or to anything else that had happened subsequently. But the position taken by the Court would disappoint the Wolds on this issue as well.

The Court ruled that because the source of the tax foreclosure was the failure of Wold to pay her taxes prior to the date of her deed to her son, the interest in the quarter that was taken by the county was the entire interest held by Wold at the moment her tax payments became delinquent. The point in time when the county actually took control of the land was irrelevant, the Court decided, because regardless of how long the county waited to take the subject property, it was still being taken based on the failure to pay the taxes for an earlier period of time. In other words, the cause of action upon which a county acts, whenever it takes land by means of a tax foreclosure, accrues from the time when the taxes become delinquent. The attempt by Wold to severe the oil and gas rights was futile, because at the time she executed the deed to her son, containing the otherwise legitimate reservation, control over the subject property already rested in the hands of the county. She had no power to either convey or reserve anything relating to the subject property, at the time she executed the deed, so it had no effect whatsoever. If either Wold or her son had subsequently paid the delinquent taxes, then the Wolds rights would have been preserved, and the reservation would have been effective against anyone subsequently acquiring the quarter, but neither of them ever did. The Court agreed fully with the lower court ruling, the Wolds had no valid claim to any estate in the subject property, and Waller had acquired the entire mineral estate, as well as the surface estate. In 1959, in the case of Payne v Fruh, the Court again faced a very similar situation, involving a claim that rights to mineral royalties had been severed from an estate prior to a tax foreclosure, except in that case, the tax

proceedings turned out to have been invalid, leaving the holder of the fatally flawed tax deed to rely upon adverse possession to support his claim. In that case, the Court again ruled that since the royalty interest had not been severed prior to the delinquency of the taxes on the land, no severance had taken place, and the entire estate, including the royalty interest, had been subject to tax foreclosure. Therefore, the Court found that the entire estate, including all the mineral rights, had been lost to the subsequent adverse possession, under the color of title provided by the tax deed. The presence of the color of title to the entire unified estate, surface and mineral, was sufficient, in the eyes of the Court, to overcome the general rule that adverse possession of a mineral estate requires proof that actual use of the mineral rights was made by the adverse claimant.

BERGER v BERGER (1958)

This case, involving a claim that a prescriptive easement had been created as a result of several decades of use of a farm road, pitting brother against brother, provided the opportunity for the Court to review similar cases from other states, and in this instance the court elected to follow the guidance provided by the Supreme Court of a neighboring state, Montana, in which a substantial number of comparable cases had already been decided by this time. The general policy adopted by the Court in this case, which is widely known as "neighborly accommodation", tends to operate to the benefit of private land owners, over both public and private road users, and minimize the number of situations in which prescriptive access easements can come into existence. One key component of the neighborly accommodation concept is the operation of the legal presumption typically associated with it. In some states, use of a road for a protracted length of time results in a legal presumption that the use originated, and was always made, under a claim of right, rather than on a permissive basis. Since facts relating to the true nature of the historic use of a road are often quite difficult to prove, due to the passage of time, the legal presumption can often control the outcome. In many states, after the passage of a certain amount of time, the burden falls upon the record owner of the land upon which the road exists, and over which the easement is being claimed, to

prove that permission to use the road in question was actually given at the outset, making all subsequent use of the road permissive and not adverse. Under the neighborly accommodation doctrine however, the burden of proof never shifts to the record owner, and instead remains perpetually upon the adverse claimant, to show that no permission was given when the use began. This policy obviously makes it much more difficult for a typical adverse claimant to prevail, because the claimant must show clearly adverse use, since the adverse nature of the use can never be implied. The Court has consistently maintained this position down through the years, with the result that relatively few access easements have been created by means of prescription in North Dakota since this time, but the legal principle of prescription remains viable and fully functional in North Dakota, given an appropriate set of conditions, and should therefore be understood by the land surveyor, who may be expected to note and document situations in which rights of access, or of other kinds, may exist by means of prescription. Since the participants in this case all have the same last name, only first names are used to identify them. Also, the Bergers involved in this case lived in Stark County, and were evidently not the same Bergers involved in the very similar 1928 case of Berger v Morton County.

> 1902 - Charles and John, who were brothers, homesteaded the southeast quarter of a certain section. The quarter was accessed by means of a road running along the east line of the section.
>
> 1912 - A bridge on the section line road washed out, and it was evidently not replaced, making at least a portion of that road unusable. The brothers had split the quarter, Charles getting the west half and John getting the east half.
>
> 1913 - Charles and John built a road, from an unspecified point on the east section line road, extending across the east half of the quarter to the west half of the quarter. The east half of the quarter had been fenced by John, so gates were placed in the fences on both the east and west sides of the east half of the quarter.
>
> 1920 - Charles and John graded and graveled the road and it became their main access route henceforward. Other parties sometimes used the road, but there was no evidence that it was ever extended beyond the southeast quarter. At least one other road provided access to the

west half of the southeast quarter, so it was not absolutely necessary for Charles to use the road across John's half of the quarter, but both brothers used it on a regular basis nonetheless.

1947 - By this time, the west half of the quarter was being farmed by Frank, the son of Charles, and the east half was being farmed by Ray, the son of John. Ray was unsatisfied with the road location for some unknown reason, so he paid the county to send out an equipment operator, who relocated the road following Ray's instructions. There is no indication of how much the road location was changed, but it did connect to the east section line road at a different location, and a new gate was installed in that location. Frank and Charles raised no objection to the relocation of the road and went on using it just as they always had.

1956 - Ray accused Frank of leaving the east gate open, allowing Ray's cattle to get out, and threatened to plow up the road. Frank responded by filing an action against Ray, claiming that the road represented an access easement by means of prescription, so Ray had no right to close or destroy it.

Frank argued that the road had become a public road, by virtue of the use made of it by his father, himself, and an unspecified number of others who had used it for unspecified purposes, presumably to reach their farm. Ray argued that the road had been created and used entirely by permission, and both he and his father had always maintained complete control over it's use, so none of the use that had been made of it was adverse to either his father or himself, and no prescriptive rights to use it had developed. The trial court ruled that a public road had been created by prescription, so Ray could not destroy it or obstruct it in any way.

Frank faced a more difficult task than he probably realized when he decided to enter into this legal battle against his cousin. In order to prevail, he had several legal hurdles to get over. First and foremost, in order to prove that a prescriptive use has developed into an easement of any kind, the party asserting that an easement exists must prove, by clear and convincing evidence, that the use of the record owner's land was adverse to the record owner. Frank, no doubt angered by his cousin's threat to eliminate the road,

and motivated by his outrage over that idea, probably discounted the difficulty in proving that the use of the road was adverse to the land rights of his cousin. In order to prove adverse use, which is essentially synonymous with hostile use, it must be shown that the use was damaging or detrimental in some way to the land rights of the owner of record. Adverse or hostile use is use that was not the result of any agreement, whereby a portion of the record owner's land is put to use by a party with no right to make that particular use of the land in question. Such use is considered legally adverse and hostile to the party whose land is being used, because it results in a loss of that party's land or land rights, which is obviously contrary to the interests of that land owner. Frank probably felt that the fact that the use of the road had continued for over 40 years, more than twice the length of time required for a prescriptive easement to develop and ripen, would make his case a simple one to win, but the passage of time was really the only factor operating in his favor, and in reality a number of factors were stacked up against him. The most obvious factor working against him was the fact that all of the parties involved in the case were close family members, who had essentially lived together, or in very close proximity, all of their lives. Although adverse conditions can and do develop between close family members, the Court always presumes that acts performed or participated in jointly by family members are intended to be for the mutual benefit of all concerned, and are not selfishly or antagonistically performed. Therefore, the Court observed that all of the relevant use that was made of the road was made within the family, and accordingly held Frank to an elevated burden of proof, with respect to the issue of adverse use.

Since the origin of the road was known in this case, rather than being shrouded in the mist of time, as is often the case when prescriptive rights are claimed, the Court had the opportunity to examine the known facts relating to the creation of the road. Since the road was created through a collaborative effort by two brothers, clearly pulling together and acting in their mutual interest, the Court found it impossible to view the road as anything other than the product of a mutually beneficial relationship, between Charles and John. Both of them subsequently used the road, in a mutually beneficial manner, and there was no evidence that Charles had ever insisted that the road be kept open against John's wishes, or that John had ever wanted to close the road and been prevented from doing so by

Charles. All the evidence pointed only to use of the road by virtue of an ongoing mutual agreement, free of any adverse relations whatsoever. Most importantly, the Court stated, the fact that the road had been gated from the very outset, and had remained gated at all times, was a major factor in determining who actually had control over the road. The fact that John had fenced his land, and had always maintained the gates at both ends of the road, clearly showed, in the view of the Court, that he had retained complete control over the use of the fenced area, including the portion of the road crossing his half of the quarter, at all times. There was no evidence that anyone had ever used the road against his wishes, so his right to exercise full control over the road had really never even been challenged. Under these conditions, the Court determined that the use of the road had been initially permissive, and had always remained permissive, rather than hostile or adverse, and had been under the control of John and then Ray. Had the use not been made by family members, and had the origin of the road been unknown, and had the gates not been present, the Court may very well have required John to prove that he had given those using the road express permission to use it at the outset, in 1902, which he probably would have been unable to prove, but since all of those factors militated against the claim made by Frank, the Court held that John had done all that a record owner is expected to do to retain control over his land.

In basing it's decision in this case primarily upon the existence of gates on the road in question, the Court was following the widely recognized general rule that gates are antithetical to the concept of a public road, and the presence of gates can also operate to prevent the development of a private prescriptive easement in some cases, depending on the specific circumstances. In so deciding, the Court cited three comparable Montana cases, in which gates also figured prominently, and the Court has remained consistent in it's position that gates are evidence of control over a roadway ever since. The 1981 case of Backhaus v Renschler is a good example of another prescriptive road case in which the existence of a gate proved to be decisive. In that case, a road that was used by the public, primarily to access a river for fishing and hunting, for over 50 years, was ruled to have remained under private control, because one gate was always kept closed and it had been locked from time to time. But in this case, the Court had one additional point yet to make. Noting that the road had been relocated at

Ray's direction, and that neither Charles nor Frank had objected to the relocation, which evidently amounted to a significant change of location, the Court ruled that the act of relocating the road was a clear assertion by Ray of his right to keep the road under his own full and exclusive control. All of the use of the road subsequent to it's relocation, whether by Frank or by any others, therefore served only as recognition of Ray's complete control over the road. Compare and contrast this to the 1928 Berger case, previously reviewed herein, in which Berger contacted the county, and asked the county to relocate a portion of the road that was on his land, thereby acknowledging both the county's control over the road, and his own lack of control over it, leading to the decision against him in that case. In this case, Ray also contacted the county about relocating the road, but he did not acknowledge county control over the road, he essentially ordered the road to be relocated, demonstrating his own control over the road in so doing. Deciding that no easement of any kind had been created over any portion of Ray's land, the Court reversed the ruling of the lower court, and declared that Ray was free to obliterate the road and bar any further travel across his land at any time, should he choose to do so.

CHAPIN v LETCHER (1958)

Adverse possession claims involving tax delinquency and cotenants came before the Court with increasing frequency during the 1950s and in this case those issues were both present, resulting in a fairly complex scenario to be examined by the Court. Two other cases that came before the Court shortly before this one, involving some of the same issues, are relevant to the case we are about to review. In 1955, in Frandson v Casey, the Court addressed the effect of a quitclaim deed that was granted in the context of a cotenant relationship. Frandson obtained a quitclaim deed purporting to convey the entirety of the subject property to him, but the grantor was in fact only a cotenant of the land described in the deed. The Court held that Frandson did not acquire the entirety of the land described in his deed, he merely became a cotenant of it, and he could not successfully assert any right to exclude his fellow cotenants from the land based solely on a quitclaim deed, since the fact that the deed was a mere quitclaim had

served to put him on notice that rights of others to the same land might exist. Frandson was unable to meet the requirements for adverse possession, so his deed was no use to him as color of title. Then in 1957, in Smith v Nyreen, the Court ruled that a Decree of Distribution, describing land owned by a deceased party, is a legal document that provides color of title and can therefore support a claim of adverse possession. Nyreen had already occupied the land in question, based on the erroneous Decree, for over ten years at the time when Smith initiated her action, claiming that she had been illegally excluded from her rightful interest in the subject property by the Decree. While agreeing with Smith that the Decree was erroneous, the Court ruled that she had failed to assert her rights in a timely manner and Nyreen had successfully completed his adverse possession of the land in question, under the color of title provided by the Decree. We will see how the decisions of the Court in those cases, as well as others, such as the Morrison and Tarnovsky cases, point the way toward the outcome of this case, as the Court continues to refine it's definition of the conditions and circumstances under which adverse possession can operate against cotenants.

1919 - The subject property, portions of two sections nominally amounting to 240 acres, was patented to Hasby.

1922 - Hasby conveyed the land to his wife by warranty deed. The Hasby family did not live on the land and there is no indication that any of them ever made any use of it.

1927 - Hasby's wife died intestate, leaving Hasby and several children and grandchildren as her heirs. Some of the heirs lived in other states and the members of the Hasby family who were living in North Dakota did not know where the other heirs were, and they made no effort to locate the other heirs, so some of the heirs were never contacted and did not know that they now had some interest in the land. This would prove to be the cause of the controversy, nearly thirty years later.

1940 - No one had paid any taxes on the land, so McKenzie County took control of it.

1944 - Three of the Hasby heirs, including Hasby himself, entered an agreement with Chapin, who paid the delinquent taxes on their behalf. Each of the Hasby heirs living in North Dakota, which included the

Letchers, then deeded their individual interests in the subject property to Chapin, who recorded the deeds. Chapin was not aware that he had not acquired the interests of all of the heirs.

1945 - Stoughton, who was also one of the heirs in North Dakota, filed a petition for a Decree of Heirship, on behalf of herself and the other Hasby heirs living in North Dakota, and a court issued a Decree of Heirship, listing the Hasby heirs that were known to Stoughton, which was recorded. All of the heirs named in the decree had already conveyed their individual interests in the subject property to Chapin. Chapin, believing that he was now the sole owner, took possession of the land in the spring of the year, leasing it to a tenant farmer who cultivated 15 acres of it, and Chapin began paying the taxes on it.

1946 - Chapin built a fence around the entirety of the subject property and his tenant again cultivated a portion of it.

1947 - Chapin conveyed the subject property to his two sons, who continued to use the land in the same manner established by their father, and they continued to pay the taxes on it.

1955 - The Fellmans, who were among the heirs of Hasby's wife that were never informed of the land rights they had obtained as a result of her death, somehow learned what had happened. The Chapins filed an action against all of the Hasby heirs to quiet their title. The Chapins had only paid the taxes on the subject property for nine years at the time their legal action was filed. After the legal action was filed, the Chapins paid the taxes for the tenth year, in an attempt to meet all the requirements of the statute supporting adverse possession under color of title.

The Chapins argued that they were innocent purchasers who had acted in good faith in acquiring the land from the Hasbys, the Stoughtons and the Letchers. They argued that they had completed the full ten year period of adverse possession by making actual use of the land for ten full years, despite having not made their tenth tax payment until after the legal action was filed against them. The Fellmans argued that they had not received proper legal notice of their rights, following the death of Hasby's wife, so nothing that had happened could have any impact on their rights. They also argued that the use of only a small portion of the subject property

by the Chapins was insufficient to provide physical notice of their presence, and insufficient to form the basis of a claim to the entire 240 acres. Further, they argued that the Chapins failure to pay ten full years worth of taxes, before their possession was discovered, was fatal to the claim made by the Chapins. In addition, they argued that although they were not aware of their rights to the land for many years, and therefore made no attempt to use any of it, they were legal cotenants of the subject property, at all times, along with the Chapins. The trial court was unsympathetic to the Fellmans, ruling that they had failed to assert their rights in a timely manner, and quieting title to the whole 240 acres in the Chapins. The Hasbys, Stoughtons and Letchers conceded the matter, but the Fellmans appealed to the Supreme Court.

The Court agreed with the Chapins that they were innocent purchasers, who had functioned in good faith, in the process of legally acquiring all of the interests in the land that were known to them. As grantees and innocent third parties, they had the right to rely on the knowledge of Stoughton, since she was one of their grantors, who had prepared the list of known heirs. None of the parties had done anything fraudulent, the Court determined, so fraud was not a factor in the case. However, the Court also agreed with the Fellmans that they were innocent parties as well, who had not received any actual notice of their rights, at the time that the other Hasby heirs received notice from the county. Therefore, the Fellmans were legal cotenants, along with Chapin, from the moment he first acquired his rights to the subject property. Chapin's acquisition had not terminated the interest in the land held by the Fellmans, both of them held a share of the rights to every part of the subject property, when Chapin's possession and use of it began, even though neither party was even aware of the existence of the other party.

The next key question was whether or not the Fellmans could be charged with notice, by the acts of the Chapins. The actual use of the land by the Chapins and their tenant was minimal. Initially, they used less than ten percent of the 240 acre area, and in fact it appears that they never used the majority of it. Chapin did fence the entire perimeter of it, as noted above, but this did not take place until 1946, less than ten years prior to the start of the litigation, so the Chapins could not maintain that this marked the

beginning of their adverse possession, they had to argue that it had commenced earlier. The Court found that constructive notice to the Fellmans, and to all the world, had been provided by Chapin, when he recorded his deeds in 1944, but he was not yet using the land at all at that time. When he began using the land in 1945 however, his possession was under color of title, and as such it immediately became adverse to the Fellmans. The fact that the Chapins used only a small fraction of the total area was irrelevant, the Court decided, because Chapin's deeds described the full subject property. Any use of the land, however small, if made under color of title, amounts to occupation of the full area described in the document or documents providing the color of title. The adverse possession by the Chapins commenced at the moment they first used any portion of the land under color of title. The land was never partitioned, so use of any part of it by the adverse claimants extended their claim all the way to the boundaries described.

The final hurdle that the Chapins had to get over was the issue created by the fact that they did not pay a full ten years worth of taxes on the land until after the trial had begun. In pointing to the failure of the Chapins to pay ten years worth of taxes before the trial, the Fellmans were operating under the presumption that the litigation had stopped the running of the ten year adverse possession period. The Court found however, that the litigation had not stopped the clock, adopting the position that:

> "One in adverse possession does not arrest the running in his favor of the statute by commencing an action .... An action to determine conflicting claims brought by an occupying claimant does not arrest the running of the statute .... An action by the claimant of adverse possession does not dispute his own possession. It is only when his claim is disputed by someone else that the statute is suspended .... An unsuccessful denial of title does not break the continuity of the open and adverse possession .... a claim which fails and does not result in a judgment in favor of the one prosecuting such claim, does not have the effect of suspending or tolling of the statute of adverse possession in favor of the person against whom such claim is prosecuted."

The Chapins paid the tenth year of taxes while the litigation was underway. The Court ruled that they were not delinquent in so doing, their adverse possession had been completed by their actual use, under color of title for ten full years, earlier in 1955, and it was merely perfected by the final tax payment. The Court upheld the ruling of the lower court in favor of the Chapins in all respects. Had the Fellmans discovered the situation sooner and acted promptly, the outcome could have been different. Once again the Court had made it very clear that all holders of land rights, including those who are unaware of their rights, bear a high burden of vigilance, regardless of where the land may be, and failure to discover any activity on any land in which one has any ownership interest or other rights can prove to be fatal to those rights.

CITY OF JAMESTOWN v MIEMIETZ (1959)

Here we again encounter a situation representing the clash of public and private rights, this time in the context of a building located partially within a public right-of-way, and we observe the Court's treatment of the efforts of the building owner to justify it's location and resist an order to remove it. While we have already learned that a building encroaching over a private property line does not always need to be removed, establishing a justification for a building to remain within a public right-of-way is usually a more difficult proposition. Public land rights are generally protected under the law with a higher level of diligence than comparable private land rights, due to the distinct legal nature of public rights, in view of the fact that private rights typically benefit only an individual or small group, while public rights benefit all, and this principle is particularly applicable to boundary, title and easement issues. This is the case, because all private property owners carry the fundamental legal burden to diligently and vigilantly protect their own rights, by taking notice of any violations of their property boundaries. Accordingly, the law provides that private land owners who ignore violations of their boundaries may fall victim to the applicable statute of limitations, potentially losing certain rights to adverse or prescriptive uses, as a consequence of their own negligence. Public trust lands however, carry no such burden and stand invulnerable to attacks based

on adverse and prescriptive uses, because the public benefit derived from them is ongoing, and remains undiminished, regardless of the passage of time, the absence of any use of the land, or even the absence of any attention to the land. In this case, claims of adverse possession and estoppel are put forth, predicated on the notion that the right-of-way in question had been abandoned, freeing it of it's public status. Key to the outcome is the fact that public land and public land rights which may appear to have been abandoned, due to long disuse, can and typically do still exist, and presuming that they have vanished with the passage of time is folly. Unlike private land rights, those rights held in trust for the people, by any governmental body acting in it's governmental capacity, need never be used, asserted or defended, in order to remain intact, because the government officials with jurisdiction over those rights are not authorized to allow public rights to vanish, so even complete indolence and inaction on the part of the government does not destroy existing public rights. The operation of the legal principle of abandonment hinges upon intent, and since it's impossible for the responsible government officials to intend to allow public rights to simply disappear, those rights continue to exist, effectively transcending such negligent behavior as might cause those rights to be lost, were they private in nature. Such was the lesson we shall see brought home here, to the vanquished party.

> 1881 - An addition to Jamestown was platted and recorded. The plat showed several blocks of typical residential lots, including some lots that were bounded on the east by a Northern Pacific Railroad right-of-way and on the west by 14th Avenue SE, which was platted as an 80 foot wide right-of-way. A portion of 14th Avenue SE evidently remained unimproved for several decades, although a dirt trail running somewhere within the platted right-of-way gradually developed over time, as a result of public travel through the area.
>
> 1938 - Miemietz bought a group of five lots in a block of the 1881 addition lying between 14th Avenue SE and the railroad. A small building existed in the area at this time. Since 14th Avenue SE was unimproved, Miemietz could not tell for sure whether the building was actually on the lot or in the platted right-of-way, and he chose not to order a survey in order to find out. His abstract of title contained a sketch of unknown origin, allegedly prepared by Northern Pacific,

that showed his lots differently than the 1881 plat. Whether he ever saw the 1881 plat or not is unknown, but if he did, he chose to ignore it and rely instead on the sketch from the abstract, by virtue of which he concluded that the building was probably on one of his lots.

1950 - Miemietz decided to build an addition onto the existing building. He was concerned about the location of the building however, and he wanted the location verified before he went to work expanding the building, so he notified Jamestown of his plan and sought the city's approval. Jamestown sent someone, presumably from the city's engineering office, out to view the building and the lot. Miemietz had a conversation with the city representative, who expressed no objections to the construction, and Miemietz was granted a building permit, based on a drawing of unspecified origin showing the building on the lot. Once again however, no survey was done, so no one was really sure where the building was located in relation to the platted right-of-way of 14th Avenue SE, but Miemietz went ahead and extended the building.

1954 - A survey was conducted by Jamestown of 14th Avenue SE, for the purpose of installing underground utilities in the right-of-way, and it was discovered that the west side of the expanded Miemietz building was just 5.5 feet east of the centerline of the right-of-way. Miemietz found this difficult to believe, so he ordered another survey, which confirmed that his building projected 34.5 feet into the right-of-way. Miemietz resisted the city's instructions to him to move the building, claiming that Jamestown was responsible for the situation, so Jamestown filed an action against him to require him to remove the building from the right-of-way.

Jamestown argued that the building was merely an encroachment, subject to removal, regardless of how long it had been in the right-of-way, and despite the fact that Jamestown had approved the expansion of the building. Miemietz argued that the city's failure to use the right-of-way in question for several decades amounted to abandonment of the right-of-way, leaving it vulnerable to adverse possession. He further argued that he had given Jamestown notice that the building might be partially or entirely in the right-of-way, and he had offered to relocate the building before expanding

it, so he was entitled to rely on the approval of the building's location that he had obtained from the city. In addition, he asserted that since Jamestown had failed to take any action to verify the building's actual location, at the time when he pointed out the problem, and had given him a permit to expand the building, Jamestown had acted negligently, and should therefore be estopped from telling him that it had to be relocated now, after he had invested substantial funds in enlarging it, making it far more difficult and expensive to move. The trial court was unmoved by any of the arguments presented by Miemietz, and ordered him to promptly remove the building from the right-of-way.

With respect to the suggestion by Miemietz that Jamestown had abandoned a portion of 14th Avenue SE, and that because it was no longer city property, due to that abandonment, it had become subject to adverse possession, and he had acquired a portion of it by that means, the Court was entirely unconvinced and set about correcting the fundamental errors in his argument. A right-of-way created and dedicated by means of a plat is expressly dedicated, and therefore can only be vacated by means of strict adherence to all the statutory procedures applicable to the completion of a legal vacation. Once any actual use has been made of a platted and dedicated right-of-way, or any lots have been sold based on the plat, the dedication has been legally accepted and becomes fully binding. After that point in time, rejection, refusal or abandonment of the right-of-way is no longer legally possible, the existence of the right-of-way can only be terminated by means of a formal vacation. Miemietz obviously believed that the minor use that had been made of a small amount of the right-of-way by the public would be seen by the Court as insufficient to constitute acceptance of the full length and width of 14th Avenue SE as platted. He may have believed that in the absence of any paved roadway or utility lines, the Court would agree with him that the right-of-way had never been fully or seriously used by the public. On the contrary, the Court held, consistent with it's ruling in the Grand Forks case of 1952, which we have already reviewed, that any public use of any portion of any dedicated right-of-way constitutes full acceptance of the entire right-of-way, for it's full length and it's full width. In addition, since every dedicated right-of-way is held in trust for the public, no municipal authority has any power to relinquish any such right-of-way, without proceeding through all the steps necessary to

accomplish a legal vacation. So even if Jamestown had actually intended to disregard the platted right-of-way, either in total or in part, and treat it as non-existent, the right-of-way would still have legally existed as platted, as a result of it's acceptance by virtue of actual use by the public, even if that use was only slight, sporadic or partial.

Having dismissed the allegation of abandonment made by Miemietz, and determined that even the very limited use that had been made of the right-of-way was sufficient to support it's ongoing existence as platted, the Court readily dispatched the adverse possession argument put forth by Miemietz. Applying the public trust doctrine, the Court stated that since every public right-of-way is held in a governmental capacity, and not merely in a proprietary capacity by the government, neither adverse possession nor prescription can ever operate to reduce, diminish or eliminate such a right-of-way, and this is true regardless of whether it is owned in fee by the public or held as an easement by the public. With reference to the claim made by Miemietz that the sketch he had discovered in his abstract gave him color of title, and a valid claim to what appeared on the sketch to be a larger area than that which was embraced within the lots as they had been originally platted, the Court correctly disposed of the idea that he had any right to rely on such a map, as opposed to the original plat by which his lots had been created. On this point, the Court provided some valuable insight into the way plat and map evidence is viewed and accepted or rejected by the Court, declaring that:

> “...although ancient maps are held in high regard by the courts, not every ancient map is admissible in evidence. One recognized rule is that an ancient map made by a private person, or as to which no official authorization or recognition appears, is inadmissible."

All that remained was for the Court to address the estoppel claim made by Miemietz. As we have seen in previous cases, and will repeatedly see again, complete good faith is absolutely essential to a successful claim of estoppel. The Court noted that Miemietz admitted he had always been uncertain about the location of the boundaries of his lots. The Court further observed that he had initially failed to make any effort to discover his lot

lines, at the time he acquired the lots, and had postponed that matter indefinitely. Upon deciding that he wanted to improve his property, after having owned it for several years, he was still unwilling to take any action, or invest any money, to learn with certainty where his platted boundaries really were. Instead, he attempted to pass that responsibility on to the city, by suggesting that the city must obtain a survey in order to approve his building permit request, or else take the responsibility for approving his request without having a survey done. The Court found that Jamestown was under no obligation to order a survey of the lots owned by Miemietz, in order to grant his building permit, or for any other reason, because the sole responsibility for determining and knowing his boundaries rested squarely on Miemietz himself. He was in no position, the Court indicated, to charge Jamestown with negligence or deception, since his own negligence, in failing to ascertain his own boundaries, easily exceeded any negligence committed by anyone representing the city. This case therefore stands as one of only a very few North Dakota cases in which the Court has seen fit to openly and explicitly reprimand a property owner for failing to have his property surveyed. While there is no absolute legal requirement ordering a property owner to have land surveyed, under certain circumstances failing to do so can definitely be an indication of the absence of good faith, which can be most destructive to the case of any litigant, as it was here. The Court upheld the decision of the lower court, that the building legally could, and in fact must, be completely removed from the public right-of-way.

LALIM v WILLIAMS COUNTY (1960)

Returning to the subject of easements, here we come to another case that resulted from the need to widen a section line right-of-way, quite similar in that respect to the Otter Tail case of 1942, which we have already reviewed. As in that case, the controversy here is over a relatively narrow strip of additional land that had become part of the right-of-way, and again the location of the strip in question is not at issue, the land rights relating to that strip form the basis of the dispute. Here however, the conflict is over not just the rights of the various parties to make different uses of that strip, but the actual ownership of the land itself. Therefore, while the Otter Tail

case stands as a major decision upholding the rights of servient land owners, whose property bears the burden of a public right-of-way, this case stands for another highly powerful proposition, that intent controls the meaning of conveyances, even over explicit deed language, and it also demonstrates that evidence of that controlling intent can always be presented, for the purpose of clarifying what the language of the deed actually meant to the parties at the time of conveyance. While this case does not deal with those descriptive elements of a deed that a surveyor is typically most concerned with, such as directions and dimensions, since the location of the subject property was not in question here, it nevertheless represents a particularly clear and strong statement from the Court, pertaining to the proper treatment of evidence that calls the true meaning of a deed into question. The ruling handed down by the Court here is therefore equally applicable to the kind of deed language that surveyors typically deal with, which is fundamentally technical in nature, and is clearly within the range of deed content that the Court finds to be ultimately controlled by intent. The fact that intent is essential to any conveyance however, is nothing new, having always been widely acknowledged. Since conflicting intentions very often appear, the most crucial question becomes which form of intent constitutes the controlling intent. In cases concerning boundary evidence, as all surveyors should already know, physical evidence carries the greatest weight with the Court and typically controls over the lesser intent embodied in measurement evidence, such as the intent to run a certain distance along a certain bearing, which is among the most basic principles of land rights that the Court has long recognized, as we have seen from the Radford and Propper cases. In resolving conflicts where there is no physical evidence for the Court to turn to however, the highest and strongest form of intent is generally that which best fits, suits or matches the purpose of the conveyance, and this is very often the case in easement and right-of-way disputes, where the outcome hinges entirely upon the interpretation of a description, as in this instance. In fact, the core legal principles concerning description interpretation and extrinsic evidence addressed in this case actually exceed measurement principles in legal significance, because these principles transcend measurement evidence, controlling exactly what land rights are conveyed, and whether or not any land in fee is conveyed at all.

1925 - Ryan acquired the southwest quarter of the southwest quarter

of a certain Section 23, and the west half of the northwest quarter of the adjoining Section 26, in Williams County. These were both typical sections, subject to the standard 66 foot wide public right-of-way centered on all of the section lines, but otherwise unburdened. Whether or not any actual roadway of any kind existed on the west line of these sections at this time is unknown.

1932 - A federally funded highway project was approved, mandating the design and construction of a highway by the North Dakota State Highway Commission. Accordingly, North Dakota prepared a set of highway plans for the project. The plans called for the proposed highway to run along the section lines forming the western boundary of the Ryan property. The plans also indicated that the proposed highway would require an 80 foot wide right-of-way, and included a right-of-way plat showing the parcels that would need to be acquired from all of the various land owners along the proposed route to facilitate the project.

1935 - When approached in regard to this acquisition of additional right-of-way width by Williams County, Ryan did not object, and cooperated by executing a warranty deed that had been prepared in advance, in favor of Williams County, as requested by the county for the purpose of widening the existing section line right-of-way from 66 feet to 80 feet. Since Ryan owned land on only one side of the section lines that were involved, only seven foot strips were conveyed to Williams County by Ryan, one strip in each section, forming one continuous strip, with the intention of extending the existing 33 foot wide portion of the right-of-way lying along the westerly edge of these sections an additional seven feet eastward.

1946 - Lalim acquired the Ryan property by means of a quitclaim deed. This deed recited no exceptions or reservations and therefore operated to convey all of the land in Sections 23 & 26 that was then owned by Ryan. By this time, the highway had been built and was in use, to what extent the expanded right-of-way was put into actual use however, is unknown.

1960 - For unknown reasons, a controversy developed between Lalim and the county, over the ownership of the land lying within the

> expanded right-of-way, and also over the mineral rights associated with that area, at some unspecified point in time, and it erupted into an outright dispute at this time. Lalim filed an action against both Williams County and North Dakota, claiming that he had acquired complete ownership of all of his aliquot parts of Sections 23 & 26 in fee, subject only to an easement over the westerly 40 feet of those sections for highway purposes.

Lalim argued that the 1935 conveyance of additional right-of-way width by Ryan was fundamentally a conveyance of an easement only, and not a conveyance in fee. Lalim maintained that the language of that conveyance was legally controlled by the 1932 highway plans and right-of-way plat, which indicated that the acquisition of the seven foot strip in question by Williams County was intended to provide only an addition to the existing 33 feet of right-of-way on the Ryan property, and the seven additional feet were therefore necessarily of the same legal character as the existing 33 feet, which was only an easement and not fee. Williams County and North Dakota argued that the language of the warranty deed signed by Ryan clearly granted the additional seven feet to Williams County in fee, and the words used in the deed must control the true meaning and nature of the conveyance, so Williams County had acquired full legal title to the entire right-of-way in fee and Lalim had acquired no rights to any portion of the 80 foot wide right-of-way whatsoever. The trial court agreed with Lalim and ruled that he was the sole fee owner of the land beneath the entire expanded right-of-way.

The language that was used in the descriptions, which were created to facilitate the acquisition of the two strips of additional right-of-way width in question, was obviously central to the controversy in this case. The warranty deeds were not titled as easement deeds, so the titles of the documents gave no definite indication of whether the fee or an easement was being conveyed. The descriptions were essentially identical, except that one referenced Section 23 while the other referenced Section 26, and they were typical of the descriptions used throughout the project to acquire land rights for the proposed highway. The description form that was employed in every case first indicated the location of the entire 40 foot wide strip, then excepted out the 33 foot portion forming the existing section line right-of-

way, leaving the additional seven feet as the subject property. Importantly, included in this description form were two references to the highway plans. One of these references was to the appropriate parcel number appearing on the plans, and the other was contained in the concluding words "...and is shown on plat as shaded area.". In every case, the description was followed by a paragraph stating, in relevant part, that the grantor is conveying the land "To Have and to Hold .... Forever", and warranting that the grantors are indeed the true and legal owners of the land, who "...have good right to sell and convey the same...". In other words, the language employed was, in every respect and in every detail, the language of a typical fee conveyance. No positive indication was provided anywhere in the express language of these deeds that anything less than a fee conveyance was intended by any of the parties involved in the transaction. Under such circumstances, the Court stated, the presumption that a fee conveyance was intended, was applicable.

Presumptions at law are very powerful factors, whenever they come into play, and at least one legal presumption comes into play in virtually every land rights case, and often more than one presumption is at work. The presence of a legal presumption can be truly critical, because those parties with a presumption operating in their favor have a distinct advantage, since the presumption determines which side bears the burden of proof. For example, in adverse possession cases, the owner of record always begins with the presumption that he owns the land in question operating in his favor, so the burden of proof is on the opposing party to present evidence sufficient to overcome that presumption, and failure to do so results in defeat. In cases where the evidence presented by both sides is scant, meager or relatively weak, the applicable presumption at law often controls the outcome of the case. Lalim was in the unenviable position of bearing the burden of proof in this case, as described above, but as it turned out, he and his legal team were up to the challenge and presented a masterful argument. The Court had acknowledged that the deed contained the language of a grant, and a grant of an unspecified nature is always presumed to have been intended to be a grant in fee. Further, plain and specific language settled upon and used in any written document of conveyance is always presumed to represent and embody the true and complete intentions of the parties. However, these presumptions are not conclusive and can be overcome. To overcome them and prevail, Lalim had to show strong evidence of an

intention to the contrary, in other words, he had to convince the Court that in spite of the deed language, Ryan really had no intention to convey the subject property in fee.

The key to Lalim's argument was found in the references to the highway plans and the right-of-way plat. These references, in the eyes of the Court, provided the essential context, within which the conveyance was undeniably made. When viewed in the light of these maps, the Court observed, it was perfectly clear that any party asked to engage in a conveyance for such a purpose, as Ryan had been, would be fully justified in believing that the conveyance of additional right-of-way width was not being requested in fee, and was to be of the same character as the existing section line right-of-way, which of course was understood by all to be an easement. Since the language had been selected by the grantees in this case, and the documents had been prepared and placed before the grantor by the grantees, Ryan as the grantor could not be held responsible for the language used. Williams County attempted to assert that a fee conveyance was truly intended, because it was supposed that acquiring two fee strips enclosing the existing section line right-of-way would have the effect of converting the existing right-of-way from easement to fee. The Court was not inclined however, to allow that alleged intent on the part of the county and the state, being the intent of the grantees alone, to control the outcome, since Lalim had shown solid evidence supporting the idea that Ryan had good reason to consider the transaction an easement conveyance. The Court held that the primary focus, as always, must be on intent, to whatever extent and by whatever means the intent can be ascertained, and intent is best determined in the context of the purpose for which a given acquisition is made. To that end, the Court decided that the intent was not controlled by the deed language, which was rendered ambiguous by the evidence that the conveyance was executed to serve a purpose for which fee acquisition was unnecessary, taking the position that:

> “...the real intention of the parties to an ambiguous instrument, when it can be clearly ascertained, will prevail as to the estate conveyed over the technical meaning of the words used .... words need not be construed literally or strictly, since greater regard is accorded to the real intention as manifested in the

> entire deed than to any particular word .... a deed must be interpreted to further the intention of the parties in the light of the subject matter, the object to be obtained, and the circumstances and conditions existing when the deed was executed .... the purpose is fully effectuated by acquiring the same kind of title that already existed in the right-of-way for the highway that had been established."

Following the principle that where public use of private land is required, no greater right is conveyed or acquired than what is necessary to accomplish the intended purpose, the Court fully upheld the decision of the lower court. In so ruling, the Court had again treated intent as paramount, and significantly, had adopted the position that evidence of the purpose for which land rights are acquired can provide the clearest and strongest indication of the true intent of a conveyance. Equally significantly, the Court had also adopted the position that the true intent of a deed can be made ambiguous by external factors, and once deemed to be ambiguous, the true intent can be resolved by means of extrinsic evidence, even when that evidence points to a conclusion that stands in clear contradiction to the language used in one or more places in the deed. In other words, the literal or technical interpretation of the words in the deed will not be allowed to control, when higher evidence of an intention to the contrary can be shown, and evidence relating to the circumstances under which the conveyance was made can represent the highest evidence of intent. In addition, the Court determined that references to land in a deed can also mean land rights, rather than the actual land itself, so the references to land in the deed signed by Ryan did not preclude the possibility that only an easement was actually intended. The manner in which the Court resolved the core issue presented by this case, the contradiction between clear deed language and relevant evidence conflicting with the content of the deed, provides great insight into the Court's treatment of evidence, which can help surveyors understand why surveys and legal descriptions based on surveys, even when highly detailed and precise, do not always control land rights. Precision, exactness and technical details in general, with regard to either words or numbers in a deed, typically fail to impress the Court and will seldom control the outcome of a case, since the Court is charged with basing it's decisions on principles of equity and justice, rather than on such factors as technical

correctness. The Court invariably focuses on the totality of the evidence, and as we will see going forward, in those cases where surveys are ruled not to control boundaries, that outcome is not the result of any absence of correctness in the survey, but rather the result of the fact that the survey neglected to take the totality of the evidence into account, and therefore represents only a technical and literal interpretation of the content of the deed, such as that struck down by the Court here. If a surveyor desires to find support for the results of a survey from the Court, then the surveyor must be open to honoring the totality of the evidence, just as the Court itself does.

BRANDHAGEN v BURT (1962)

We have already reviewed a number of cases very amply showing how the actions of various parties, particularly land owners, can have a serious impact on their land rights, especially when those acts or omissions play out over an extended period of time. The basic idea that people can be held responsible for their acts or omissions that result in damage to rights of others finds legal expression in the principle of estoppel, and the related idea that lengthy delays in claiming or asserting rights, also resulting in damage to the rights of others, are similarly unjustified, finds it's expression in the principle of laches. The fundamental concept behind these long standing legal principles rests upon the notion that all members of a society have the responsibility to deal fairly with other members of the society, and attempts to take advantage of others should be discouraged or prevented by the law, rather than being legally supported. Our society, being quite a modern and well developed one, has established and put in place many laws and rules that generally serve their intended purpose very well, such as the statutes of frauds, the statutes of limitations, the recording laws and the laws relating to subdivisions and land use, to list just some of those that apply to land rights and therefore often come to the attention of surveyors and other professionals dealing with land rights. But it remains essential for both professionals and private land owners to keep in mind that none of those laws and rules were ever intended to overcome or supplant the basic

principles of society, that operate to promote fair dealing and good faith in transactions involving land rights, and the Court is therefore quite justifiably hesitant to apply the law in any unintended manner. So attempts to corner or entrap other parties, such as an innocent adjoining land owner in this case, through manipulation of the law to achieve an unintended purpose, such as protecting actions taken in bad faith, will continue to come within the scope of matters that the Court retains the option to strike down as illegitimate. Observing how these principles play out in the eyes of the Court holds potentially valuable lessons for land surveyors, one of the primary lessons being the fact that it should never be taken for granted that the Court will apply statutes in a strict, literal or arbitrary manner, without due consideration to equity and justice, since the Court's principal objective in interpreting the law, is the protection of rights created in good faith, as is very clearly seen here.

> 1948 - Brandhagen and Burt owned adjoining lots in a platted subdivision, which were evidently intended for commercial use rather than residential use. How or when either of them had acquired their lots is unknown, but there was never any dispute over their ownership of their respective lots, or over the location of the boundary between their lots. Both of them had plans to erect commercial buildings, and they met and discussed those plans. Brandhagen intended to erect the east wall of his building 18 inches inside his east lot line, which was Burt's west lot line. Brandhagen agreed to allow that wall to be used as a party wall, so Burt had his building, a Super-Valu grocery store, designed accordingly. Brandhagen put his building up first, in the intended location, then Burt connected his building to it, so part of Burt's building was on Brandhagen's lot. The water and sewer lines required to serve both buildings were installed together and the cost was paid entirely by Burt, as compensation to Brandhagen for the right to share the use of the wall, per their agreement. Brandhagen was married, and his wife held a legal interest in the Brandhagen lot, but she took no part in the agreement between her husband and Burt.
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> 1949 to 1958 - At an unspecified time during this period, Burt sent Brandhagen a check for half the value of the wall, per their oral agreement, but Brandhagen never cashed the check and returned it to Burt after holding it for a number of years. Burt also paid for the

repair and upkeep of the wall during this period, which was also per his unwritten agreement with Brandhagen.

1959 - For unspecified reasons, the Brandhagens decided to attempt to quiet title to their lot at this time, so they filed an action against Burt, claiming that his building was encroaching on their lot, and seeking damages from Burt for his occupation and use of a portion of their lot.

The Brandhagens sought to obtain legal verification of their alleged right to exert complete control over their lot, presumably for the purpose of forcing Burt to either move his building or pay them for his use of their lot on an ongoing basis. They did not deny the existence of the oral agreement made in 1948, but they argued that it was a legal nullity, representing a violation of the statute of frauds, so they were free to maintain that Burt had no right to use any portion of their lot in any way. They also argued that Mrs. Brandhagen had never even orally agreed to allow Burt to use any portion of their lot, so she had a complete and absolute right to fully control the use of the Brandhagen lot, and to demand compensation from Burt for his use of her portion of it. Burt argued that he had fully performed his part of the oral agreement, by doing everything that the agreement had called for him to do, therefore the statute of frauds was not applicable, and he was entitled to an easement over the portion of the Brandhagen lot occupied by his building, for the purpose of maintaining the building in it's original location. He also argued that Mrs. Brandhagen should be estopped from denying the existence of the alleged easement, even though she had no part in creating it, because she was fully aware of everything that had taken place, yet she had remained silent. The trial court agreed with Burt and quieted title to the lot in the Brandhagens, subject to the requested easement in favor of Burt, contingent upon a nominal payment by Burt for the easement.

We have seen, in a number of the cases we have already reviewed, that the Court consistently sets the statute of frauds aside, when sufficient evidence is presented to prove that an agreement was actually made, although it may have been poorly documented or undocumented, if meaningful actions were taken in reliance on the agreement. Such actions are legally regarded as performance, proving and supporting the existence

and nature of the alleged agreement, making the statutory requirement for written evidence of the agreement's specific content and details irrelevant, and such conditions are therefore described as coming within the performance exception to the statute of frauds. In this case, we see the performance exception applied in the context of an easement. An easement is a land right, of a fundamentally permanent character, and is thus within the range of land rights that are covered by the statute of frauds, so the law provides that easements must be set down in writing upon creation or transfer, just as is the case when creating or conveying any tract or parcel for transfer in fee. As always of course, it's essential to understand that the Court takes notice not only of the letter of the law, but the spirit of the law as well, and will not require that the law be enforced in a manner that runs contrary to it's spirit, since that would amount to an outright miscarriage of justice. For that reason, the statute of frauds, much like the statutes pertaining to recordation, is naturally applied only when doing so serves justice, and not when doing so would favor a party who has failed to demonstrate good faith, or penalize a party who has acted in good faith and therefore is due equitable protection. In this case, the Court concluded that since no one disputed that an agreement had been made between Brandhagen and Burt in 1948, and there was no suggestion that Burt had violated or broken the agreement in any way, or that he had failed to do all that the agreement had stipulated that he must do, both the existence and the purpose of the agreement had been satisfactorily proven, so the agreement was valid and was not subject to rejection merely for lack of compliance with the statute of frauds. In other words, since serious reliance had been innocently made, in the form of building construction, based on the agreement, it had been irrevocably adopted, and neither party could be allowed to assert that it had no legal force or meaning. To that extent, this case provides a clear indication that the Court had progressed by this time to a more affirmative position, with respect to easements, than it had held half a century before, when it had ruled that the statute of frauds barred the existence of an easement, under comparable circumstances, in the case of Johnson v Bartron, which he have previously reviewed.

Having dismissed the statute of frauds claim made by the Brandhagens, and confirmed that a valid easement agreement existed between Burt and Mr. Brandhagen, the Court turned it's attention to the

estoppel claim raised by Burt against Mrs. Brandhagen. The circumstances here were remarkably similar to those in the 1908 case of Engholm v Ekrem that we have previously reviewed, the first North Dakota case effectively applying estoppel in the context of comparable land rights. In both cases, the alleged rights of a wife were asserted, in an effort to invalidate an agreement made by a husband in the wife's absence, and in derogation of the wife's land rights. The Court had not previously applied estoppel for the purpose of creating or supporting an easement however, and the Court agreed with Mrs. Brandhagen that her husband had no right to burden her property with an easement without her knowledge, and he was legally required to obtain her written consent as a cotenant of their lot in order to do so, which he had failed to do. Still, consistent with it's holding in the Engholm case, the Court here again found that the wife had sufficient knowledge of the situation, at a time when she could and should have openly and fully expressed her displeasure with the agreement made by her husband, if in fact she had any serious issues with the arrangement. Mrs. Brandhagen, the Court ruled, had remained silent for an unjustified length of time, while watching events that she had both a right and an obligation to question unfold on a portion of her property, and she had tacitly accepted the benefits of her husband's agreement, all of which had operated to the detriment of Burt, when she eventually chose to express her position that the easement agreement was unacceptable to her. Quoting in part from a federal case that had taken place in Alaska, and citing rulings from other states to the same effect, the Court stated that:

> “The majority of jurisdictions where the question has been raised hold that, where the owner of real property stands by and sees an owner of an adjoining property erect a valuable structure which encroaches .... and with full knowledge of such encroachment, makes no objection thereto, such owner is estopped to claim title to such property encroached upon .... one who knowingly permits another to spend money for improvements, under the belief that he has the right to possession of the land on which the improvements are placed, will not be permitted to set up his interest to the exclusion of the one who in good faith made such improvements."

Whether or not the Brandhagens had actually plotted and conspired to entrap Burt, in order to extort money from him once he had made a major investment in his business, is of course unknown, but the Court no doubt recognized the possibility that they had done so, and their actions pointed distinctly toward that possibility. One reason that the principle of estoppel exists in fact, is to prevent such an entrapment from being perpetrated. Regardless of the Brandhagens real intent, the Court approved the creation of the easement in question, even in the complete absence of any written evidence whatsoever, thereby effectively sending a message to any and all parties who might be considering such a scheme, that the Court has the means to prevent such injustice, and is fully prepared to do so as needed. The Court therefore upheld the decision of the lower court that the easement existed and Burt could not be required to relocate his building. The Court determined that the easement was binding upon Mr. Brandhagen as a result of his original oral agreement with Burt, and it was binding against Mrs. Brandhagen, not by means of her husband's agreement, but because of her own failure to assert her rights to the portion of the lot in question in a timely manner. She had not been divested of her land rights by her husband's words or acts, she had separately divested her own interest, by means of her own protracted silence. Thus, one easement had come into existence by the operation of two distinctly different principles of law, by virtue of a performed oral agreement, with reference to Mr. Brandhagen, and by virtue of estoppel based on laches, with reference to Mrs. Brandhagen.

PERRY v ERLING (1965)

During the 1960s, a number of cases involving riparian rights arrived upon the Court's doorstep, all of which resulted from the infamous wandering activity of the mighty Missouri River, primarily presenting issues concerning the ownership and division of accretion. We will review the two most significant of these cases in detail, the historical facts relating to which are particularly well documented, while making general reference to the nature and outcome of the other riparian cases of this period. In the 1962 case of Jennings v Shipp, the river had moved over a quarter mile away

from a meander line and a lower court had performed a division of the accretion that was based on running one line perpendicular to the river and another line parallel to the perpendicular line. The Court struck down that division method, and at the same time also rejected an assertion that extending section lines or other aliquot lines to the river might be an appropriate means of division. The Court remanded the case to the lower court, insisting that additional evidence must be obtained, in order to perform a proper proportional division, based on the original and current river frontage. After this was done, the case again came before the Court, in 1966, and the Court approved the proportional division. The Court also adopted the position, in that case, that accretion is to be treated as distinct from the adjoining upland, and may be either conveyed or reserved as such, when the adjoining upland is conveyed. The Court again sanctioned proportional division of accretion in two cases that took place shortly after the case we are about to review. In 1965, in Greeman v Smith, the Court approved an accretion division performed by a lower court, which crossed a section line, while also declaring that the section line right-of-way was not limited to the portion of the section line that was originally platted, and did extend, along with the section line itself, across the area representing the accretion, all the way to the water at any given time, even though the section line could not be extended through the accreted area for boundary purposes. Then in 1967, in Martin v Rippel, the Court again upheld a lower court's division of several hundred acres of accretion, among multiple parties, which crossed multiple section lines. In that case, the Court also held that the twenty year statute of limitations does not apply to accretion, so even the failure of the record owner to use any accretion that has attached to his upland property for decades does not bar the record owner from subsequently claiming and obtaining his proportional share of any such accreted land by means of accretion division. Aside from accretion division however, a question of potentially greater consequence was at issue in the present case, wherein we will see the Court formally adopt an unconventional position, severely restricting the riparian rights of originally non-riparian lands.

1872 - Townships were subdivided by the GLO in Burleigh County, east of the Missouri River. In one such township, through which the river flows from north to south, the west line of Section 8 was within

the river and the east bank of the river was in the westerly part of the section, so government lots were platted along the western edge of the section. The controversy in this case involved the entire northwest quarter of Section 8.

1873 - The northwest quarter was conveyed twice, first from Ireland, who was evidently it's original occupant, to Bacon, and then from Bacon to the Lake Superior and Puget Sound Company. There was no evidence however, that the quarter was ever patented, to Ireland or to anyone else. Furthermore, this chain of conveyances lead to a dead end, because there was no evidence that the company ever conveyed the quarter to anyone.

1882 - Williams deeded the quarter to Holland. However, the value of this conveyance was also highly in doubt, since there was no evidence of how Williams had acquired any right to the quarter, and there was also no evidence that Holland ever conveyed the quarter to anyone.

1919 - Farris acquired the quarter by tax deed. There was no evidence as to whether or not the tax foreclosure proceedings were legitimately carried out however, so the ownership of Farris was also subject to question.

1959 - Farris conveyed the quarter to Erling's husband. There is no indication that any of these alleged owners of the northwest quarter had ever made any physical use of it all, evidently it remained vacant unimproved land.

1961 - The Park District of the City of Bismarck discovered that the northwest quarter of Section 8 had never been patented and applied to the BLM for a patent. The BLM tentatively approved the application, subject to a public hearing.

1962 - The hearing was held and two parties objected to the proposed patent, Perry and the Erlings. Perry was the owner of the northeast quarter of Section 8. How or when Perry had acquired the northeast quarter is unknown, but her ownership of it was undisputed. Perry had never made any claim to the northwest quarter prior to this time, but she may have been using it as a means of access to the river. The BLM reviewed the claims to the northwest quarter made by both Perry and the Erlings and decided that neither claim had any validity.

1963 - The Interior Board of Land Appeals reviewed the BLM decision and approved it. The Erlings filed an action in federal court to prevent BLM from issuing the patent requested by the Park District. Erling's husband died and the northwest quarter was included in his estate. Perry filed an action against the Erling estate, and the Park District as well, even though the Park District had not yet acquired any interest in the land, in which Perry claimed to be the true owner of the northwest quarter.

Perry did not argue that she owned the quarter based on any documentary evidence, nor did she argue that she owned it based on any use or possession of it. She argued that the river had gradually migrated eastward and completely wiped out the northwest quarter, until the river intruded into the northeast quarter, owned by her. At that point in time, she argued, the northwest quarter ceased to exist in the form of any physical land, all previous ownership of it was extinguished, since land that no longer exists cannot be owned, and her northeast quarter became riparian land. The river, she further argued, had then gradually returned to its approximate original location, expanding her ownership to the west, along with it as it moved, by virtue of the doctrine of accretion. The Erlings argued that the northwest quarter had never been completely wiped out by the river and that Farris was the legal owner of the quarter at the time Farris conveyed it to Erling's husband, so his acquisition of the land was legitimate, and upon his death it had become a part of the Erling estate. The Park District conceded that it was possible that the entire northwest quarter had been wiped out by the river, but argued that was irrelevant, because it was still possible to determine the location of all of the lines of subdivision within Section 8 by means of survey, including all the boundaries of the northwest quarter, so there had been no destruction of boundaries by the river, regardless of how much or how far it had moved. In other words, the Park District argued that the river's reversal of direction had restored the original northwest quarter, rather than expanding the northeast quarter, and the northwest quarter was still in federal ownership, regardless of whether or not it had ceased to physically exist, due to erosion and submergence by the river, for some period of time. The trial court accepted Perry's version of what had taken place and agreed with Perry that the deed from Farris to Erling had conveyed nothing, because the northwest quarter had been

completely eroded away and submerged, so all of the accretion lying within the northwest quarter had attached to Perry's quarter and belonged to her.

The Court, of course, had no opportunity to fully resolve the ownership of the disputed northwest quarter, because the Court had no jurisdiction over the BLM. The BLM had determined that the quarter had always remained in federal ownership, having never been patented, and had decided to convey it to the Park District. The Court could only reach a binding conclusion on the question of whether the rights of Perry were superior to those of the Erlings, or the rights of the Erlings were superior to those of Perry. If the BLM determination were to withstand and survive all challenges made in federal court, then both parties would lose and the land would be patented to the Park District. But if the BLM position were to be struck down in federal court, then the ruling of the Court in this case would control the ownership status of the land, so the riparian issue presented by Perry was nevertheless a very serious one.

The Court launched into an extensive examination of riparian law, taking note of many decisions from other states. The Court ultimately found that among the midwestern states, Iowa, Kansas, Missouri and Nebraska had all adopted the position that any land entirely lost to erosion and submergence was utterly and permanently lost, it could not be restored by becoming subsequently exposed, and the rights of any prior owners of such land were absolutely extinguished and could never be revived. The rationale supporting this legal principle is that any land which becomes riparian increases in value, and once it has become riparian it would be unjust to deprive the riparian owner of the riparian rights bestowed upon the land by nature. The Court acknowledged that this was in fact the position held by the majority of states nationwide on this issue. However, the Court found that two midwestern states, Oklahoma and South Dakota, had not adopted this rule, and had instead adopted the doctrine of re-emergence, which states that land completely destroyed by erosion and submergence can re-emerge intact from the body of water that destroyed it, and nothing is lost by the prior owner of the land during this process. The Court then decided to adopt the doctrine of re-emergence as North Dakota law, which of course was fatal to the argument made by Perry. With reference to the applicable statutory language, concerning the nature and effect of accretion, the Court

found that:

> "...the Legislature would not have intended the unjust result of divesting title in the riparian owner forever and giving a non-riparian owner title to the land rebuilt where the former land of the original riparian owner was located..."

This decision was a true landmark in North Dakota riparian law, with monumental implications for all property owners near the Missouri River, and it has been consistently and repeatedly followed ever since. It may be the most pivotal decision ever made by the Court in the arena of riparian law. The decision marked a distinct departure from the rule observed in the 1937 Oberly case and the 1955 Hogue case, that artificial boundaries cannot terminate riparian rights, although the variance in the circumstances allowed the Court to distinguish those cases from this one without striking them down. The Court had reverted back to the earlier position taken in the 1937 Gardner case, and decided that henceforward, artificial boundaries could in fact block or bar riparian rights acquired by non-riparian property owners through river migration. Owners of originally non-riparian lands can never gain any accretion outside their original boundaries, so they can now be completely cut off from all access to the water, by a reversal of the river's migration. This decision would prove to have a major impact on future cases involving gradual but dramatic movements of the Missouri River over long spans of time. One Justice dissented this decision, on the grounds that all riparian owners should be treated equally under the law, regardless of whether they were originally riparian or non-riparian, but his view, although in line with the view of most states, did not prevail. Accordingly, the Court reversed the lower court, holding that Perry had no valid rights to the northwest quarter and that the Erling's had the superior rights and would get the quarter if the BLM position should be vanquished in federal court. However, the Erlings went on to lose their case against the BLM and the Park District, so in the end the patent issued to the Park District was upheld, and the Erlings emerged from the whole struggle with nothing. Nevertheless, the significance of this ruling has been demonstrated in subsequent cases, such as the 1968 case of Tavis v Higgins, in which the Court expressly upheld the re-emergence doctrine as a valid basis for the denial of an accretion claim. Re-emergence has now remained unchallenged

for over forty years in North Dakota, as there have been no further cases involving accretion claims along the Missouri River at the Supreme Court level since 1968.

COKINS v FRANDSON (1966)

As we have seen in the Wilson case of 1951, the Court had already acknowledged that even unambiguous descriptions of land can be subject to reformation and may not control land ownership, in those instances where it is evident that the description was created or used based on a false assumption or mistaken idea. Although fifteen years would pass, between that case and the next successful description reformation case, which we are about to review, some other notable cases decided during the 1950s also involved the question of reformation, in the context of a contract, such as a deed or other written instrument documenting an agreement. In the 1954 case of L. W. Wentzel Implement v State Finance, the Court reiterated the fundamental principle that evidence tending to indicate that reformation of any legal document may be necessary may be presented, even though the language of the document at issue may appear to be clear and certain, stating that parol evidence is admissible to show how the instrument in question should be corrected to conform to the true terms of the agreement actually made, and to bring the language of the document into line with the true intentions of the parties. Although written language is always presumed to correctly and completely capture the essence of the agreement and to fully manifest the true intent of the parties, the contrary may be shown, and the Court has long maintained the position that any kind of evidence that serves to clarify the true nature of an agreement is valuable, and should therefore be heard and considered. Also in 1954, in Magnusson v Kaufman, while confirming the validity of the use of the standard PLSS abbreviations in legal descriptions, the Court again placed the heavy burden of insuring that all the language used in a document of conveyance is correct and complete squarely upon the grantor, refusing to allow a grantor who signed a document that was clearly and boldly labeled as a deed to deny that it was intended to represent an outright conveyance. Later that year, in Ives v

Hanson, the Court again declined to approve a proposed reformation of a deed that would have operated in favor of a grantor, in a situation where the only testimony was from the grantor himself, since his grantee, the only other party with direct personal knowledge of the nature of the original conveyance agreement, had died. But as we will see, when a grantee can make a valid case for reformation of a written agreement, particularly where there is evidence tending to indicate that the grantor may not have been acting in complete good faith, the Court can be quite receptive to such a proposal.

1960 - Frandson owned a restaurant. The location, size and shape of the property on which the building sat are unknown, since the Court did not find it necessary to discuss these details in order to adjudicate the issues presented. Evidently Frandson owned a substantial tract of land bordered by a public highway and he decided to sell off various portions of it, one of which contained the restaurant building. There is no indication that any surveyor was involved at this time.

1961 - Cokins agreed to buy the restaurant, so Frandson created a description of the portion of his property containing the building. They entered into a contract that contained the terms of the agreement, including the description of the restaurant property. Frandson changed his mind for some unknown reason and refused to complete the conveyance to Cokins. Cokins filed an action against Frandson, to require him to carry out the contract, by conveying the restaurant property.

1962 - Cokins won the case against Frandson, so Frandson was compelled, by court order, to sell the restaurant property to Cokins. A survey of the restaurant property was then performed and it was discovered that the legal description used in the contract between Cokins and Frandson contained one or more unspecified errors. After having ruled that Frandson must convey the restaurant property to Cokins, the trial court ordered the description used in the contract to be reformed, which resulted in a larger portion of Frandson's land being conveyed to Cokins.

1965 - The case came before the Supreme Court for the first time. The Court upheld the ruling of the lower court that Frandson was

bound by the contract to perform the conveyance to Cokins. In so ruling, the Court stated, as a general rule, that a trial court does have the authority to reform a description used in a contract, which is what the trial court had done. But the Court did not address any specific issues relating to the particular descriptions in question, because Frandson had not raised any such issues in making his appeal to the Court, so no questions regarding the validity of either the old description or the new description of the restaurant parcel had been put before the Court yet at this time. Frandson, therefore, filed another appeal to the Supreme Court, this time specifically claiming that even though the trial court had the authority to reform descriptions, it was wrong to have done so in this particular case. The Supreme Court agreed that the description issue had not been fully adjudicated previously, so another Supreme Court decision, specifically addressing the description issue, would be appropriate.

Cokins argued that the deficiency of the original description had been unknown to both parties, so the use of the original description in the contract was a mutual mistake, which if allowed to stand, would have the effect of preventing the contract from carrying out the true intentions of the parties to the agreement, so the trial court had correctly ordered the description to be reformed. Frandson argued that although the original description may have contained one or more errors, he never intended to convey any land to Cokins that was not contained within the original description, so the use of the original description was not a mutual mistake, and Cokins was not entitled to demand that the description be reformed. The trial court found that a mutual mistake had taken place and ordered the reformation of the description as requested by Cokins.

The Court agreed that the central issue was whether or not the evidence was sufficient to prove that a mutual mistake had been made, rather than a mistake by one party alone. If one party simply failed to understand what was being conveyed, then description reformation is not appropriate. But if both parties had a clear mutual understanding and agreement, a meeting of the minds with respect to what was going to be included in the conveyance and what was not going to be included, and the description failed to fully or properly express that agreement, then the

description is subject to reformation. Citing the 1951 case of Wilson v Polsfut, previously reviewed herein, which established the precedent for description reformation in North Dakota, the Court observed that if both parties intended and believed that the description included a certain area, but due to the fact that neither party had sufficient knowledge to fully comprehend and visualize the actual contents of the description, neither of them realized that it did not include part or parts of the intended area, then they are not bound by the language, and either one of them can successfully maintain that the language must be reformed to express their true intentions. To enact such reformation however, the evidence that the language is incorrect or mistaken, in some way that prevents it from expressing the true intentions of both parties, must be clear and strong, because the language is always presumed to be correct and complete, unless or until the contrary can be shown. So the burden of proof was on Cokins to show that the original description was not what either party intended to convey.

Cokins testified that the parties had agreed that the new parcel containing the restaurant building would extend to the public highway, in order to provide direct and convenient access from the highway to the business. He claimed that the survey performed after the contract was signed had revealed that the description provided by Frandson contained errors, one of which was that the described parcel did not extend all the way to the highway right-of-way. Frandson conceded that the original description did contain errors, but maintained that he had deliberately intended to reserve a strip of land between the restaurant building and the highway and had never agreed that the restaurant parcel would have direct access to the highway. The fundamental question was whether or not the testimony of Cokins, regarding the nature of the agreement between the parties, was acceptable evidence upon which to base reformation of the description. The Court once again applied the principle, as it had consistently done in previous cases, that any evidence of an agreement is valuable evidence, adopting the position with respect to land rights that:

> "...when the issue is whether or not a written instrument should be reformed because of a mutual mistake, parol evidence is permissible to correct the instrument to conform with the agreement or intention of the parties."

The Court found that the testimony of Cokins was both acceptable and reasonable, and was more convincing than the testimony of Frandson, regarding the intent of the parties. It was unreasonable, the Court decided, to suggest as Frandson had, that Cokins had agreed to acquire a building to be used for business purposes with no direct access to a public road that passes in front of the building. The Court ruled that a mutual mistake had taken place, because a grantor will not be presumed to have intended to retain ownership of a narrow strip of land that is of material significance or benefit to his grantee. The testimony had evidently revealed that Frandson may have attempted to create a spite strip, between the building and the highway right-of-way, which he could later use as leverage, to induce or compel Cokins to pay him again, for an easement to obtain convenient access to the building for restaurant customers. Despite his testimony, regarding his own intent, Frandson's contention was of no avail, because as the grantor, he was presumed to have intended to convey the subject property in a useful form, he bore the burden of doing so, and he could not successfully maintain that he had intended to do otherwise. The Court would not allow his own failure to clearly and properly reserve anything that he had actually intended to reserve from his conveyance to operate to his benefit. The Court approved the description, as reformed by the lower court to extend to the highway right-of-way, providing convenient access for Cokins and his customers. In addition, the Court required Frandson to pay Cokins damages, for the period of time during which Cokins had been required to operate the restaurant without direct access to the highway, due to the denial or blockage of that access by Frandson. As can readily be seen, the Court demonstrated that it was entirely unsympathetic to a grantor who either failed to use a proper description when conveying land, or attempted to use a description as a manipulative tool for his own future profit. Frandson's decision not to have his property surveyed and properly divided and described to begin with, proved to be a very costly one.

PUTNAM v DICKINSON (1966)

We have already seen a number of cases showing the consequences of improper or incomplete platting, particularly with respect to public rights created by dedication, but here we arrive at perhaps the Court's most detailed examination of a plat, and we see how a controversy over private rights emanating from the creation and use of the plat plays out, in the absence of any dedication issues. This case has become one of the most frequently cited North Dakota cases, with reference to rights resulting from the creation and use of a plat, because it demonstrates and supports the application of some of the most essential principles relating to the grantor and grantee relationship, particularly with regard to the respective legal burdens borne by each of those parties. While upholding previously expressed principles, such as the right of reliance created by use of a plat in a land transaction, and the concept of appurtenant rights, the Court here takes the important additional step of clarifying that a deed does not always represent the entirety of an agreement between grantor and grantee. Under the precedent established in this case, evidence of other agreements between grantor and grantee, can in effect supplement the rights specifically enumerated in the deed, effectively attaching items depicted and matters addressed on the plat to the rights acquired by means of explicit recital in the deed. Here we also see how different the perspective of the Court becomes, upon the grantor and grantee relationship, when a subsequent grantee acquires all or part of the grantor's remainder interest in subdivided land, due to the burden of inquiry notice of the rights of the initial grantees that falls upon the subsequent grantee. Even reliance upon statutes can be insufficient to overcome the presence of conditions providing inquiry notice, as we once again see very poignantly illustrated here. A good example of a later case also following the principle of inquiry notice, and decided on that basis, is the 1981 case of Allen v Minot Amusement. In that case, the Court ruled that a grantee of a building in a shopping center was in violation of certain covenants relating to the use of the building, placing the burden of inquiry notice upon the grantee to discover the existence of the relevant unrecorded covenants through inquiry, prior to acquiring the building in question, demonstrating that the burden of diligence borne by grantees in a residential setting, in the case we are about to review, applies equally to grantees in a commercial context, and indeed to all grantees in

general.

1954 - Maher owned a substantial tract of land, which he decided to subdivide into residential lots. He placed an advertisement in some newspapers, stating that he was planning to offer lots for sale. This ad included a map showing some lots and some areas labeled as parks, along with a statement that "...permanent park areas are provided to purchasers of lots.". This map had no name or title and was evidently just a preliminary subdivision plan, since no complete or final subdivision plat had yet been recorded, and no lots were sold at this time.

1956 - Maher recorded a plat entitled "Maherwood Park". This plat contained just 10 lots, all in one row along one street and it did not include any park areas. These lots were all sold to various parties by Maher within two years.

1958 - Encouraged by the success of his first subdivision, Maher recorded another plat entitled "Melody Lane". This plat again showed the same 10 lots that comprised Maherwood Park, and it created a larger number of additional lots lying to the east of those 10 original lots. Lying in between the old lots and the new lots however, this plat showed two blocks that were not divided into lots and were labeled "Maherwood Park". The streets running along the east and west sides of these two park blocks were not labeled with street names, but they were shown as being equal in width to the named streets that were created by the plat. This plat evidently contained no specific statement indicating Maher's intentions with respect to dedication.

1959 to 1961 - The new lots created by the Melody Lane plat were sold to various parties, including Putnam. Maher showed all of the lot buyers the plat, and in some cases he even personally walked them around the area, pointing out the park area and telling them that it was going to be available for them to use as a park. Several of the lot owners began making use of the park blocks for recreational activities shortly after acquiring their lots. No evidence was presented indicating that the park areas were ever used by anyone other than the lot owners. The nameless platted streets running along the edges of the park blocks were also used by the lot owners to access the park

areas, although no actual roadways existed in those locations.

1962 - In response to concerns raised by the lot owners, Maher executed an explicit dedication, covering all of the named streets that he had platted, to clarify that he had intended to dedicate those streets for public use. Neither the park blocks nor the nameless streets adjoining the park blocks were referenced in this dedication however.

1964 - Maher issued a warranty deed, conveying the two blocks labeled as Maherwood Park on the plat of Melody Lane, to Dickinson. Maher then quitclaimed the two streets bounding these two blocks on the east and the west to Dickinson, who planned to subdivide the entire area that he had just acquired into additional lots. The lot owners became aware of Dickinson's plan to close the park areas and the adjoining streets and filed an action to prevent him from doing so.

Putnam and his fellow lot owners in the Melody Lane Subdivision argued that they had all purchased their lots in reliance on the Melody Lane plat, which clearly indicated that two blocks of the subdivision were parks. They also argued that the streets adjoining the parks had been legally committed to their use by Maher, by means of the Melody Lane plat, even though they were never given any street names, so Maher had no right to convey either the parks or the streets to anyone for any other purpose, and Dickinson had no right to convert the areas shown on the plat as parks and streets into lots. Dickinson argued that neither the park blocks nor the nameless streets had ever been legally dedicated as such, therefore he had the right to develop them into lots. He also argued that since the deeds held by the lot owners were silent with respect to the parks and streets, and each deed described only the individual lot sold to each lot owner, the lot owners had acquired no rights to any areas outside the boundaries of their lots. The trial court ruled in favor of the lot owners, declaring that although the park blocks and the nameless streets had never been dedicated to the public, a negative easement existed, permanently limiting the use of those areas to the uses logically indicated by the manner in which those areas were depicted on the plat.

The Court began by addressing the assertion made by Dickinson, in

support of his overall position that he had the right to do as he pleased with the land he had acquired from Maher, that the lot owners had no rights at all beyond the narrow confines of their individual lots. In view of the very substantial body of case law that already existed in North Dakota at this time, relating to the rights of owners of platted lots, it's frankly difficult to see how Dickinson or his attorneys could have imagined that this assertion would find any success. In making this assertion, Dickinson evidently relied on a literal reading of statute 9-06-07, which as he interpreted it, stipulates that any written agreement legally supersedes any and all previous unwritten agreements, essentially negating the legal value of all previous conversations and negotiations, and making the final written and signed agreement the entirety of the agreement between the parties. On that basis, Dickinson suggested, because there was no language expressly mentioning any of the park areas or streets in any of the deeds issued by Maher to the lot owners, their rights were strictly limited to the interior of their specific lots. Further, he suggested, the statute prevented the lot owners from presenting any evidence relating to anything that Maher had said or done prior to issuing their deeds to them. Essentially, Dickinson was asserting that based on 9-06-07, a grantor can say anything to his grantees, and he bears no responsibility for anything he has said or done, as long as he does not mention any of it in the deeds that he eventually issues, which of course would make it practically impossible to ever invoke estoppel against a grantor. The response to this assertion from the Court perfectly illustrates the folly of those who choose to ignore case law, and instead attempt to simply read the statutes themselves and rely on their own personal interpretations of the statutes, or worse yet, attempt to concoct an interpretation that suits their own personal needs. It's the Court's job to interpret the statutes, and determine what they mean, and what effect or effects they may or may not have, based on the legislative intent behind the statute and it's equitable purpose, known as the spirit of the law. The body of existing case law, as generated and handed down by the Court in it's rulings, serves to provide that information for the benefit of all the people of North Dakota, who are well advised to take notice of it and respect it. Those who proceed to act based on their own reading of the statutes run the serious risk of being corrected by the Court, as Dickinson was about to discover.

Recognizing the absurdity of the statutory interpretation proposed by

Dickinson, the Court dismissed it as fundamentally inequitable. Under the Court's interpretation of the relevant statute, evidence of oral agreements concerning subject matter that is not expressly mentioned in a deed, and which does not expressly contradict anything recited in the deed, is acceptable and constitutes legitimate evidence of agreements that are additional or supplemental to the agreement outlined in the deed. In so deciding, the Court took the position that a deed does not necessarily represent the entirety of the agreement between the grantor and grantee, and other agreements can exist, which can be binding upon either or both of the parties. In this case, the lot buyers had read the ads published by Maher in 1954, and they had fulfilled their burden of inquiry as grantees, by asking Maher to confirm that he intended to devote certain areas to use as parks, and he had done so, by showing them the park areas, both on the plat and on the ground. Therefore, the grantees were fully entitled to rely on the representations made to them by their grantor, regardless of whether or not their deeds made any reference whatsoever to parks or streets. Once again, as in all the previous cases decided by the Court involving plats, the Court had upheld the right of buyers of platted lots to the use of all the beneficial items depicted on the plat, holding that the representation made by the subdivider to his grantees, by means of the plat, gave rise to an estoppel against the subdivider, preventing him from denying that he intended to provide any of the benefits that he had bestowed upon the lot owners by including them as attractive features or inducements on the plat. An easement covering the park blocks, for the benefit of the lot owners, the Court concluded, was in no way contrary to any of the language in the conveyances made by Maher to the lot owners, and it had been included in each of those conveyances, although it was not expressly recited in any of them.

Dickinson must have suspected that his statutory claim would fail, because he had another defense prepared. Having been forced by the Court to concede that Maher was estopped from changing his mind about the park areas and making some other use of them himself, Dickinson asserted that the estoppel could not be applied to him, since Maher had never said anything to him about having promised to reserve the park blocks permanently, and there were no easements of record to give Dickinson any notice that the blocks could never be developed, so he had been an innocent

buyer without notice of all the facts. In other words, he claimed that he was entitled to really solely on the information that was available to him as a matter of public record, and that he had no obligation to take notice of the existing conditions on the ground that he was proposing to purchase. As we have seen, the Court has repeatedly denied that there is any validity in this position, and quite consistently held grantees to their burden of inquiry notice, with respect to land rights of all kinds. As far back as 1895, as discussed in the earliest case included in this review, and in all of the prominent easement cases since that time, the Court had required grantees to carry their burden of diligence with respect to notice, or suffer the consequences, yet Dickinson had evidently learned nothing from those many examples, so he was destined to join those others who had failed to do so in defeat. No grantee is entitled to ignore the existing physical conditions upon, or uses of, the land that he proposes to acquire, regardless of what the public record may or may not reveal with respect to the land in question, and Dickinson had failed to observe that the park areas were being used by the lot owners and to respect their right to make that use. The consequences of that failure rested solely on Dickinson, the Court held, and it could have no impact on the existing rights of the lot owners to use the park blocks, so Dickinson's acquisition was subject to the easement in favor of the lot owners, which rendered the land undevelopable. He owned it, but only the lot owners could use it, and he had brought that sorry state of affairs upon himself, through his own ignorance of the law. It's likely that Maher knew this, and took advantage of Dickinson's ignorance to unload his remaining essentially worthless land on somebody, but Maher had probably done nothing illegal in making the conveyances to Dickinson, and was not charged with anything, so Dickinson was left holding the bag. Ironically, the lot buyers had proven to be smarter, with respect to land rights, than Dickinson, since they had been diligent in their inquiries, when dealing with Maher, while Dickinson had not. The critical point that a grantee of a grantor's remainder land must always be especially careful, when making such an acquisition, obviously bears repetition here. The Court concisely summed up the situation, stating that:

> “...defendants thought they were entitled to rely upon the records on file in the office of the Register of Deeds and their attorney's opinion in regard thereto and were not under

> obligation to make inquiry. They did not understand their full duty as prospective purchasers .... Their failure to perform that duty leaves them without the protection that the law affords to an innocent purchaser."

All that remained was to determine the status of the nameless streets bordering the park blocks. The Court agreed with the lower court that these areas were fundamentally of the same character as the park areas, since the only reasonable conclusion that could be drawn from the plat was that they were intended as ways of some kind, with which to access the park blocks. In addition, Maher had excluded them, along with the park blocks, from his 1962 dedication statement, showing his intent to keep them private and reserve them for use in connection with the park blocks, and the lot owners had been using them to access the park areas, showing that their intentions for the use of these areas were in agreement with Maher's intent. Therefore, the Court decided that the nameless streets were most properly categorized as private alleys, never dedicated to the public, but devoted to the use of all the lot owners, and for that reason they had been properly included by the trial court in the easement granted to the lot owners by Maher, by his use of the plat of Melody Lane in making his conveyances. So Dickinson was vanquished again, to the extent that the alleys were also completely and permanently undevelopable, just as were the park blocks themselves. While otherwise fully upholding the lower court's ruling, the Court disagreed with it's characterization of the easement as negative. Negative easements, the Court stated, citing and adopting the definition thereof that had already been adopted by Montana, are those which operate only to prevent a specified use or uses from taking place on the burdened land. A negative easement operates only upon the servient land owner, and does not give the dominant party, who benefits from the existence of the easement, any right to physically enter the servient estate. In this case, although the easement did bar the owner of the servient land from using it as he wished, the lot owners, as the dominant parties, also held the right to enter and use the areas covered by the easement, so while it had some characteristics of a negative easement, it was more properly characterized as an affirmative easement.

SMITH v ANDERSON (1966)

Although streets, alleys and other such inherently public areas are typically created and described with reference to a plat, and are typically recognized as easements, that is not always the case, and here we encounter a situation involving a public alley created in a different manner. In this case, the alley that is at the center of the controversy was created within a platted lot, by means of a quitclaim deed, which expressly stated that the conveyance was made for the purpose of creating a public alley. As we will see, the Court treats the legal status of this alley, in terms of dedication, as being equal in strength and effect to a platted alley. Also as a result of having been created in this manner, the alley in this case is not merely an easement, but is owned in fee by the municipality in question, and is held in trust for the public, so in that respect as well, it's public status is equal or superior to a typical platted alley. As will be seen, the legal status of the alley in question becomes an issue, after many years of disuse, during which time the surrounding lot owners make the false assumption that the absence of any use of the alley means that it no longer exists, so they gradually each appropriate various portions of it for their own personal use, eventually making it's original location essentially invisible. This is a very common mistake, resulting from the fact that the typical land owner does not have a complete understanding of the law, particularly with regard to the true nature of public rights. In addition, the situation then becomes further complicated, when the lot owners join together in requesting that the alley be legally vacated, but they bungle the description of the alley's actual location. It's important to note that the Court is completely unconcerned with why the description was erroneous, nor does the Court place any significance at all upon the subsequent correction of the error. Whether the error occurred because the actual location of the alley had become obscure or disappeared on the ground, or because the lot owners attempted to identify the location without the assistance of a surveyor, or for any other reason, makes no difference to the outcome. The Court decides the fate of the alley based on it's true legal status, regardless of the acts or intentions of the various private parties, and even regardless of the acts and intentions of the municipality having jurisdiction over the alley, because in the view of the Court, public rights are entitled to an elevated level of protection under the law, making them invulnerable to attacks and challenges of the types

made by the private land owners here. This case therefore stands as a noteworthy exception to the concept that intent is paramount and always controls land rights, demonstrating that although intent does conclusively govern private land rights, the need for proper protection of public rights introduces other significant legal factors that can overcome even the formidable power of intent.

1907 - A public alley, ten feet in width, was created by means of a conveyance for that specific purpose, in the west half of Block 3 of Williston. Who owned the lots in that block and why the alley was created are unknown, but it was accepted by Williston and put into use as a public alley. The west half of that block contained 12 platted lots, numbered 13 through 24, with Lot 13 at the south end of the block and Lot 24 at the north end of the block. The strip that was dedicated as an alley was described as the north ten feet of Lot 18. There is no evidence that any surveys were ever conducted for the purpose of verifying the actual location of this alley, so whether or not it was really in the described location is unknown, but since there was no evidence positively indicating that it was not so located, it was presumed to have actually occupied the north ten feet of Lot 18.

1908 to 1945 - After being used by the public for an unspecified number of years, the alley eventually fell into a state of complete disuse. How many times the lots in this block changed hands is unknown, but by the end of this period the various parties who owned lots in this block were evidently no longer aware of where the alley had been physically located, and they may also have been unaware that it still legally existed as a burden on Lot 18. Toward the end of this period, the legal existence of the alley was evidently either discovered by the lot owners themselves, or it was brought to their attention.

1946 - At this time, Smith, Anderson and Polk had become the owners of various portions of the lots adjoining this alley, and they presented a petition to Williston, requesting that it be officially vacated. Evidently, Anderson owned all of the lots north of the alley, and all three of these parties owned portions of the lots lying south of the alley, so Williston granted the requested vacation. Unfortunately,

for some unknown reason, the petition mistakenly stated that the alley was located on the north ten feet of Lot 17, rather than Lot 18, and this apparent mistake was repeated in the resolution formally adopting the vacation. In addition, nothing was done to determine or indicate exactly how the strip was to be divided among the adjoining lot owners.

1947 to 1965 - At some point during this period, an unknown party discovered the mistaken lot number in the vacation document, and changed the 17 to an 18 in the official record. By the end of this period, an unspecified portion of the alley was allegedly being either occupied or used by Anderson, but another portion of it was allegedly occupied by a building owned by Smith. How it was determined that Smith's building was located on the strip in question, or where the boundaries of the strip were located, is unknown.

1966 - A dispute broke out between Anderson and Smith when Anderson claimed that she owned all or part of the strip in question. Although Smith's building allegedly stood at least partially within the strip, she chose to fight Anderson's claim to the strip, not by claiming ownership of any portion of it herself, but instead by filing an action claiming that it was still a public alley, which had never been legally vacated. Polk was either no longer present, or made no claim to any part of the strip, and took no part in this litigation. There is no evidence that any surveys of any of the lots or the alley were ever performed, subsequent to the original survey of the subdivision, and no reference is made to any lot corner monuments or any other physical evidence of the lot lines, so how the location of the lot lines was determined by the lot owners is unknown.

Smith argued that the vacation proceedings were legally defective, in part because of the mistaken description of the location of the alley, therefore there had been no legal vacation of the public alley. She further argued that although Williston did not claim or want the alley, and the public had not used it at all for decades, Williston was in fact still the owner of the strip and could not legally refuse to acknowledge it's ownership of the strip, because public alleys cannot be simply abandoned and must be properly formally vacated, so Anderson owned no part of the strip.

Anderson argued that the description error made during the vacation process had been corrected and was therefore not fatal to the vacation, so the vacation was legitimate and effective. She also argued that even if the vacation was fatally flawed, she had occupied or used all or most of the strip for over ten years, under color of title, and she had thereby acquired at least a portion of the strip through adverse possession. Williston sided with Anderson and supported her position that the strip had been legally vacated and the public held no legal interest in it. The trial court ruled that the alley no longer existed and Anderson had adversely possessed the portion of the strip that she had been occupying or otherwise using.

The Court first analyzed the claim made by Smith, that the alley had never legally ceased to exist, despite the absence of any public use of it for a protracted period of time, and despite Williston's clear intention to release all of it's interest in the alley. While the intent of a land owner, or any holder of land rights, is always relevant, and such intent normally does control, the Court determined that there can be exceptions to that rule, which can arise when public rights are involved. Since the statutory provisions applicable to vacation proceedings are clearly spelled out, and complete compliance with all such provisions is mandatory, intent to vacate, without full compliance, is insufficient to accomplish the goal of a legal vacation. This is the case, because the rights that are sacrificed and relinquished, in the event of a vacation, are not rights that are held by the municipal authority on it's own behalf, they are rights that are held in trust for the public. Therefore, the municipal authority is charged with the burden of good stewardship, so it must exercise full diligence if it truly intends to abandon or otherwise terminate public rights. A fundamental part of that burden, the Court concluded, lies in the responsibility to give proper notice to the public of the actual location of the rights being released, by means of an accurate description of the location in which the rights exist. In this case, both the petitioning parties and Williston had failed to correctly describe the location of the alley, so the legally mandated disclosure of the true location of the alley to be vacated had never been provided to the public. The correction of the mistaken lot number in the public record, the Court indicated, was irrelevant, regardless of who had changed it, because any such changes, coming after the completion of the vacation process, can have no effect on the process itself, which is the focus of the law. In other words, because the

wrong lot was identified, the public never had the opportunity to know the real location of the alley, until some time after the matter had been closed to consideration. Because the description error was in effect at the time when the vacation process was actually being carried out, it was necessarily fatal to the attempted vacation.

In view of the Court's position on the question of the validity of the vacation, Anderson's claim of adverse possession was obviously in serious jeopardy. In fact, whatever evidence she may have presented in support of that claim was never even directly addressed by the Court, because any use she might have made of the strip was irrelevant, since it had remained always public in nature and was therefore immune to adverse possession. The Court rejected her assertion that the void vacation document provided her with color of title to the strip, holding that her use had never become adverse. Although she could very well have acquired all or part of the strip by means of adverse possession, had it actually been vacated, and thereby become private land deprived of it's public character, all of her use and occupation of it was powerless to terminate the rights of the public, regardless of how long she had used it without objection or interruption, since the alley was never legally vacated. Just as in previous cases that we have reviewed, such as the Grand Forks and Jamestown cases of the 1950s, the Court again demonstrated that it was fully prepared to adamantly defend public rights against encroachment, and to maintain it's well established position that dedicated areas of any kind are not subject to loss by means of either abandonment or adverse use. Summarizing the law with respect to claims of adverse rights that militate against the interests of the public, the Court stated that:

> "...title to public streets and alleys cannot be acquired by prescription .... rights of the public in a street or alley cannot be divested by adverse possession .... no title can arise out of long-continued encroachment or obstruction of a public street or alley .... no title can be acquired thereto by such occupancy, no matter how long it has been continued and whatever may have been it's character."

Lastly, pointing out the fact that Smith herself had been a willing and

active participant in the attempted vacation, twenty years earlier, Anderson suggested that Smith should be estopped from denying that it was the objective of all the parties to legally and permanently eliminate the alley in 1946. The Court agreed with Anderson, that if the same issues had been presented in the context of a contest over private land rights, Smith might very well be subject to estoppel on that basis. Once again however, due to the fact that rights held in trust for the public were at stake, the balance of equity had to shift accordingly, in defense of those rights, so although Smith could be estopped as a private individual, when speaking solely in her own personal interest, she could not be estopped when speaking as a member or representative of the general public, in defense of the alley itself. As can readily be seen, Smith had very wisely selected a legal position that allowed her to turn the Court's desire to protect the rights of the public to her own advantage and against Anderson. If Smith had simply claimed adverse possession of part of the alley herself, rather than focusing her argument on the public nature of the alley, to vanquish Anderson's claim, Anderson may well have prevailed again, as she had at the trial court level. Having found that the alley still existed, and was still owned solely and entirely by Williston, in trust for the public, the Court reversed the ruling of the lower court. Ironically, although Williston had sought, along with Anderson, to establish that a valid and legal vacation had taken place, the Court decided that title must be quieted in Williston, and in no other party, so Anderson was denied the opportunity to compel Smith to relocate the building that intruded into the alley, and Williston was forced to deal with the encroaching building. Even if the vacation effort had been valid and effective however, Williston would have remained ownership of the strip, since no steps were ever taken to apportion or otherwise convey any portions of the strip to any private parties, as noted above. Since the only legal effect of a vacation is to revoke the specific burden of public use imposed by a dedication, vacation itself does not operate to transfer fee ownership, so even if the vacation had been successful, Williston would have remained the record owner of the strip, since it was originally dedicated in fee, and was not merely an easement. Whether the claims of adverse use made in this case could have had any effect on the ownership of the strip, if the dedication had been successfully removed by means of a legal vacation, leaving the area as merely a strip of plain land held by the city, no longer representing an alley, was not addressed by the Court, being

beyond the range of matters that the Court was required to decide to resolve the specific issues presented by this case, so that question was left open to future adjudication, at such time at it may arise on another legal battlefield.

WOODLAND v WOODLAND (1966)

Having accepted the concept of re-emergence, with respect to entire tracts of land, eroded away and submerged by the Missouri River, in the Perry case just the previous year, the Court proceeded to embrace an even more expansive version of that doctrine in this case. Once again here, as in the 1937 Oberly case, the river represented a county boundary. In that case, as we have seen, the Court observed that it would be problematic, and would make no sense, to allow submerged section lines, or lesser boundary lines for that matter, to emerge from a river, as it moves across the land in one direction, and continue to stand as boundaries, in opposition to the river itself, since the river was originally intended to be the boundary, and to remain such, carrying the boundary along with it through the course of it's natural and gradual movement. The Court had upheld that position in the Hogue case of 1955 as well, wherein the river also constituted a county boundary. In each of those cases, the section lines, once submerged, ceased to have any effect as boundaries. In the Perry case however, the Court had returned to the contrary logic of the 1937 Gardner case, treating section lines as absolute and superior in force to the river itself, allowing the section lines and lesser aliquot lines to submerge, reappear, and continue to control. But in the Perry case, the lines re-emerged on the same side of the river, as the river movement reversed it's direction, and the river was not a county boundary, so the net effect of the re-emergence was not widespread and was relatively minimal. The movement of the river in the case we are about to review was more comparable to it's movement in the Oberly case than the Perry case, being all in one direction, although far more dramatic in terms of distance, since in this case the river moved over two miles, in the process of gradually cutting through and eliminating a horseshoe bend. Yet in this case, as we shall see, while treating the river's movement as gradual and accretive, rather than avulsive, by maintaining that the river remained the county boundary at all times, the Court took the major step of granting

amnesty to all of the originally platted lines of all the sections, aliquot parts, and government lots, that had been successively submerged by the river, allowing them all to keep their controlling effect as boundaries upon emerging, even though they were now located completely on the other side of the river, and in a different county as well, a quite remarkable and most extraordinary result.

1888 - Original GLO surveys, subdividing townships, were performed in an area where the Missouri River forms the boundary between Emmons County and Morton County. In one township, through which the river flowed in a southeasterly direction, there was a horseshoe bend in the river. The northeastern portion of the township lies in Emmons County, but the majority of the township lies in Morton County. A peninsula of land extended from the Morton side, in a northeasterly direction, including portions of Sections 1, 11, 12 & 14, as a result of the horseshoe bend. The land within this peninsula was platted as government lots and the rights to the lots in the west half of Section 12 would become the subject matter of this case. There was an area of high ground, known as "the island" in the northwest quarter of Section 12, near the northeasterly end of the peninsula, which the river wrapped around the northeast side of, but all the remaining ground within the peninsula was low and marshy.

1899 - An avlusive event allegedly took place, in which the river cut to the south of the "island", abandoning the northeastern portion of its previous channel, and reducing the total length of the peninsula from about two miles to about one mile. As a result of this event, most of the west half of Section 12 was now on the Emmons side of the river and only a small portion of it, in the southwest corner of the section, remained on the Morton side. So at this time, the horseshoe bend was only about half as long as it had previously been, and some of the lots that had been platted inside the bend, within the peninsula, were now either completely on the other side of the river, or were partly on the other side and partly within the river itself.

1916 - Following the 1899 avulsion, this portion of the river gradually migrated southwesterly, continuing to reduce the length of the peninsula and the size of the horseshoe bend, by erosion and

submergence. By this time, the peninsula was only about half a mile long, and the west half of Section 12 was now completely on the Emmons side, northeast of the river. Most of the portions of Section 12 that had been originally platted as riparian lots, within the peninsula, were now at least a half mile or more away from the river, but were still swampy, marshy and basically useless.

1920 - Cox established a homestead on the former "island" in the northwest quarter of Section 12. There is no indication that there had been any settlement or occupation of any of the land in Section 12, or in the adjoining sections, or any patents issued, prior to this time.

1926 - All the platted riparian lots in the northwest quarter of Section 12 were patented to Cox and he recorded his patent in Emmons County. Another avulsive event allegedly occurred at this time, in which the river finally cut off the last remaining portion of the peninsula and abandoned the remaining portion of the horseshoe bend. The river now flowed southeasterly though Sections 10, 14 & 15. The river stabilized in this location, over a mile southwest of the platted riparian lots in the northwest quarter of Section 12, and it remained in this location henceforward.

1930 - The father of the Woodland brothers began cultivating portions of the lots that had been platted in the southwest quarter of Section 12, south of the Cox homestead. How their father acquired his rights in the area is unknown, but his ownership was undisputed, so presumably these lots were patented to him around this time.

1932 - Cox successfully defended his ownership of the northwest quarter of Section 12 against a neighbor who owned land in Sections 2 & 11, who had filed an action in Emmons County claiming that all or part of the land occupied or claimed by Cox was actually accretion to the riparian government lots in Sections 2 & 11.

1935 - Cox apparently abandoned his homestead, and it fell into disuse, but it remained in his name in the Emmons County records. He had never used most of the northwest quarter, since it was still mostly marshland, nor had he ever made any claim to any accretion beyond the boundaries of the northwest quarter of Section 12.

1951 - The father of the Woodland brothers died and Lawrence

Woodland filed an action, in Emmons County, against his brother Homer and other family members, to resolve a dispute over the lots that had been platted inside the peninsula in the southwest quarter of Section 12, which had been owned by their late father. Homer owned government lots in Sections 2 & 11, which had originally been platted along the northwest side of the horseshoe bend, across the river from the peninsula in that direction, and Homer also owned lots that had originally been platted in the southeast quarter of Section 12, along the southeast side of the bend, across the river from the peninsula in that direction. Homer claimed that all the land in the southwest quarter was actually accretion that had attached to his adjoining lands as the river moved southwest during the 1899 to 1926 period of erosion and accretion. This first legal battle between the Woodland brothers, over their respective rights to their late father's land, dragged on for nine years.

1958 - The lots formerly owned by Cox were conveyed to Hartung & Thompson, by means of a guardian's deed, and they recorded the deed in Emmons County. Lawrence then leased the lots from Hartung & Thompson and began cultivating portions of the land that had not been used by Cox.

1960 - Lawrence ultimately lost the 1951 case, and title to the southwest quarter of Section 12 was quieted in Homer, against Lawrence. However, Homer's title was still potentially subject to a challenge by Hartung & Thompson, as successors of Cox, because the title to the southwest quarter had not been quieted against Cox, since he was not involved in the 1951 action. Homer continued cultivating portions of the lots platted in the southwest quarter, as his father had, and as he had done since his father's death. He also expanded the area of cultivation in the southwest quarter however, bringing him again into conflict with his brother Lawrence, who was simultaneously expanding the cultivation of the lots platted in the northwest quarter that had been patented to Cox, as the former marshland gradually dried out and became useful.

1966 - Tensions between the brothers evidently continued to escalate, each of them still claiming rights to the land that was being used by the other, until Homer filed an action against Lawrence, and against

Hartung & Thompson as well, claiming that he had rights to the entire northwest quarter of Section 12, as accretion to his land in Sections 2 & 11, with the exception of the small "island" area that had been occupied by Cox, to which Homer made no claim.

Homer argued that he owned the entire southwest quarter of Section 12, by virtue of the 1960 ruling in the 1951 case, which had quieted his title to the southwest quarter. He also argued that the lots originally platted in the northwest quarter had all been wiped away by the river, as it migrated gradually southwest between 1899 and 1926, so the lots that were patented to Cox did not exist, and the land now covering the northwest quarter, except for the small patch of high ground known as "the island", was actually all accretion to the riparian lots that he owned in Sections 2 & 11. He was essentially trying to apply the same argument to the northwest quarter that he had successfully made in the 1951 case with respect to the southwest quarter. That case had never reached the Supreme Court however. He conceded that "the island" was not accretion, but maintained that this small area, about 12 to 13 acres, was all that Hartung & Thompson had acquired. In addition, he claimed adverse possession of the entire southwest quarter, as a defense against the countercharges of the defendants, and he also questioned whether the land was really in Emmons County or Morton County. Lawrence, along with Hartung & Thompson, argued that the existence of the lots platted in the northwest quarter had been upheld in the quiet title action won by Cox in 1932, and they owned the entirety of those lots, which actually projected into the southwest quarter, as they had been originally platted. Furthermore, they argued, since their lots were riparian, they were entitled to all the accretion lying southwest of their lots, all the way to the river's present location in Section 14. This was the argument that Lawrence had been unable to make himself in the 1951 case, because the northwest quarter was owned by Cox at that time, and Cox was not a party to that case. Now he had a chance to go after the southwest quarter again, since he now had the support of Hartung & Thompson. In other words, they claimed ownership of most of the southwest quarter of Section 12, as accretion to their lots in the northwest quarter. So in essence, each of the brothers claimed nearly all of the land that was being either held or used by the other. The trial court found that adverse possession was not a factor, the lots platted in the northwest quarter did still exist, they were in Emmons

County, they were owned by Hartung & Thompson, and since they were riparian, the accretion that occurred between 1899 and 1926 had attached to those lots, so Hartung & Thompson owned all that portion of the southwest quarter that had originally been within the peninsula. This time, Lawrence had prevailed over Homer, as this decision effectively reversed the 1960 decision in Homer's favor.

This case obviously presented some of the most complex circumstances ever faced by the Court in a land rights case. The Court acknowledged that it was impossible to reach any complete resolution of all the riparian rights potentially resulting from the river's movement, not only because the evidence was unclear and disputed as to whether the various portions of the river's movement represented avulsion or accretion, but more importantly, because many parties with potentially valid riparian claims were not participants in the case, most notably, the two counties themselves. On the basis that all river movement is presumed to be accretive, rather than avulsive, in the absence of any serious argument or clear evidence to the contrary, and following decisions from Colorado, Montana and Oregon so holding, the Court ruled that the present location of the river still formed the boundary between the counties, so although the entire peninsula was originally part of Morton County, all of the former peninsula was now in Emmons County. The Court noted that everyone involved, and all of their predecessors as well, had always treated the river itself as the county boundary, even including those who knew or believed that some of the river's movement had been avulsive. Furthermore, the Court observed, Morton County had never taken any action to assert any rights east of the river, and had never disputed the jurisdiction of Emmons County over all land east of the river. In addition, citing the 1916 Page case, previously reviewed, the Court agreed with the trial court that adverse possession was not a factor in the case, since the majority of the land involved had remained in it's wild state, which was a marsh that was generally not useful for cultivation, only a few isolated areas had ever been cultivated by anyone until the last few years, and hunting alone was not a valid basis for such a claim.

The most significant legal issue in play in the case related to the Court's interpretation of the effects and impact of the doctrine of re-

emergence on riparian boundaries. Citing the precedent setting case of Perry v Erling, decided just the previous year, the Court again upheld the view that section lines, aliquot lines and government lot lines have absolute control over boundaries and can block or stop the progress of accretion to sections, aliquot parts or lots that were not originally riparian. The Court also upheld the principle, as previously established, that any artificial boundary line that can still be positively located on the ground, survives complete submergence and can still control, even after being long submerged, once it has re-emerged from the water. This case, however, set a new precedent, dramatically expanding that principle, by holding that boundaries can re-emerge on the opposite side of a river. The Court cited no precedent from any other states or from federal law for this position, but unhesitatingly adopted it nonetheless. Under this view, each government lot is essentially a distinct unit, defined by it's original platted boundaries, not subject to either expansion by accretion, or destruction by erosion and submergence, and it was on this basis that the Court ultimately decided this case.

The Court determined that the lots patented to Cox were still in existence at the time they were patented, even though they were on the opposite side of the river and in a different county by that time. The 1932 case won by Cox, the Court stated, had confirmed this and was binding on all parties, eliminating Homer's claim to any portion of the northwest quarter. The 1960 decision however, which had quieted title to the entire southwest quarter in Homer, was erroneous and was not binding on Hartung & Thompson, so their ownership of all of the lots in the northwest quarter, including the portions projecting into the southwest quarter, was upheld by the Court. However, the Court did not agree with the lower court that the lots in the northwest quarter were entitled to any accretion, so the Court struck down that portion of the lower court ruling, and quieted title in Homer to the lots that were platted within the southwest quarter, holding in effect that none of the original lots had been either increased or diminished in any way by any of the action or movement of the river. In the end, neither Homer nor Lawrence got all that they were seeking, but neither did either of them lose completely.

TRAUTMAN v AHLERT (1966)

This case marks the end of a period that lasted more than three decades, during which the concept of acquiescence was virtually dormant in North Dakota. Since the formal adoption of acquiescence by the Court in the Bernier case of 1931, as a boundary resolution doctrine, equivalent to partial adverse possession, no cases involving any serious arguments of acquiescence had reached the Supreme Court, so in the 1960s the doctrine still stood as an obscure and neglected legal remedy in North Dakota, although widely applied in most other states, as a form of practical location. The high burden of proof required by the Court for acquiescence, combined with the Court's refusal to acknowledge it as a form of practical location supporting mutual agreements between adjoining land owners, had the effect of minimizing the usefulness of acquiescence in North Dakota. Specifically, the Court's insistence on applying the twenty year adverse possession requirement to acquiescence, along with the requirement for mutual use, with reference to any allegedly acquiesced line, limited the usefulness of acquiescence to those relatively few instances where the appropriate physical conditions had been in place for decades, as in the Bernier case. For example, a claim of acquiescence, regarding an aliquot line dividing a quarter section, was rejected by the Court in 1937, in Stutsman v State, despite testimony that an agreed line had been established by the predecessors of the adjoining owners, primarily because the alleged line was not marked on the ground in a manner that the Court found to be sufficiently visible to provide any form of physical notice. The alleged line was defined only by reference to distances from buildings, the line had no visible physical presence unto itself, so the Court decided that it was not clear that the parties had acted with reference to the alleged line, or that they were even in clear agreement regarding it's exact location. In that case, the Court upheld the aliquot line of record, treating a building that was over that line as an encroachment, rather than as evidence of a boundary agreement. The case we are about to review however, presents a distinctly different situation, involving very clear and obvious physical evidence of intent to establish a boundary, demonstrating what the Court finds to be satisfactory visible evidence, sufficient to put an adjoining land owner on notice that a boundary claim is being physically asserted. In this case, for the first time, the Court expressly acknowledged that in North Dakota, acquiescence when

successfully proven, operates to transfer title to a physically marked portion of a tract, rendering legal descriptions and boundary lines of record irrelevant and ineffective. Although it would be another fifteen years before acquiescence would once again take center stage, this ruling was undoubtedly very instrumental in paving the way for it's return to prominence, making this one of the most influential boundary cases in North Dakota history.

1902 - Ahlert's father acquired the southeast quarter of a typical regular section. Whether or not he acquired it by patent is unknown, but there is no indication that there had been any prior use of the section, other than a few trails that ran across it.

1920 - Ahlert's father began cultivating his quarter. As he plowed the land he encountered numerous rocks. He placed the rocks that he had removed from the cultivated area along the western edge of his quarter. Evidently he felt that the north, east and south boundaries of the quarter were satisfactorily clear, but the location of the west boundary was unclear, so he placed the rocks in a line, with the idea that this would establish his western boundary. Whether or not he ever looked for the north or south quarter corners of the section, or ever found anything that he believed marked those corners, or made any kind of measurements to determine the location of this rock line, is unknown. The south quarter corner, if it was ever set, was in a low, wet area, described as a slough. An old private dirt road ran north from the slough, west of the rock line. Eventually the rock line extended all the way from the north edge of the slough to the center of the section. Neither the road nor the rock line was dead straight, both bent around other low areas that were too wet to cultivate. Another private dirt road ran east from the center of the section to the east boundary of the section, meandering along near the north boundary of the southeast quarter. Another private dirt road ran northwesterly, from the junction of the two other roads, at or near the center of the section, connecting to a public road running along the west section line. Ahlert's father sometimes used this road to access his quarter.

1943 - Trautman's father acquired the other three quarters of the

section. The previous owner of these quarters had never cultivated them, but had harvested wild hay from them and had hunted on the land.

1946 - Trautman's father rented his three quarters to Ahlert, who also harvested wild hay from the land. This use of the three quarters and the roads by Ahlert continued until the time of the trial.

1949 - Ahlert's father died and Ahlert took over his farming operations. He continued to use all the land up to the rock line as cropland, as his father always had.

1964 - Trautman acquired the three quarters and a controversy arose over the west and north boundaries of the southeast quarter, and the use of the roads across the other three quarters. The rock line had been continually built up by the Ahlerts over the decades and by this time it was 10 to 15 feet in width, amounting in practicality to a wall. Trautman ordered a survey, which indicated that the centerline of the section was about 100 feet east of the rock line. What method or evidence was found or used to place the line in that location is unknown. The survey also indicated that the road running along the north side of the southeast quarter, which the Ahlerts had always used as their north boundary, was actually a short distance inside the northeast quarter, although exactly how far it was from the north boundary of the southeast quarter was not indicated on the survey.

1965 - Trautman gated and locked the road running northwesterly, at the point where it connected to the section line road, blocking Ahlert's access. He also built a fence east of the rock line, which Ahlert then tore down. Trautman filed an action against Ahlert for trespassing and destruction of the fence.

Trautman argued that the boundaries of record of the quarters of the section, as shown by the survey, controlled, and that everything Ahlert and his father had done was done by permission, so none of it was adverse to the Trautmans and they had the right to exclude Ahlert completely. Ahlert argued that the north and west boundaries of his quarter had been established by the use of the land made by his father and himself, and the survey had no effect on his right to maintain those established boundaries. He also argued that the road running northwesterly, connecting his quarter

to the section line road, was a public road, because it had been used by his father, himself, and various hunters. The trial court agreed with Trautman on all the issues, it decreed that the surveyed lines were the true boundaries, and Ahlert had no right to use or enter any of Trautman's quarters for any reason.

The Court first examined the creation and effect of the rock boundary. The Court accepted the survey done for Trautman as showing the true aliquot line without question, regardless of how that line was arrived at during the survey, since Ahlert offered no survey or other evidence to contradict it. It was undisputed that the rock line had been intended by Ahlert's father to mark his boundary, the only question was whether it had become binding, despite being in the wrong location, or whether it was still subject to correction. The Court accepted the concept that an entryman has the right to locate his boundaries, in order to begin making use of his land, and that his actions can operate to establish those boundaries conclusively. Provided that no fraud or gross negligence on the part of the entryman can be shown, openly visible boundaries established by the entryman are presumed to have been established in good faith, regardless of whether or not he employed a surveyor to assist him, regardless of what method he used to locate his boundaries, and neither gross negligence nor fraud is shown by the mere fact that the boundaries established by the entryman are not in agreement with a subsequent survey.

The Court found that the rock line was a clear and highly visible means of establishing a boundary, therefore any subsequent grantees of adjoining lands had the burden of taking notice of it and determining, at the time of their acquisition, whether or not it was in the correct location. Also importantly, the Court decided that the fact that it was not straight was of no greater significance than the fact that it was in the wrong location. It was a visible, functional boundary, that was binding upon all who observed it, or had any opportunity to observe it. Citing the 1931 Bernier case, which as we have seen, established the manner in which the doctrine of acquiescence would be applied in North Dakota, the Court determined that the Trautmans had ample opportunity to observe the rock boundary, and question it in a timely manner, but had failed to do so, and instead acquiesced in it as their boundary. Since they had never used any land east of the rocks, they could

not claim that they did not consider the rock line to be a boundary. The Court would not allow their verbal claims concerning permissive use to contradict their long standing conduct, with respect to such a clearly marked boundary. Since their acquiescence had continued far longer than the required 20 years, the rock line had become binding. The Ahlerts had adversely held a portion of the southwest quarter, making the true aliquot line location meaningless and ineffective as a boundary. The Court had again intimately linked acquiescence to adverse possession, again indicating that in North Dakota, acquiescence serves only to justify adverse possession, in the absence of knowingly and willfully adverse intentions. Also very importantly, the Court had no difficulty whatsoever reconciling the location of the rock boundary with the existing aliquot descriptions of the land, even though it was known and conceded not to be on the aliquot line. After announcing that the Ahlerts had successfully adversely possessed a portion of the southwest quarter, the Court went on to declare that:

> "...the boundary line between the Southeast Quarter of Section 9 and the Southwest Quarter of Section 9 was established by acquiescence of the parties and their predecessors..."

Having fully dealt with the west boundary, the Court went on to address the other two issues, relating to the roads. On these two issues, the view of the Court was in unison with that of the trial court. The Court dismissed the assertion of Ahlert that the road running along the southerly edge of the northeast quarter was as clearly a boundary as the rock line. A road can certainly be a boundary, or become a boundary, but it is by no means a boundary by default. In this case, the testimony of various witnesses indicated that the road's location had changed materially over the decades, some even suggested that the Ahlerts had deliberately plowed into it every year, forcing it further north each year. The Court found that there was no comparison between the solidity and stability of the rock boundary and this dirt road. Since the mere existence of the road, unlike the rock line, was insufficient to provide notice to the Trautmans that the Ahlerts considered it to be a boundary, there was no basis upon which to declare that it was a boundary. Even though the Ahlerts had cultivated a gradually expanding strip of the northeast quarter for decades, because no definite line could be established, the Court restricted them to the line of record, as

indicated by the survey, on the north. Ironically, if they had not steadily forced the road out of position each year, the outcome on this issue might have been otherwise. Finally, citing the 1958 Berger case, previously reviewed, the Court found that the use of the road by the Ahlerts and a few hunters, who obtained permission to use it, was clearly insufficient to support the Ahlert's assertion that it had become a public road. If Ahlert had sought only a private access easement, instead of a public right-of-way, he may have had a better chance of success on this issue as well. The Court modified the ruling of the lower court, reversing it's decision regarding the rock boundary and upholding the lower court on the other issues.

GRAVEN v BACKUS (1968)

In this case, the Court had the opportunity to deal with survey evidence and boundary evidence in the context of a case focused on encroachment for the first time in nearly half a century. The outcome of this case, being very much in line with the Court's historical treatment of encroachments, provides a good demonstration of the consistency found in the vast majority of the Court's rulings. But like most cases of this nature, the typical surveyor may find the discussion frustratingly lacking in the kind of survey details that a surveyor would need to evaluate in order to make any judgment regarding the relative merit of the surveys involved. It must be remembered however, that the Court never reaches out in pursuit of additional avenues of exploration, the Court concerns itself only with questions and conflicts that are placed squarely before the Court by the parties and their legal counsel. For that reason, survey details are relevant to the Court only in cases that are specifically focused on conflicting surveys and in cases where charges of professional negligence bring the liability of one or more land surveyors into play. Cases involving allegations of negligence on the part of a professional land surveyor are quite rare, and particularly so in North Dakota. In fact, only a few hundred surveyor liability cases nationwide have ever reached the Supreme Court level, and only one such case has taken place in North Dakota in the modern era, the 1994 case of Porth v Glasoe, in which the surveyor was fully vindicated by

the Court. This case is ultimately another classic illustration of the doctrine of balancing the equities, which the Court frequently turns to when dealing with land rights issues, revealing it's distinct preference for solutions that have a sound basis in equity, as opposed to those based on technical factors.

> Prior to 1968 - Two typical adjoining city lots, each with 50 feet of street frontage, and being 140 feet long, were owned by these two litigants. The north lot was a residential lot owned by Graven, whose house and garage were on it. The west 70 feet of the south lot was a commercial lot owned by Backus. There was no dispute over their ownership of the lots. Backus decided to enlarge the existing building on his lot and he wanted to extend it all the way to his north property line. The city engineer located and marked the north line of the south lot, as requested by Backus. Backus then hired a building contractor, who erected a wall along the line staked by the city engineer, and the building was eventually completed, without any concerns or objections being raised by anyone about it's location during the construction process. After the project was done, Graven hired a surveyor to check the building location. The surveyor found that one inch of the new wall was on the Graven lot, and the roof and two window sills projected three inches onto Graven's lot. No details are provided regarding the methods used to locate the lot line, by either the engineer or the surveyor. There is no indication of whether or not any monuments existed at either end of the lot line in question. Graven filed an action to require Backus to remove the wall from his lot.

Graven argued that the construction of a portion of the wall on his lot by Backus amounted to a willful encroachment upon his property and maintained that he had the right to insist that it be removed, regardless of the difficulty or hardship involved in doing so. Backus did not contest the assertion that a portion of the wall was on Graven's lot, but argued that instead of being required to move the wall, he should be allowed to buy the portion of the Graven lot occupied by the building. The trial court agreed with Backus, ruling that the wall did not need to be moved, and requiring Graven to convey the occupied strip to Backus, upon payment by Backus of an amount determined by the trial court, which included the market value of

the strip and trespassing damages.

Just as in the 1924 Owenson case, previously reviewed, the Court was faced with the question of whether or not an admitted encroachment must always be subject to removal. In that case, the Court had thoroughly examined the complex circumstances, including multiple land transactions, that had brought the litigants into conflict with each other, in order to determine which of them had acted in good faith and which of them had not. In this case, 44 years later, the Court followed exactly the same course of inquiry, and citing the Owenson case, again arrived at a decision that was based on balancing the equities, entirely consistent with it's decision in the earlier case. The Court rejected the assertion by Graven that the encroachment resulted from negligence on the part of Backus. The fact that Backus had obtained the services of a reputable and respected engineer, the Court found, amply demonstrated that he had every intention of placing the building on his own lot, and nothing more in that regard could be expected of him. The fact that Graven stood by, silently observing, without ever raising any concerns, threw a different light upon him however. If in fact he had any kind of suspicions about the building location, or any reason to suspect there might be a problem, he had a duty to raise that issue in a timely manner, rather than waiting until it was too late for Backus to prevent the building from encroaching on Graven's lot. Graven's failure to act or speak at the appropriate time made him a contributor to the encroachment, and the fact that he pounced on the opportunity to point out the encroachment, only after the construction was finished, gave the Court the distinct impression that he had contemplated, and perhaps deliberately sought, the opportunity to cause Backus the maximum amount of inconvenience and expense. In conclusion, the Court spelled out the conditions that rendered removal of the encroachment unjustified, as follows:

> “We find that the encroachment was due to an innocent mistake as to the true location of the boundary line and was not discovered until after the building was erected; that the encroachment was not made negligently or in willful disregard of the property rights of the plaintiff; that the cost of removal of the encroachment is disproportionate to any damage caused to

> the plaintiff's property; and that the plaintiff's property is not irreparably injured."

Since these conditions all operated in favor of Backus, the Court upheld the ruling of the lower court, that Backus could either move the wall or acquire title to a strip of the Graven lot, and the decision as to which of these alternatives would be employed, was at the discretion of Backus, not Graven. The Court had again made it clear that it is highly disinclined to order any form of destructive action unnecessarily. Whenever there is a reasonable way to preserve the existing conditions, by supporting construction that was undertaken in good faith, the Court has shown it's willingness to provide such support. Property owners who attempt to gain a windfall, as a result of construction that encroaches on their property, by allowing work to continue until such time as removing it becomes a serious problem for the builder, would do well to heed the lesson learned by Graven.

This case also provides an excellent illustration of the manner in which the Court typically views and treats property boundary surveys and survey evidence in general. As noted above, it is impossible to tell with certainty, from the evidence presented in this case, which of the two surveys of the lot line in question was actually correct, or which was closer or more correct than the other, or even whether either of them was correct or even close to the true original lot line location. This situation often appears in land rights cases, and courts have developed a systematic way of dealing with such routine inadequacies in the evidence. First, courts do not view surveys as critical or decisive, with respect to boundaries. Surveys are only one of many forms of evidence that can control a given boundary location, and the most essential evidence always relates to the actions and conduct of the parties themselves, not those of any surveyor. Acts of an original surveyor have particular significance, but only because the original surveyor is functioning as a tool of the property owner, carrying out the property owner's wishes, and serving as the property owner's hands, in dividing the land. Retracing surveyors, such as those in this case, have no such authority, with which to control boundary locations, and can merely express professional opinions, based on existing evidence and their own measurements. Secondly, courts treat every competently performed survey

as being correct, but only until it is contradicted. In this case, the first survey was contradicted by the second survey, but the second survey was never contradicted by any subsequent survey, or any other evidence, so it was recognized as being the correct survey, as opposed to the first one, even though the Court had no basis upon which to decide which one of the two was actually more accurate. Under this rule, wherever two or more retracement surveys are in conflict, the most recent one is typically accepted over any earlier ones, as long as it stands uncontradicted, undisputed and unchallenged, regardless of how it was performed. The courts follow this procedure out of necessity, because there is no other way for them to efficiently deal with the complexities of survey evidence. The burden, therefore, is always on the party challenging the most recent survey, to provide some form of serious, tangible evidence casting doubt upon it, or else it will stand as correct in the eyes of the Court, and it will never be questioned by the Court, rendering all earlier retracement surveys, even those that may have been superbly surveyed, devoid of value.

ZUEGER v BOEHM (1969)

At this point in time, issues concerning the significance, relevance and availability of the long standing section line right-of-way concept began to spring up with greater frequency and urgency, brought to the forefront by the increasing access needs of a developing society. A review of some notable earlier cases providing context is appropriate at this juncture, supplementing those cases relating to the public section line right-of-way that have already been cited herein. In 1917, in the case of Faxon v Lallie Township, the Court had ruled that any section line can be put to use as a public highway at any time, without any survey work subsequent to the original GLO survey of the section line in question, based on the legal presumption that section lines, once marked on the ground, remain forever clear and visible, and every section line location is subject to easy and immediate identification by any party at any time. Of course, surveyors know this not to be the case, but as always, the rulings of the Court are based upon accepted legal principles, such as the principle that section lines

are permanent in this particular instance, and the burden of proving the contrary rests upon any party asserting that the principle in question is not applicable under the given circumstances. In that case, Faxon's farm was split by a public road built through his land and the Court found that he was entitled to no compensation for that use of his land, because the public right-of-way had always existed in that location, pursuant to federal law, specifically 14 Stat 253, now known as RS 2477, and adopted into territorial law as previously discussed herein, although it had never before been used by the public in any manner. Faxon pressed his case all the way to the United States Supreme Court, where he was ultimately vanquished, when the matter was tersely dismissed for want of jurisdiction. The Court next maintained it's stance on the section line right-of-way, as a legitimate legal concept, in the 1921 case of Huffman v West Bay Township, indicating it's steadfastness on this issue with the phrase "Once a highway, always a highway". Then in the case of Hillsboro v Ackerman, in 1922, the Court held that the location of a public road, which had been originally built in a certain location, based upon that location having been legally determined to be a section line, could not be relocated based upon a later survey indicating a different section line location, following the long established and widely observed general principle that certainty and finality of location are of greater value than precision of location, in matters concerning land rights. Lastly, in 1936, in King v Stark County, the Court decided that when a section line road is converted into a state highway, the state acquires the right to close off the existing access of all abutting land owners, as long as access at some location is provided, and the state has the right to dictate the location at which the land owners will have access, and the land owners are entitled to no compensation for the relocation of their points of individual access along the public highway. In addition in that case, the Court found that land owners along a section line right-of-way have no right to insist that the existing grade be maintained, and they are entitled to no compensation for any grade changes, unless such changes result in flood damage to their land.

1964 - Zueger owned a farm in Morton County, through which at least one section line ran for an unspecified distance. Boehm also owned a farm, either adjoining Zueger's farm, or somewhere near it. These farms were located in an unorganized township, so there were

no township roads and the roads in the area were subject only to county jurisdiction. Boehm knew that all section lines were subject to use for purposes of travel by the public, and he wanted to travel the section line that ran through Zueger's farm, because doing so would allow him to reach his own farm from a public highway. Zueger had one or more fences running either along or across this particular section line, making it impossible for Boehm to use it for vehicular travel. In addition to the fences, the terrain was also an obstacle to travel, so grading work was required to create a useful road along this section line, even if the fences were not present. Boehm submitted his request to use the section line to the county, and the county responded by issuing an order that the section line must be cleared of fences, and made available for Boehm to use. Zueger complied and cleared the section line right-of-way of fences. The county however, declined to provide any personnel, equipment or funds with which to build a road on the section line, so Boehm proceeded to grade the section line himself, making his own road, without any participation by the county. Zueger protested to Boehm, claiming that Boehm had no right to do any such work on Zueger's land. Boehm nonetheless continued the grading work and the county took no action to prevent it, so Zueger filed an action against both Boehm and the county, charging that the work amounted to trespassing, and seeking damages for the disturbance of his land.

Zueger argued that although the law does provide that public travel along section lines cannot be deliberately or negligently impeded or blocked by land owners, the law made no provision for any physical road construction, improvement or alteration of the land along section lines by any individuals, either the users of the right-of-way or the owners of the land. He asserted that construction work on section line roads can only be done by the proper authorities, therefore Boehm had no right to disturb Zueger's land in any way, and Boehm had only the right to travel over and upon the existing ground, as he found it. Boehm and Morton County argued that Boehm had the right to do whatever was necessary to exercise his right to travel the section line in question, because without the right to make a usable road on the section line, his right to travel the section line was worthless, and the county had no obligation to do anything more than

require that the section line be cleared of all obstacles that had been placed within it, and see that it was kept clear of any such obstructions. The trial court summarily dismissed Zueger's argument without consideration, approving what Boehm had done, as well as the position taken by the county on the matter.

This case marked the beginning of a time period during which the Court would be repeatedly asked to clarify many of the legal details relating to the creation and use of section line roads. The law providing that all section lines represent public highways had been in place for a full century by this time, yet many details relevant to it's proper implementation had never been litigated or otherwise conclusively determined, so the Court would be required in a number of cases to interpret various aspects of the meaning of the old law, in the context of the modern world, with all it's technological advancements, in order to make the law applicable and useful in practice in a modern society, while also upholding land rights. The spirit of the law was clearly to provide definite access to all land owners, in order to render all land useful, and to foster the development of society, but the legal implications of that, for both the public and private parties, remained unclearly defined. The Court had always acknowledged the fundamentally public character of the rights relating to all travel along section lines. The law creating the right of the public to travel section lines, and establishing the existence of a public right-of-way for that purpose, dating back to the territorial era, ultimately gave control over every section line right-of-way to North Dakota. North Dakota, the Court noted, had the right to delegate control and authority over any section line right-of-way, and had effectively done so, putting that authority in the hands of county and township officials to a great extent. Nevertheless, the purely public nature of all section line right-of-way meant that all determinations governing what can and cannot be done within a section line right-of-way must be controlled by state law, and must be made in the public interest, distinguishing section line roads from private access easements, in which the public has no rights or interest. To that extent, the Court agreed with Zueger, that although Boehm had a definite right to use the section line right-of-way in question, as a member of the public, he had no right to construct a road himself, within the public right-of-way, entirely on his own volition. Further, he had no right, either as a public road user or as a private individual, to physically alter Zueger's

land, even though it was within the public right-of-way. If Zueger had granted Boehm an access easement, Boehm's rights would have been private in character and the situation would have been entirely different. In that event, Boehm would have had the right to enter upon Zueger's land for the purpose of improving and maintaining his access easement, to make and keep it suitable for his own personal use, but that was not the situation here.

Boehm believed and asserted that he was acting under the authority of Morton County when he did the grading work. He had obviously expressed his desire and his need to use the section line right-of-way, and his proposed use of it had not been rejected by any county officials. Indeed, the county officials had promptly complied with his request to have the right-of-way made free of obstacles, and they had cooperated with him and supported his idea to put the right-of-way into use, leading him to believe that he was free to prepare the right-of-way to serve as his own new personal driveway. No one had told him that he could not create a path suitable for basic and reasonable vehicular travel, so naturally he presumed that when the county declined to provide any assistance to him in improving the right-of-way, the county was merely leaving it up to him to build the road for himself. The Court held however, that the mere fact that the county had made no effort, and taken no steps, to prevent Boehm from improving the right-of-way himself, and had stood by without taking any action at all, was not equivalent to granting him the right to do so. He had never been actually directed by the county to grade the road, he had acted on the assumption that his work would be accepted and approved. In fact, Morton County stated that it had expected Boehm to build a road in the right-of-way himself, and that the county planned to adopt the road as public once Boehm completed it. But the Court indicated that this still fell far short of what was required for the proper creation of a new section line road under the law, so once again, the Court found that there was significant merit in the argument that Zueger had attempted to make before the trial court, and therefore the trial court had erred in dismissing his case summarily, without full consideration and adjudication. At this point, it looked like Zueger was about to prevail in all respects and Boehm would suffer complete defeat, but the Court had more to say on this matter.

The Court reversed the decision of the lower court and remanded the

case for a complete trial of the issues presented, but all was not lost for Boehm. The Court had staunchly defended Zueger's right to defend and protect his land from unwarranted acts of disturbance, and had chastened Boehm for his actions taken without proper authority, but the fact remained that the section line right-of-way was intended to serve as a road, and Zueger could not prevent it from being used as such, either by Boehm or by the public in general. Having amply protected Zueger's rights as a private land owner, the Court sought to establish a viable means of allowing the rights of the public to be put into use as well. Morton County had declined to participate in building the road, although it had recognized that building a road in the proposed location was legally justifiable and would be genuinely beneficial. The decision by the county to order the section line right-of-way to be made open and available for it's legally intended use as a roadway, the Court ruled, was a valid decision that the county had the authority to make, and which should be put into effect. The fact that the county did not have the personnel, or the equipment, or the money to build such roads should not be allowed to render the creation of good and useful new roads that serve the public interest impossible, the Court decided. For that reason, the Court adopted the position that counties can legally confer the right to construct section lines roads upon private individuals, such as Boehm, who are prepared to do the job themselves. When so delegating their authority to build a road, the Court concluded, counties must provide an overseer, who shall take full responsibility for the construction work, in order to insure that it is done properly and in a manner that results in a good county road, that can be safely used by the public, equivalent in all respects to all other county roads of the same kind, all without undue damage or disturbance to the private land owners along the section line. By this means, the Court sought to enable the ongoing development of North Dakota, at the county level, by creating the opportunity for even the poor rural counties to acquire new routes of access in the most cost effective way. As we will soon see however, the issues brought up in this case would only lead to many additional issues of the same variety, pertaining to the development, use or blockage of numerous portions of the public section line right-of-way, demanding the attention of the Court.

ODEGAARD v CRAIG (1969)

As has been previously noted, the Court has always been disinclined to render judgment in boundary cases based on detailed survey evidence, because the Court generally prefers to base it's decisions upon principles of law, rather than on technicalities. For this reason, cases containing specific rulings on the technical aspects of surveying are quite rare. This does not mean however, that the surveyor can learn nothing from the decisions of the Court. The manner in which the Court views and treats surveys is a matter of potential interest to the surveyor, since the surveyor can benefit from understanding the interaction between survey evidence and the larger principles of law that control land rights. Surveys are typically either accepted or rejected by the Court based upon whether the survey is protested or stands uncontradicted, rather than upon an examination of the specific methods or procedures employed in performing the survey. As we have already seen, and will repeatedly see again in later cases, the Court presumes that every survey has been done in a professional manner, and therefore accepts any survey as a factual indication of the true location of the relevant corners and lines of record, if the survey is not questioned or disputed in any way by any of the parties. Of course, that does not mean that even a correct survey will control, a survey can be accepted as correct and yet have no effect whatsoever on the boundary location. This case is no exception, as here the Court rejects a survey that was challenged and could not be shown to have been performed in compliance with the relevant statute concerning survey work, without ever looking into any specific details relating to the survey, and without ever making any judgment or drawing any conclusion as to the survey's correctness or lack of correctness. The Court has very seldom passed judgment on details relating to survey evidence in the last hundred years. In 1932, in Emmil v Smith, the Court rejected an original sandstone quarter corner monument, because there was conflicting testimony regarding it's location, suggesting that it may have been hidden, moved or otherwise falsified. Then in 1959, in Hanson v Grubb, the Court held that a description which is clearly intended to run to a PLSS corner, does run to the corner, regardless of any variance from a course and distance stated in the description. The rulings in these two cases have never been applied in any subsequent cases however, illustrating the great infrequency with which issues of this type come before the Court. The

case we are about to review stands for the proposition that whenever the integrity of a survey is challenged in any way, the burden of proof is on the surveyor to show that the survey work was in full compliance with the law, in order for the survey to have any opportunity to be upheld as controlling if attacked.

1938 - Craig, who was a tenant farmer at this time, leased and farmed the entire east half of a typical regular section, which was in federal ownership. He evidently decided that he would no longer farm the northeast quarter and he erected a fence where he believed the north line of the southeast quarter to be. How he decided where to build the fence is unknown, there is no indication that he found, or even looked for, any corner monuments, or made any measurements.

1939 - Odegaard, another tenant farmer, leased the northeast quarter and began farming it up to the fence. Craig continued to lease the southeast quarter and farm the area south of the fence, and this arrangement continued in the following years.

1943 - Both parties acquired title to their respective quarters, by quitclaim deeds from the United States, and the farming went on unchanged.

1957 - For some unknown reason, the fence was taken down by Craig.

1958 to 1968 - The crop lines varied from year to year and the former location of the fence became obscured.

1969 - The Odegaards filed an action requesting that the line be determined by means of a survey, to be performed under the statutory procedure for the restoration of corners and lines of original GLO surveys, and the Craigs agreed, but were either unable or unwilling to pay for such a survey. The Odegaards then ordered a survey, which was done by the county engineer, but the Craigs disagreed with the resulting line and pulled out all the stakes that had been set by the county engineer. There is no indication of whether or not any survey monuments existed anywhere in this particular section, and no indication of how the county engineer located the line, or why the Craigs believed that the true line was in some other location.

The Odegaards stated that the line staked by the county engineer was acceptable to them, and argued that since the Craigs had destroyed the stakes, the Craigs should be required to pay to have the county engineer stake the line again, and that the Craigs should be required to honor the resulting line. The Craigs did not specifically argue that the line staked by the county engineer was wrong, nor did they argue that the true line was in any particular location, they simply argued that the county engineer's survey was unacceptable to them, and that under the law they were not required to abide by any survey that was not performed in accordance with the statutory procedure. The Craigs also argued that they were entitled to a portion of the northeast quarter by adverse possession, based on the former fence location, even though no one could recall exactly where the fence had once been. The trial court agreed with the Odegaards that the survey done by the county engineer was acceptable and ruled in their favor.

The Court first disposed of the adverse possession issue. The claim of adverse possession made by the Craigs was flawed in a number of respects. First, all the land involved was in federal ownership at the time their occupation began, so it was not subject to adverse possession during the early years, for that reason. Second, they were initially tenants, so their presence on the land was nothing more than a physical manifestation of the legal presence of their landlord, which was the federal government, so any adverse possession they could have accomplished would have accrued to their landlord, and not to themselves, during the years that they were merely tenants. Third, the fence, upon which they based their claim, did not exist for the requisite twenty years, and they could not prove where it had been. Fourth, they had effectively abandoned control of the strip that they were claiming, along the south side of the former fence, by removing the fence themselves and allowing the use of that area to become mutual. Finally, their possession could only have been adverse from 1943 at the earliest to 1957 at the latest, so they could not meet the twenty year time period, twenty years being required rather than ten, since they had no color of title to the northeast quarter.

The Court next confronted the claim made by the Odegaards, that the survey done by the county engineer should be treated as binding upon all parties. This was the Court's first opportunity to interpret and rule upon the

intent and meaning of the relevant statute, 11-20-07, directing county surveyors on how to restore corners and lines of the original government surveys. The Court upheld the statute and ruled that it was fully applicable to the situation presented by this case. The first and foremost directive announced by the statute, as quoted by the Court, explicitly places the burden upon the retracing surveyor to discover, consider and employ all valid available evidence of the original government surveys, before resorting to measurements as a basis for restoration of original corners:

> “1. All corners and boundaries which can be identified by the original field notes or other unquestionable testimony shall be regarded as the original corners and must not be changed while they can be so identified."

The Craigs had charged that the survey done by the county engineer was inadequately performed, which was an assertion that they were entirely within their rights to make, the Court determined. This charge was sufficient to cast doubt upon the integrity of that survey, specifically with regard to whether or not it was performed with such diligence as to satisfy the standards set out in the statute. The Craigs had agreed to accept and abide by a survey that was fully and properly performed under the statute, the Court found, this did not mean however, that they had agreed to accept just any survey. The Craigs had reserved the right to demand a valid and complete survey, based upon legitimate evidence and legally supportable survey procedures, as enumerated in the statute. The fact that the Craigs had not been willing or able to pay a portion of the cost of a legitimate survey, which the Court acknowledged could be quite expensive under the circumstances, did not give the Odegaards the right to unilaterally order a substandard survey and then demand that the Craigs accept it. The Court ruled that the Craigs had not relinquished any rights by agreeing to honor a statutory survey and they still had the right to protest any survey that could not be shown to be in full compliance with the law. The Court decided that the trial court had erred in approving the county engineer's survey over the objections of the Craigs, struck down that portion of the lower court's ruling, and remanded the case to the trial court, with directions to appoint a registered professional land surveyor to perform the required survey, the cost of which would be borne equally by the litigants.

HECTOR v STANLEY TOWNSHIP BOARD OF SUPERVISORS (1970)

The issue of access to landlocked parcels or tracts was the sole focus of this case, yet the decision handed down here by the court was quite a powerful one, with far reaching effects. Statutory interpretation was at the core of this controversy, requiring the Court to provide the final word on the true meaning of a statute had been created for the general purpose of enabling land use. Whenever a landlocked tract or parcel, not touching any public right-of-way is conveyed, the first consideration is whether or not the grantor had some specific intention in mind, with regard to the matter of accessing it. If the grantor still owns adjoining land, across which access to a public right-of-way is possible, the situation is typically resolved by the creation of a reasonable access route over the grantor's remaining land, to serve the basic access needs of his grantee. The grantor generally has the option of dictating the location of the route, if none currently exists and the conveyance language is silent with respect to the matter of access. The situation is similarly resolved in situations where the landlocked parcel is reserved, rather than conveyed, and it is the area abutting a public right-of-way that is conveyed. In either case, the basic objective of course, is to create useful access for all parties, without burdening any third parties in any way. Under either of those circumstances, a common law way of necessity answers the need, and the matter is therefore susceptible of resolution without the complications introduced by the involvement of any other nearby land owners. In situations where the landlocked tract or parcel already exists however, and the entirety of that tract or parcel is conveyed, as in this case, the situation is more complicated, because it becomes impossible to create ground access to the landlocked tract or parcel without involving one or more third parties, and requiring them to accept the burden of an access route over their land, usually against their wishes. It was to address this situation that the statute in question here was created, and the controversy here centers on the specific question of who has the authority to decide what will be done in each particular instance. As we will see, the ruling of the Court in this case set a clear and strong precedent, outlining the extent of both the authority and the obligation, that the law bestows upon county and township officials as public servants, to address all such situations involving access needs forthrightly and in complete good faith, in

order for the law to be faithfully carried out as it was intended to function.

> 1968 - Hector acquired the northeast quarter of the southwest quarter of a certain section located in a rural area. No public roads existed in the interior of this section, so Hector had no way of legally accessing his land by means of travel on the ground from any public road. The exact language of Hector's deed is unknown, but it contained no references to any existing or intended means of access to the land being conveyed. There is no indication of who he acquired the land from, or who owned the adjoining parts of the section, but evidently his grantor owned no other land in this section, making it impossible for Hector to obtain access to his land by means of a typical private way of necessity over his grantor's remaining land. He contacted all of the adjoining land owners, seeking an access route to his land, but was unable to obtain a right of access from any of them. He then decided to seek the creation of a public road and submitted his request to Stanley Township. A river ran through the eastern portion of his land, so he proposed a public road running about a quarter of a mile, from a point on the west edge of his land, westward to connect to an existing public highway located on the west line of the section, since this appeared to be the most direct and logical location for an access route to his land.
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> 1969 - Hector got a letter from the township notifying him of "...the unanimous decision of the board declining any right-of-way...", without any explanation for the rejection of his proposal, and offering no alternative access route. So Hector filed an action against the township, accusing the township of having failed in it's statutory duty to create a public road to serve his land and demanding that a legal access route to his land be created.

Hector argued that the township was required by statute to provide a legal and reasonably useful access route to his land and the township's refusal to do so was a violation of the law. Stanley Township argued that it held the sole and absolute authority to decide whether or not any such access request would be granted, and it had the right to deny any such request for any reason. The township further argued that any statute requiring the creation of every public road requested, or allowing land

owners to protest and appeal township decisions, and demand the creation of public roads, would be unconstitutional, so the statute must have been created with the intention to give townships the right to conclusively refuse such requests. The trial court agreed that the statute in question gave townships a right of absolute refusal, and agreed that it would be unconstitutional for any court to overturn such a decision by a township, so it found that Hector's case was without merit and dismissed his request without any further consideration.

Rarely does the issue of constitutionality arise in land rights cases. The majority of conflicts over land rights are resolved on the basis of large and general equitable principles that grew from the common law of the Old World over several centuries and were extended or adapted to suit the needs of the New World. In many instances, these common law principles have been incorporated into statute law, and the Court treats all such statutes as efforts to linguistically capture and reiterate those aspects of the common law that were seen as particularly vital or important, using language that is understandable to members of our society. To that end, the Court proceeds to apply the statutes in such a manner as to embody and perpetuate the spirit of the common law, unless something in the language of a given statute clearly expresses the idea that the statute was intended to vary from the relevant common law principle in some specific way. Above all, the North Dakota Supreme Court, like the Supreme Courts of all other states, strives to interpret every statute in a manner that brings or keeps it within the Constitution of North Dakota. The Court realizes that it's role in government is intended to be a fundamentally affirmative one, not a destructive one, so the Court endeavors to read each statute that is brought into question in a way that allows it to have effect, rather than treating it in a way that prevents it from having any effect, or eliminates all or part of it's intended effect. In other words, just as the Court seeks to ascertain the true intent of a deed, it likewise seeks to ascertain the true intent of the legislature in creating all statute law. When the intent of a statute can be determined, it will be given effect, unless found to be in derogation of the North Dakota Constitution or fundamentally repugnant to justice. Here, Chapter 24-07 of the Century Code was called into question, and the Court came to it's defense.

Section 24-07-06 of the Century Code, which mandates the legal creation of a new public road, to serve land not served by any existing public road, in those situations where a genuine need for such access is proven, was the focal point of this controversy. That statute authorizes counties and townships, as the stewards of public roadways, to act as necessary to provide public access to land, for the benefit of society. The statute, to that extent, is a specific application and codification of the general common law principle that the needs of a society must generally come above the wishes, desires or preferences of private individuals. In effect, the statute is analogous to the concept of eminent domain, allowing for the creation of new rights that serve the needs of the public, and society as a whole, inevitably at the expense of certain existing private rights, where the creation of such public rights is well justified, though not without compensation of course, to any private parties whose rights are diminished or reduced in the process of creating new public rights. In this case, all parties acknowledged that townships had the authority to create new public ways, the dispute was over whether or not they have an obligation to do so, and whether a decision made by a township or county is absolutely conclusive or is subject to judicial review. Since the spirit of the law mandates that genuine necessity for the creation of a new public road must be shown, the Court found that counties and townships are certainly not required to create every new road requested, and are fully entitled to deny any such request, where the requisite necessity is not adequately shown. In that regard, the Court indicated, the burden is on the party requesting access, to prove that no legal access is currently available, and failure to present such proof is grounds for a legitimate refusal to create a new public way. In other words, the statute does not even come into play until necessity is proven. Hector however, the Court observed, had a valid claim based on true necessity, provided that the evidence before the Court regarding the location of his land, and the absence of any legal ground access to it, was correct and complete. Thus the burden passed from him to the township, to show some legitimate reason why the township considered his request unworthy of any action.

Stanley Township had given no specific reason or justification for it's refusal to provide Hector with access, and the trial court had not required the township to present any evidence at all, holding that the township's

decision was final and binding and was not subject to appeal or review. The trial court, in a highly unusual step, even went so far as to declare the statutory appeal process itself utterly invalid and unconstitutional, on the grounds that it improperly allowed decisions which counties and townships had conclusively made to be judicially overturned. The Court however, was not inclined to accept the idea that the legislature had intended to give such absolute authority to county and township officials, noting that doing so would operate to invite tyranny at the local government level, and would no doubt result in numerous unjust decisions, of an arbitrary and capricious nature, based on personal influence, grudges and prejudice. Whether or not any such prejudicial attitude against Hector was a factor in the decision against him, that had been made by Stanley Township was unknown, and the Court made no direct suggestion of that, yet the Court was very cognizant that it was quite possible that such factors could be present, and the Court made it perfectly clear that this would be fundamentally unjust and therefore legally intolerable. Stanley Township had not specifically asserted that Hector had been negligent, and had foolishly put himself at the mercy of the township, by failing to require his grantor to provide some means of legal access to the land in question prior to Hector's acquisition of it, but that assertion was implicit in the position taken by the township, and the Court clearly found it unpalatable, by virtue of it's treatment of Hector as a completely innocent grantee. Accordingly, the Court reversed the lower court ruling and remanded the case for the purpose of resolving the issue of necessity based on the evidence, and deciding the fate of Hector's request based on it's merit. In so ruling, the Court upheld the constitutionality of the statutory appeal process and determined that under the relevant statutes neither counties nor townships are authorized to deny public access to requesting parties who are able to demonstrate a genuine need for legal access. Obviously, this decision, while clarifying the Court's position on the creation of public ways of necessity, left a great many issues relating to funding, compensation, location, description and other potentially troublesome legal questions relating to the creation of new roads yet to be adjudicated, at such time as they may arise in subsequent cases.

MADER v HINTZ (1971)

In this, our third successful description reformation case, we see the reformation remedy applied in a third different context, as we see it introduced here by the Court itself, in pursuit of it's perpetual goal, to make both of the opposing parties whole, to the greatest extent possible, by putting the parties in the positions that they would have occupied had nothing gone wrong with their transaction in the first place. We have seen reformation used to correct an accidental omission, in the 1951 Wilson case, and used to prevent a deliberate deception, in the 1966 Cokins case, and here we see it used as an equitable remedy, in lieu of rescission of an otherwise valid and legitimate land transaction. Among cases involving conflicts between a grantor and grantee, this case is an example of one in which the Court finds that the balance of good faith is in favor of the grantor, despite the fact that improper conveyance language was used by the grantor. Accordingly, the Court invokes description reformation as the remedy that best protects the interests of both parties. Again here, as is so often the case, we are not given the details, regarding the source or the specific nature of the description error or errors that are at the root of the conflict. But this fact itself serves to show yet again that the Court does not make it's decisions based on details, such as the metes and bounds calls in a description, which are at issue here. Instead, the Court seeks to find a way to cut through the details, not allowing them to stand as obstacles to justice, as it crafts a solution that makes the original intentions of the parties, as embodied in their original agreement, a reality. This case presents a great lesson for any surveyors who may be inclined to believe that the calls of a description always control the boundary location and therefore must always be followed exactly as written. As will be observed, the land ownership rights of the parties to a conveyance are controlled primarily by the best evidence of their intentions, their understanding of the boundary location, and their agreement regarding the boundary location, not by the calls of a description that fails to match their intentions.

> 1959 - Mader owned a trailer court. No previous conveyances of the tract of land occupied by the trailer court were included in the evidence, so how or when the tract was originally created is unknown, but it was known that the property was an irregularly

shaped parcel, described by metes and bounds, lying along the east bank of the Missouri River. Mader agreed to sell the trailer court to Hintz, representing to Hintz that it contained "five and one-half acres more or less". The parties entered into a contract for deed, which contained the existing metes and bounds description of the parcel, but contained no reference to acreage. The contract for deed stipulated that Mader would provide an abstract of title to Hintz, showing that Mader had clear title, and that Mader would provide a warranty deed to Hintz, upon completion of the payments to be made by Hintz. However, Hintz did not request an abstract at this time, so Mader did not provide one. Hintz took possession of the trailer court and began faithfully making the appointed payments.

1967 - While attempting to develop a plan to relocate trailers, Hintz made reference to the legal description of the parcel for the first time and discovered that it contained a number of unspecified errors. Hintz consulted an attorney who suggested that Hintz should demand an abstract of title from Mader. Mader provided the abstract, the attorney reviewed it, and advised Hintz that it appeared that there were serious problems with Mader's title. Hintz immediately informed Mader that he intended to rescind the contract for deed and demand a full refund of the payments that he had made to Mader. Mader responded by telling Hintz that he would do whatever was necessary to clear his title and he did not believe that Hintz had any right to rescind the contract. Hintz did not accept this response, he ceased making payments and vacated the subject property.

1968 - Mader filed an action against Hintz, to compel Hintz to complete his payments under the contract. Hintz refused to make any further payments and insisted that it was Mader who had violated the terms of the contract.

Mader argued that he had not broken the contract by failing to provide the abstract sooner, because Hintz had not previously requested it, and Mader had provided it promptly once Hintz did request it. Mader also argued that the problems with his title were not fatal, and he could and would remedy them, and that once the problems were eliminated he would be able to fully perform the terms of the contract and uphold his part of the

transaction, so Hintz had no right to demand that the contract should be rescinded and Hintz was bound to complete his payments. Hintz argued that he was entitled to rescind the contract, because Mader was unable to convey clear title to him, either at the time the contract was written or at the present time, and Hintz had no obligation under the contract to settle for anything less than clear title. The fact that Mader had been in breach of the contract at all times, and still continued to be in breach of it, Hintz argued, gave Hintz the option to choose to rescind it. The trial court ordered a survey of the parcel to be made and a new description of it to be prepared, and this was done, but Hintz declined to accept this as a solution and continued to insist on his right to rescind the contract and get all of his previous payments back from Mader. The trial court agreed with Mader that it was Hintz who had broken the contract, by refusing to complete his payments, and decreed that the contract had been effectively cancelled by Hintz, so Mader came away with both the land and the money, while Hintz came away with nothing.

The Court began by observing that no claims of fraud had been made by either party and neither party had expressly accused the other of acting in bad faith. The Court accepted the assertion by Mader that he was unaware that there were defects in his title, because he never had any reason to suspect that any boundary or description issues existed. Mader and Hintz agreed that there had never been any doubt or question in their minds about what land was being conveyed. Both of them thought they knew where the boundaries of the parcel were on the ground, and their ideas in that regard were in full agreement. One issue of concern to Hintz arose from the fact that Mader had informed him that the subject property contained over five acres, but the survey performed at the order of the trial court had revealed that it actually contained less than four acres. Nevertheless, since Hintz had not been mislead to his detriment by this innocent mistake on the part of Mader, the Court found that this mistake did not provide grounds upon which Hintz was entitled to rescind the contract for deed. Hintz had gotten the exact parcel that he had sought to buy, since he had not been deceived in any way regarding the actual location of any of the physical boundaries of the parcel, so he could not show that he had been harmed in any way by Mader's mistaken reference regarding the acreage. The position taken by the Court on this issue was in line with the principle followed by the federal government, that in conveying the public domain, by reference to plats

showing acreage, the acreage is to be treated as being informative only, and is not controlling, when shown to be in conflict with either platted boundaries or physically marked boundaries.

Having established that there had been a genuine meeting of the minds between the parties in 1959, as to the subject matter of the conveyance, and that the content of the original description was manifestly erroneous, and that no third parties would be injured or damaged in any way by reformation of the description, the Court determined that the trial court had been correct in concluding that reformation was the appropriate remedy. Hintz had forsaken his right to rescind the contract and demand a refund, based solely upon description errors that were previously unknown and which were entirely correctable, the Court decided, by his failure to take advantage of the offer by Mader to provide an abstract in 1959. The description issue was fully discoverable and correctable in 1959, the Court found, so Hintz could not successfully charge that the faulty description was grounds for rescission 8 years later. But although Hintz had lost the opportunity to rescind the contract due to the description problem, he could not be legally required to accept a problematic description. Citing several of it's own previous decisions on related issues, the Court defined a marketable title as one that is free from reasonable doubt, and stated that:

> “...factors which are relevant to marketability include the extent to which the title has been accepted by other purchasers and incumbrancers, whether any adverse claims have been asserted against the persons in possession under the questioned title, and whether there is any reasonable likelihood of a successful attack upon the title."

Mader had contracted to provide clear title and a warranty deed to Hintz. The mere fact that Hintz was not entitled to unilaterally cancel the contract and demand the return of his payments, did not mean that Mader was not obligated to uphold his part of the transaction. Of course, Mader had agreed to take any steps required to clear the title, as previously indicated, so he had already accepted this as part of his burden, as the grantor. Therefore, the Court ruled that the contract had not been cancelled and was still in effect, modifying the ruling of the lower court to that extent.

Mader was granted the opportunity to clear his title and the Court declared that he was not in breach of the contract, nor had he ever been in breach of it, because he had never yet been called upon to deliver clear title to Hintz, and Hintz was in no position to accuse Mader of breaching the contract until such time as Hintz had completely fulfilled his part of the contract by completing his payments. In other words, the status of the title was irrelevant until Hintz made his final payment and thereby became entitled to demand delivery of a clear title, so Mader had until that time to clear his title. Only if Hintz made full payment, and Mader was still unable to clear the title at that time, would Hintz then have a valid basis upon which to claim that Mader had breached the contract. So in the end, all that Hintz had accomplished, by stopping his payments, was to delay his own acquisition of the parcel, by giving Mader additional time to clear his title. Once again, just as in the 1951 Wilson case and the 1966 Cokins case, the Court had shown that it is quite willing to exercise the remedy of description reformation, in any situation where reformation offers the best avenue by which to harmonize the relevant document of record with the intentions of the parties.

BOLYEA v FIRST PRESBYTERIAN CHURCH OF WILTON (1972)

Since this will be our last case focused specifically on issues relating to the validity of deeds, we will take notice here of three other cases from the modern era that also well illustrate the power and effect of deed delivery. In 1966, in Parceluk v Knudtson, the Court upheld the validity of an unrecorded deed that had been given by a father to one of his daughters, when other family members attempted to claim the land that he had conveyed to her, after his death, based on the fact that the same land that he had conveyed to her appeared in his will. In that case, the Court also applied the statute of frauds to protect the innocent grantee from charges by her siblings that she had orally relinquished her right to the land. Then in 1970, in Frederick v Frederick, the Court found that no conveyance had taken place, although a father had fully prepared deeds granting land to his sons, and had told his sons that he intended to grant the land in question to them

and was planning to give them the deeds. Because the father had kept the deeds locked up, and had died without ever physically handing the deeds to any of his sons, the deeds were a nullity, and the land passed to his widow, who was free to refuse to convey any of it to the sons. In the 1974 case of Gajewski v Bratcher, a very intense legal battle that went on for many years and stands as one of the longest land rights cases in North Dakota history, the Court upheld a quitclaim deed as a complete conveyance, despite extensive testimony attempting to prove that it was given for security purposes only and was not intended as a conveyance, following the established rule that a physically performed conveyance, including a physical deed delivery and subsequent occupation of the land by the grantee, is legally absolute, unconditional and conclusive, in the absence of clear proof of fraud, accident or mistake. In that case, the Court refused to accept any testimony from the grantor that would tend to impeach the validity or effect of the quitclaim, and held that a subsequent purchaser of the same land had notice of the rights of the original grantee, provided by the original grantee's visible use of the land, so the subsequent grantee, although holding an otherwise valid warranty deed, had acquired nothing. All of these cases, including the one we are about to review, involved members of the same family, but as will be observed, the Court clearly sees that as no impediment to the enforcement of the solemn and binding act of conveyance, and steadfastly continues to hold grantors fully responsible for the consequences of all the actions they take, with respect to the conveyance of land, or rights to their land.

> 1960 - Hall, a man of advanced age, was the owner of a large number of tracts of land in North Dakota, including fourteen quarter sections of cropland that he leased to various tenant farmers. His ownership of these quarters at this time was undisputed. He married Schliter, a divorced woman. Bolyea was Schliter's daughter. Neither Hall nor Schliter ever had any other children.
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> 1963 - Schliter died. Hall allegedly deeded the fourteen quarters to Bolyea. This alleged act would become the focal point of the controversy. Hall continued to function as the owner of all the subject properties, paying all the taxes on them and collecting all the payments from the various tenants who were occupying them, until his death. Bolyea played no role in overseeing or operating any of the

subject properties and probably never even visited any of them.

1969 - Hall prepared a will, in which he bequeathed all of his land to three churches, including First Presbyterian, stating that all of his land holdings were to be divided equally among the three of them. However, Hall made no attempt to describe his land in any way in the will. He essentially left the task of figuring out exactly how much land he owned up to the executor of his estate. Evidently, Bolyea was not mentioned at all in the will, at least not in connection with any real property.

1970 - Hall died and the executor of his estate, along with the three churches, claimed that the churches were entitled to ownership of the fourteen quarter sections, based upon the will, since the quarters were all found to be standing in Hall's name in the public records. Bolyea filed an action against the Hall Estate and the three churches, asserting that she had been the true owner of the subject properties since 1963.

Bolyea argued that Hall had conveyed the quarters to her, the conveyance had been absolute and unconditional, and had been made freely and without coercion of any kind, therefore she had become the sole owner of the quarters at that moment, even though none of the deeds were ever recorded, and they had subsequently been either lost or destroyed. The estate and the churches essentially argued that Bolyea had fabricated the alleged conveyances and was lying about what had happened in 1963. They argued that they were entitled to rely on the public records to conclusively determine the ownership of the subject properties, and that testimony contradicting the evidence of record should not be allowed. The trial court accepted the testimony of Bolyea, and others supporting her claim, and ruled in her favor.

Testimony was obviously especially critical to the outcome of this case, much as it was in the Silbernagel case, twenty years earlier, that we have already reviewed, which featured a highly comparable situation, also involving outright destruction of valid legal documents, by a grantor presumably acting in ignorance of the law. Without the opportunity to present testimony, Bolyea would have had no case at all, so the decision to

allow her testimony, and that of those who testified on her behalf, was of enormous importance. The Court had consistently maintained that testimony is always acceptable for the purpose of showing the circumstances under which documents of record, including deeds, were prepared and finalized, because the context provided by such supplemental information provides the Court with essential perspective and a frame of reference, upon which a sound judgment can be legitimately based. Although no testimony can directly contradict the written language of a deed, testimony can always serve to explain what the parties understood the language to mean, thereby enabling the Court to see the conditions and the issues just as the parties saw them at the time of conveyance. But in this case, the testimony related to documents that no longer existed, so the testimony would not merely have an impact on the content of the deeds, it would serve to assist the Court in determining whether or not they had ever existed at all.

Bolyea had four witnesses who all testified that they were present at the time of the alleged conveyance from Hall to Bolyea, and each of them recalled the event in detail. One of them was the attorney who had drawn up the deeds to Bolyea at Hall's request. The conveyance had allegedly taken place in the attorney's office. The other three witnesses were the attorney's secretary and two friends of Bolyea. The Court allowed the testimony of all these witnesses, and that of Bolyea herself, to stand. It was not hearsay, the Court found, and all of it was relevant to proving the intent of Hall at the time. While accepting the testimony in favor of Bolyea however, the Court also upheld the rejection, by the trial court, of the testimony of three friends of Hall, who had all sought to testify that he had expressly told them that he had not intended to convey any land to Bolyea and that he had destroyed the deeds. The Court determined that the exclusion of this testimony, given by Hall's friends, was not an error on the part of the trial court, because evidence relating to anything that a grantor said or did after conveying property can have no effect on the conveyance itself, since once the land has been conveyed it is no longer within the power of the grantor to control the land in any way, much less undo the conveyance and take back the land. So the testimony of Hall's friends, to the effect that he had changed his mind about conveying the land to Bolyea, although presumably true, was irrelevant, and was of no help whatsoever to the defense.

The testimony that was presented provides a classic illustration of the essential elements of a complete and binding conveyance. The attorney testified that he had told Hall that if Hall personally handed the completed deeds to Bolyea, and she held them, even just momentarily, a binding conveyance would occur, and Hall had told the attorney that he understood that. The secretary testified that she had typed the deeds, using written instructions from Hall to supply the descriptions of the fourteen quarters, which she had filed away and presented as evidence, then Hall had signed them, and the attorney had notarized them. All the witnesses agreed that Hall had then physically given the deeds to Bolyea. One of Bolyea's friends testified that Bolyea still had the deeds the next day, but that Bolyea had then given them back to Hall, who had told Bolyea that he would keep them in a safe place. Evidently, not long thereafter Hall changed his mind and destroyed the deeds, and Bolyea had never discussed the fate of the subject property with him again. She was quite understandably not cognizant of the fact that the failure to record the deeds would cause her to experience difficulty claiming the land in the future. Citing the Silbernagel case of 1952, which we have already reviewed, as another example of a case involving unjustifiable destruction of deeds by a grantor, the Court decided that the testimonial evidence presented by Bolyea was sufficient to uphold the lower court's ruling in her favor. A physical delivery had occurred, the intent of the grantor to convey the land at that particular moment was undisputed, and nothing the grantor had done beyond that point in time mattered, including his ongoing control over the land, or even the contrary intentions that he expressed in his will, in the erroneous belief that he had undone his previous conveyance. The fourteen quarters had all been fully conveyed to Bolyea in 1963, the subsequent fate of the deeds was of no consequence whatsoever, and the public records indicating that Hall had still owned the land at the time of his death were powerless to control the actual ownership of the land. Once again, the Court had demonstrated that it is always prepared to diligently protect the rights of an innocent grantee, regardless of the failure of the grantee to comply with the recording laws.

SMALL v BURLEIGH COUNTY (1974)

During the 1970s, the many issues related to the practical use of the legally acknowledged section line right-of-way finally reached a high enough level of urgency that their resolution could wait no longer. Obstructions, primarily in the form of fences, had by this time made a great many portions of the section line right-of-way either unusable or difficult to use, at a time when the use of all available land for agricultural purposes was at a premium. To extract an effective solution from the existing law, to the numerous conflicts over section line use that were rapidly emerging at this time, the Court would be required to probe and divine the meaning of some very elementary language that had stood as the law for many decades, without the fundamentally necessary clarification. The most elemental aspect of these disputes could be traced to a controversy over the meaning and legal significance of the word "open". Two divergent schools of thought, both having some merit and support in the law, had long existed on this particular question. Under the broader view, the word open was intended to have a purely legal meaning, so under this view the use of that term was merely indicative of the existence of the public right-of-way, and essentially all section lines were open in all respects, at all times, regardless of whether or not any physical use had ever been made of them or not. Under the narrower view, the term open had been intended to point expressly and solely to those section lines that had been physically used and adopted as roadways of some kind, and therefore did not embrace every section line, or mandate that all section lines were subject to use as roadways at all times for any access purpose. This was the fundamental dichotomy or legal schism that the Court would need to rule upon and settle, to begin the process of determining the relative rights of owners of land adjoining or enclosing section lines and the public. In this case, the Court was confronted with a highly typical clash between adjoining farmers, one wanting free use of a section line road, the others wanting to retain control over it. Although a roadway of some kind, presumably just a basic dirt trail or path, had existed along the section line in question for quite some time, it had always been viewed by the farmers whose land it crossed as being merely a private access route subject to their control, since no action had ever been taken declaring that it was public in any sense or respect. So the Court elected to make this the battlefield upon which an especially

important and long neglected precedent would at last be conclusively established.

> 1974 - Small owned approximately 2500 acres, on which he grew alfalfa. He also owned an unspecified amount of additional land, separated from his 2500 acre tract by two miles, and he lived on this additional land and raised livestock there. He had the need to transport alfalfa to feed his livestock on a regular basis, and he used an existing section line road for that purpose. The road in question ran through the land of two other farmers, Golden and Yegen, who maintained fences that crossed the road in several places. There were gates at these fence crossings and Small had been using this route for an unspecified length of time without objection from Golden and Yegen, since he respected the gates and used them properly. Small eventually grew tired of the nuisance presented by the gates however, and filed a request with Burleigh County, asking that the section line road be cleared of these obstacles. The county took the position that the gates were acceptable and Small would just have to continue to tolerate their presence, declining to act on his request and refusing to order the roadway to be cleared. Small then filed an action against the county, seeking to compel the county to require the public right-of-way to be cleared of all impediments to public travel.

Small argued that the county had a duty, as the legally delegated steward of the public roads running along section lines, to insure that those roads were completely open for free travel by the public at all times. In addition, he argued that as a public road user, he had the right to remove any obstacles to travel that he encountered along those roads himself, if the county failed to perform it's duty on his behalf. Burleigh County argued that it had the sole authority to decide all issues relating to the use of section line roads, and that authority included the right to permit fences within the section line right-of-way and gates across section line roads. Golden and Yegen also participated as intervenors, supporting the position taken by the county, and arguing that Small had no right to demand that this particular road must be free of gates, because alternative routes that were ungated existed, so he could not show that he had any absolute need to use this particular road. The trial court held that the county had complete jurisdiction

and absolute authority over such section line roads, so the gates could remain in place and Small had to continue to use them properly, or go some other way, and he had no right to damage or alter them in any way.

The Court took the opportunity presented by this case to examine the nature of the section line right-of-way laws more closely than it ever had before, noting that it's earlier rulings involving section line right-of-way issues had failed to define the nature of this form of public right-of-way in a manner sufficient to clarify the meaning and intent of the law. The principle issue was distilled down, by the Court, to what was meant and intended by the use of the word "open", which appeared in certain key passages relating to the section line right-of-way concept. The Court pointed out that the 1866 grant made by the United States, and accepted by the Territory of Dakota in 1871, from which the section line right-of-way concept arose, said nothing with regard to opening actual roads, it simply established the existence of a permanent public section line easement for general travel, regardless of whether any such roads were in existence or not. However, certain statutes of 1897 and 1899 had stated that all section lines "...should be considered public roads to be opened...", giving many the impression that a formal decree by an authorized county or township official was required to create or adopt any particular section line road on behalf of the public. But in 1917 in the Faxon case, previously cited herein, the Court had held that those statutes could not control rights obtained by the people of North Dakota from the United States. Nonetheless, the Court observed, a 1955 law had permitted fences "...along or across section lines not open for travel...". However, the Attorney General of North Dakota, in 1963 and again in 1968, had published opinions indicating that all of the section line right-of-way is legally open to public travel at all times, and no formal road opening of any kind is required prior to the commencement of use of the right-of-way by the public for that purpose. The Court therefore conceded that the law was in a state of disarray in North Dakota on this issue, due to the lack of clarity and completeness in the numerous previous attempts to address the legal status of section line roads and public right-of-way in general, from diverse perspectives, and for varying purposes, at different times.

In view of the foregoing, the Court proceeded on the basis that the real core issue in this case was whether "opening" a section line right-of-

way was an automatic event, which legally took place at the moment the right-of-way was created, or a separate subsequent event, that takes place only when the authorities having jurisdiction over the specific portion of the right-of-way in question choose to act to make it physically available for free and complete use as a roadway by the public. A majority of the Court, including the Chief Justice, took the position that all of the section line right-of-way, having been legally established and repeatedly upheld as a legitimate public easement, was already open, and indeed had always been open since 1871, even where no road had ever existed, by a margin of three to two. The two dissenting Justices felt that the counties and townships should have the right to refuse to accept any given portion of the section line right-of-way, and the authority to decline to make it available for full and unimpeded public use. They defined the term "opening" as meaning "placing the highway at the service of the public", and they would have upheld the decision of the lower court, supporting the assertion by Burleigh County that it had no obligation to recognize the road in question as public, for that reason, but their view did not prevail. The Court decided that the fences of Golden and Yegen must be removed from the public roadway or come down entirely, reversing the ruling of the lower court to the contrary. Maintaining private gates across a public roadway was an untenable proposition, without justification under the law, in the eyes of the Court, and could not be tolerated. The fact that Small had alternative routes that he could use was irrelevant, because both he and the general public were fully entitled to the unimpeded use of all public roads, so Burleigh County was obligated, as Small had suggested, to order all such obstructions removed. In view of the apparent internal contradiction on this matter in earlier North Dakota law, the Court turned to the Supreme Court of it's sister state, taking judicial notice of the treatment that the original right-of-way grant, also fully in effect in South Dakota, had received there. Quoting from a prominent South Dakota case, the Court approved and adopted the position that:

> “...the act of 1871 .... was evidently intended to make every section line .... an easement and right-of-way .... section lines throughout the territory .... should be open to the use of the public, and no action of boards of county commissioners or supervisors of townships is required to establish or open such

highways..."

But the final word on this matter was not in yet. Golden was unsatisfied with this result, so he evidently set out to get the applicable statute changed, to allow his fences to remain in place. In 1975, the language of statute 24-06-28 was amended for the apparent purpose of limiting the removal of existing fences and gates within a section line right-of-way and permitting the construction of new fences, with either gates or cattle guards, inside a section line right-of-way. Once this was done, Golden attempted to have the ruling of the Supreme Court that his fences and gates must go, legally vacated, on the grounds that it was no longer appropriate, since the applicable law had been changed. The trial court denied his request and maintained that the order of the Supreme Court remained valid, despite the statutory modification, and was still subject to enforcement. Golden then found himself in the awkward position of appealing to the Supreme Court, requesting that the Court reverse the decision of the lower court, which had upheld the 1974 Supreme Court ruling. In other words, he was asking the Court to strike down a lower court ruling that had followed an order of the Supreme Court, in effect asking the Court to reverse it's own prior decision. So the case returned to the Supreme Court in 1976, at which time the Court unanimously rejected Golden's assertion that the 1974 Supreme Court order was effectively nullified by the 1975 legislative action, modifying the language of 24-06-28, because there was no evidence to indicate that the statutory change was intended to be retroactive. Although the amended statutory language could apply to fences built going forward, from the time of the passage of the amendment, the Court determined, it could not apply to Golden's fences, since they were built at an earlier time, when it was not legally possible to obtain permission to maintain gates across public roadways, so his gates had come into existence without the permission that was contemplated and stipulated by the 1975 statutory language. Just as in the Faxon case over half a century before, the Court had adamantly protected the concept of section line right-of-way, as a fundamental and absolute public right, always subject to public use, but many further issues related to making practical use of it remained unresolved, and in fact it would be only two weeks before the Court would speak to these same issues again, in the context of another case featuring a comparable set of circumstances.

SAETZ v HEISER (1976)

Although the Small case, just reviewed, was of great significance, it left some unfinished business for the Court to attend to, and the Court very swiftly and unhesitatingly stepped up to the plate and squarely addressed the next major and obvious issue concerning the use of section line roads, which was the question of the proper, appropriate and legal use of gates and cattle guards. While the Court had been divided in deciding the Small case, as previously noted, it was completely unanimous here, providing a much improved level of clarity, to serve as legal guidance for road users, land owners and county and township officials alike, on what would and would not be seen as legally acceptable uses of the various areas that qualified as public section line right-of-way, with the goal of minimizing the frequency of such conflicts in the future. This case therefore represents a major step forward, in resolving the long standing legal ambiguity regarding the use and obstruction of section line roads, and toward providing a clear legal basis for consistent application of the law. The 1975 legislative response to the Small ruling was in focus here, and once again, not surprisingly, the statutory language in question was found to be something less than absolutely clear and complete, giving rise to varying interpretations of the legislative intent, known as the spirit of the law, which as we have seen from similar circumstances in earlier cases, ultimately controls the true meaning of the law, and the manner in which it is applied and enforced. Although disputes such as the one we will see play out in this case are ostensibly disputes between private property owners, the significance of the involvement of the public authorities having jurisdiction over the section line right-of-way should be appreciated and not under estimated. In fact, the essential public nature of the section line right-of-way makes the role of county or township officials critical to the proper implementation of the law, since those officials have been legally delegated the authority to deal with issues that arise relating to the section line right-of-way, and therefore are charged with properly understanding and applying the law, rather than washing their hands of such issues and leaving the private parties to fight among themselves or take the law into their own hands. So it's important to note that here again, just as in the Small case, and the Zueger and Hector

cases before that as well, the ruling of the Court is expressly targeted at outlining the appropriate legal role and functions of the counties and townships in all such controversies. The objective of the Court in cases such as this, involving public rights, is not merely to correctly apply the law in one isolated instance, but to encourage, and in fact to require, the appropriate local level officials to step up and apply the law fully and properly, in order to prevent the Court from having to serve as a legal backstop over and over again, every time issues of the same nature arise. The message from the Court to both public officials and private professionals dealing with land rights is perfectly clear, learn the law, then know it, understand it, appreciate it, and honor it.

1963 - Dunn County officially discontinued efforts to maintain a certain section line road, running between Sections 33 & 34 in a certain township. How long the road had existed, whether anyone had been using it or not, who owned the land in these sections, and who suggested the discontinuance, are all unknown, but these were not matters that had any bearing upon the issues in play in this case.

1964 to 1973 - At an unspecified time or times during this period, an unspecified number of fences were built across this section line, with gates where they crossed the section line, by Heiser and Dvorak, who had become the owners of some of the land adjoining the section line in Sections 33 & 34, and eventually some portions of the road were plowed up by these parties.

1974 - Saetz owned Section 27, and he wanted to use this section line right-of-way for access, since it would allow him to reach the southwest corner of his section from a public highway running along the south township line. When he had acquired his section, what use he was making of it, and whether or not he had any other legal access route to it, are all unknown, but none of these factors were relevant to the outcome of this case. Neither the county nor the land owners were receptive to Saetz's desire to put the road back into use and maintain it as a public road, so Saetz filed an action against Dunn County and the land owners, seeking the right to maintain the right-of-way himself and use it for his own access purposes.

1975 - A statutory amendment concerning fences within any section

line right-of-way was passed, as discussed in the concluding paragraph of the case just reviewed herein.

Saetz did not argue that he needed to use the specific portion of section line right-of-way in question for any particular reason, or that he had no other legal or potential access route to reach his land, he simply argued, just as Small did in our previous case, that free and unhindered access over any public right-of-way is a fundamental public right, that must be made available and kept available to all, once requested. Therefore, he argued that Dunn County had an obligation to either maintain the road in a manner suitable for typical public use, or allow him to do so himself, and the land owners had no right to obstruct or impede his use of it in any way. Dunn County and the land owners argued that the law relating to fences within a section line right-of-way had been changed in 1975, so gates across section line roads were now legal, and any number of gates could be legally maintained on such a road, anywhere within the public right-of-way by the land owners, as long as the land owners did not completely prevent the public from using the right-of-way at all. The trial court agreed that the statutory amendment of 1975 had legalized gates across section line roads, so Saetz had no right to demand that the gates be removed, and he was free to choose to either use the section line right-of-way just as he found it, or not use it at all.

The similarity in the conditions, circumstances and arguments between this case and the Small case is very high, and it should be noted that these two cases played out in parallel, at substantially the same time. If either one of these cases had come along and been decided earlier, the other case may have never taken place, because the parties presumably would have observed the results of the first case and known what the outcome of another case of the same stripe would be, making it unnecessary to fight essentially the same legal battle all over again. But this case contains a very important difference from the Small case, because in deciding this case, the Court was required to go beyond it's ruling in the Small case, and specifically address the meaning and intent of the legislative action of 1975. Because the defense argument in this case was based entirely on the 1975 change to the law, concerning fences, gates and cattle guards, the Court deemed it necessary to expressly present it's interpretation of the law as it

now stood, in order to clarify what was permissible or allowable under the law, and what was not. Interpretation of the true impact of any statute is the domain of the Court, and the Court has the final word on how all North Dakota statutes are to be implemented and enforced, so the manner in which the Court would see fit to read and interpret the statutes in question would not only control the outcome of this case, it would also serve as direct legal guidance to both the lower courts and the public, to be applied in reference to comparable situations as they subsequently arise. In this case, there was no controversy over the facts regarding the existing conditions, there was no disagreement over where the section line really was, and all the parties recognized and agreed that it had been fenced and gated pursuant to the discontinuance order issued by the county. The sole dispute was over the legality of the existing condition of the road, so the only question to be resolved by the Court was whether or not the argument made by Saetz, that the existing situation was unjust and illegal, had any merit. Therefore, the Court's interpretation of the law would be the central focus of the case and would dictate the result.

Just as in the Small case, all of the parties involved, except the plaintiff, agreed that the existing condition of the road in question was acceptable, and the presence of fences in the public right-of-way, with gates across the actual roadway, was legal. Both the county and the land owners adjoining the section line felt that the fences were necessary, and that the gates must therefore be tolerated and respected by anyone choosing or needing to travel the road. The 1975 amendment to 24-06-28, in their view, had been intended to legitimize all existing gates on section line roads and allow more gates to be built on such roads. For that reason, Heiser and the other defendants may very well have imagined that the Court would uphold the right of the land owners to maintain the fences, and the right of the county to decline to order the gates removed, as being legally supported by the amended statute, but their confidence in the effect of the relevant statutory language was misplaced. As amended, 24-06-28 declared that fences were not obstructions, and that both gates and cattle guards could be built within the public section line right-of-way. The amended statute also acknowledged the authority of county and township officials over the right-of-way, and made disturbing any fence an infraction, but importantly, it left all fences still subject to removal. The key specific question to be answered

therefore, was whether the statute was intended to provide counties and townships with a legal option to choose not to order section line roads cleared and kept clear, or whether it placed a legal obligation on those authorities with jurisdiction over section line roads to make and keep them clear for unimpeded public use. Citing it's ruling in the Small case, to the effect that the public interest in any section line right-of-way is a fundamentally paramount interest, representing a permanent and absolute burden upon the land, which both land owners and public authorities must honor, the Court chose the latter answer, stating that:

> "...we conclude that the Legislature did not intend to violate it's trust by tolerating fencing in any form which would effectively deprive the public of it's right to free passage over section lines .... the legislative purpose was to accomplish a balancing of the public rights to passage and the rights of the fee owner .... gates are accordingly authorized within thirty-three feet of a section line but only in a gateway adjacent to a cattle guard."

Following the general rule that courts will always interpret the law in a constructive manner, to the greatest extent possible, rather than a destructive manner, the Court chose to read the language of the amended law in a way that would make it legally supportable, and eliminate the possibility that the Court could be required to strike it down. Had the Court taken the position that 24-06-28 was actually intended to legalize gates across public roads, the Court would have had to declare the statute to be an unconstitutional violation of the rights of the public, which it had just ardently upheld in the Small case. In addition, the Court held that prior written permission from the proper authorities is required before building anything in any public right-of-way, and that those officials are authorized to grant such permission, where it would impede travel along a section line, only in situations where the section line is physically useless as a roadway, due to being located in physically impassible terrain, such as a section line traversing the wall of a canyon or falling in a river. The discontinuance of the road as a county road, by Dunn County in 1963 had no effect on the rights of the public, since the county was not authorized to legally terminate the existence of a section line right-of-way by means of any such unilateral decision or act, and the mere decision to stop maintaining a certain road is

an economic decision, that does not equate to a legal vacation or abandonment of any rights. Having determined that the gates in question must be replaced with cattle guards, and that Dunn County had the legal obligation to enforce the law, by requiring the land owners to make the roadway available for unimpeded use by Saetz and by the public, the Court reversed the lower court's decision and remanded the case for consideration of damages to be awarded to Saetz for the period of time during which his use of the right-of-way was impeded or hindered. This ruling of the Court was codified into Sections 24-06 & 24-10 of the Century Code in 1977 and a specific procedure for legally closing portions of section line right-of-way was also formulated at that time. The era of gated public roads in North Dakota was thus finally relegated to history.

ROYSE v EASTER SEAL SOCIETY (1977)

While most of the major North Dakota cases dealing with easements involve public rights, such as the series of section line right-of-way cases that we have just reviewed, the Court has also produced some outstanding decisions dealing with private easement rights, and this is one of the strongest of those. This case goes a long way toward disproving some common mistaken assumptions that are often made by property owners, particularly the idea that land owners can do anything with the land inside their boundaries, and also the idea that land owners need to look no farther than their own deeds to determine what they can do with their land. While misunderstanding the law relating to easement rights can obviously be very costly to land owners, as is very well demonstrated here, that can also become a problem for land surveyors, potentially creating situations from which professional liability claims can arise. In fact, the surveyor can benefit from developing a proper understanding of easements in a number of ways, not only by avoiding claims of professional negligence or incompetence, but also by achieving a level of expertise that allows the surveyor to better serve clients, pointing out to them the possible significance of existing easements, and creating new easements properly, using the appropriate language and description form, to accomplish the intended purpose in an efficient and effective manner. In this case, we see a

classic set of circumstances, in which misunderstanding of how easements rights function, and how they are conveyed, leads to a construction fiasco, requiring a new building addition to be torn down. While the Court generally deplores results of this kind, as we have learned from the Owenson, Brandhagen and Graven cases concerning building encroachments, in some cases such consequences are inevitable. This case also stands as yet another fine example of how mistakes made by a grantor, who conveys tracts, parcels or easements to multiple parties, can become major problems for his grantees, often only after the grantor has departed from the scene, leaving the grantees to litigate against each other, failing to realize that the blunders or treachery, as the case may be, of their mutual grantor actually planted the seeds of the conflict in which they have become entangled.

1974 - The Easter Seal Society (ESS) owned a tract of land, of unspecified size, on which there was a building used by ESS. Sprenger owned a tract, also of unspecified size, bordering the ESS tract on the south and the west, which was evidently vacant land. ESS wanted to expand it's building by adding onto the south side of it, but the south side of the building was evidently close to the south boundary of the ESS property, so ESS acquired that portion of Sprenger's tract which adjoined the south boundary of the ESS property from Sprenger, extending the ESS property an additional fifty feet south, far enough to allow for the planned building expansion. In the deed from Sprenger to ESS however, Sprenger reserved an access easement over the south forty feet of the land that he conveyed to ESS, so that he could still reach his remaining land lying west of the ESS property from the public road, which was east of the ESS property. Thus, forty of the fifty feet conveyed to ESS were burdened with an easement, leaving ESS only ten feet of unencumbered land on which to build, and this forty foot wide area would become the focus of the controversy.

1976 - Sprenger conveyed his remaining land to Royse. This deed was silent regarding access to the land that was being conveyed to Royse. The concluding paragraph of this deed however, dealt with encumbrances and made reference to "...right-of-way, easements...", in the context of exceptions to the encumbrances intended to be

covered and protected against by the deed, without indicating whether or not this language was being used in reference to any specific right-of-way or easement. Just two days after executing this deed, Sprenger executed another deed, conveying the forty foot access easement, which he had reserved in 1974, to ESS. Just two weeks later, Dreher, who was planning to purchase Royse's land, visited the site and observed that ESS was engaged in construction work which prevented him from accessing the tract that Royse had acquired from Sprenger. ESS had begun work on the building expansion, and was expanding the building southward, nearly all the way to the south boundary of the parcel that ESS had acquired from Sprenger, so the extended building now covered nearly all of the access easement. Dreher informed ESS that he intended to acquire the Royse tract and use the access easement to reach it, so the building must go. ESS refused to clear the easement area and insisted that it had the right to extend the building as it had done, since it had acquired the easement from Sprenger. Royse and Dreher filed an action against ESS, demanding that the building be removed from the easement area.

Royse and Dreher argued that the easement reserved by Sprenger in 1974 was appurtenant to the land that was retained by Sprenger at that time, therefore the easement was conveyed to Royse, along with the land that was conveyed to him in 1976, even though it was not mentioned in Royse's deed, so Sprenger had no right to convey the easement to ESS, because by the time he attempted to do so, he had already conveyed it to Royse. On that basis, they asserted that the easement still existed and it could not legally be blocked by ESS. ESS argued that Sprenger had decided not to convey the easement to Royse, and had conveyed it to ESS instead, and since it was completely within the ESS property, it had ceased to exist at the time ESS acquired it, by means of merger. ESS also argued that the easement had been abandoned by Sprenger and Royse, since neither of them ever used it, so Dreher had no right to demand that it be revived and made available for his use. The trial court found that the easement had passed to Royse and had not been abandoned, so it still existed and the ESS building addition was in violation of the easement and must be removed from it.

The circumstances of this case presented an ideal opportunity for the

Court to clarify the concept of appurtenant rights and the significance of appurtenant easements in general. Although many previous cases, including several that we have reviewed, involved rights that were appurtenant in nature, the Court had seldom found it necessary to specifically refer to them as appurtenant in rendering it's decisions, so this legal concept, which had it's origin in common law, remained rather poorly understood in North Dakota at this time, even though it had been captured and briefly outlined in statute 47-10-11, as the Court pointed out. Appurtenant land rights are those which are fundamentally attached to the land, rather than being attached to, or associated with, any particular person or persons. Rights are considered appurtenant when they are so closely associated with the land that they are essential to it's use and give the land a substantial portion of it's value. Obviously, if such rights, once created and connected to any given tract or parcel of land, were to become disconnected from it and lost, the value of the land would be significantly reduced, or in some cases virtually eliminated, and serious conflicts and disputes would arise incessantly. The concept of appurtenance provides that certain rights that were created to benefit a given tract or parcel of land, which lie or exist outside the boundaries of that tract or parcel, are in fact legally part of the tract or parcel. The practical application of the legal principle of appurtenance results in all such rights being automatically conveyed, whenever the land itself is conveyed, regardless of whether any reference is made to the existence of the appurtenant rights in question in any of the documents of conveyance describing the land. In other words, the law presumes that all rights that are relevant to a given tract or parcel are always intended to be conveyed along with it, and the failure to expressly list, state or describe all of those rights is legally attributed to negligence on the part of the grantor. Hence, the grantor bears the burden of explicitly describing any rights that he truly does not intend to convey, well enough to make it clear to his grantee that the grantee is not getting those particular rights. The basic policy behind this concept of course, is the protection of innocent grantees, which we have discussed in reviewing a number of other cases. Since the access easement in question here was clearly created for the benefit of Sprenger's remainder land, when he made his conveyance to ESS, the Court found that it was an appurtenant easement, permanently attached to that remainder land, and since 47-10-11, which represents the statutory recognition of the relevant common law principle, provides for the

automatic conveyance of such easements, it had passed to Royse, despite being unrecited in his deed. As can readily be seen, understanding the power and effect of this principle is essential to surveyors, who must always be aware that easements can exist, despite being unmentioned in the particular deed that the surveyor is working with, so complete reliance on one particular deed can be a serious mistake, with very unfortunate results.

The Court also dispatched the claim made by ESS that the easement had been abandoned, because it had never been used. An easement is a permanent right, unless expressly described as being temporary or otherwise subject to termination, either at a specific point in time, or upon the passage, completion, accomplishment or arrival of a specific event, so when an easement is created and conveyed in writing, by means of any type of document, the grantee of the easement is under no obligation to use it in any manner whatsoever, and is free to let it sit unused until such time as it is needed, without fear of losing it. Although other parties may suppose that it has been abandoned, because they see it going unused, they do so at their own risk, particularly if the document creating the easement has been recorded, because the recorded document provides notice of the easement's existence to all parties. ESS had no valid reason and no right, the Court observed, to believe that the easement had been abandoned, so the right to use it was still fully in effect, and Royse and Dreher had the right to demand that it remain vacant and available for use at any time. Interestingly, ESS did not suggest that a forty foot wide access easement was excessive and unnecessary, and that ESS, as the servient land owner, should be allowed to use a portion of it, as long as they left a portion of it vacant to serve the purpose of access. But even if ESS had made this argument, the Court may still have held that ESS had effectively destroyed the opportunity to use the easement for access at all, by covering virtually all of it with their building, so even this idea would have left at least a portion of the building subject to removal. Having concluded that the easement was conveyed to Royse, and was not excepted from his deed by the language in the last paragraph of that deed, since that language applied only to potential burdens on the land that Royse acquired, rather than easements for the benefit of the land conveyed to him, the Court fully upheld the lower court's decision that the easement deed from Sprenger to ESS was worthless and conveyed nothing, so the building addition had to be completely removed from the easement.

Sprenger could have prevented the easement from passing to Royse, but only by openly and explicitly stating in his deed to Royse that it was not being conveyed, to provide clear and definite notice of that to his grantee. Since Sprenger had failed to do that, Royse was entitled to the easement, regardless of whether Sprenger's failure was the result of deviousness or just plain ignorance. Although the easement would indeed have been dissolved by a legal merging of rights, as ESS obviously believed, when ESS acquired it by deed from Sprenger, that never happened, because Sprenger no longer had any control over the fate of the easement at that point in time, so his deed purporting to convey the easement to ESS was utterly empty and void.

While it may appear that the Court showed no sympathy for a noble organization, with it's seemingly harsh treatment of ESS, that is not really the case. Even though ESS demonstrated serious ignorance of the law, with respect to the principles of appurtenance and abandonment, by building within an access easement, the Court recognized that both Royse and ESS may in fact have been victims, and pointed ESS toward the proper remedy. Since Sprenger did not participate in the litigation, his true intent was unknown, and of course the Court could not allow ESS to introduce evidence contradicting the content of the deeds issued by Sprenger, but the Court was justifiably suspicious of Sprenger's motivation. His creation of a forty foot wide easement over a fifty foot wide strip, rendering eighty percent of the land that he conveyed to ESS useless for construction, when he knew that they wanted to build on the land, was certainly suspicious, suggesting that he may have initially intended to entrap or extort ESS. In addition, his failure to expressly convey the easement to Royse, followed immediately by his attempted conveyance of it to ESS, strongly suggested that he either deliberately intended to leave Royse landlocked, or he intended to take advantage of ESS again, by selling them an easement that he no longer owned. Whatever Sprenger had intended, the Court ruled, his successors, Royse and ESS, were legally bound by the language of the deeds created by Sprenger, and were stuck with the consequences of his acts and deeds, which as it turned out, had played out in favor of Royse and Dreher, and proven to be quite damaging to ESS. It is true that the Court could have exercised it's equitable power to extinguish the easement and allow the building addition to remain, in which case the Court would have required ESS to compensate Royse for the value of the extinguished

easement, as an alternative to tearing down the portion of the addition that had already been built. The Court did not consider this alternative justified however, since Royse and Dreher were legally entitled to the easement, and they had the right to insist on it, rather than accepting mere compensation for it. Instead, the Court decided to take the unusual step of suggesting that ESS could have a potentially successful case against Sprenger, and may want to consider pursuing that course of action, should they desire to attempt to recover their construction losses. Courts only rarely say anything that might result in further litigation, but since the behavior of Sprenger gave the impression that he may very well have dealt with ESS in bad faith, the Court saw fit to open that door for ESS.

PRODUCTION CREDIT ASSOCIATION OF MANDAN v TERRA VALLEE (1981)

If any one case stands as a turning point in North Dakota boundary law, this would be that case. Although many of the earlier boundary cases that we have reviewed had very significant boundary implications, this is arguably the most important boundary case ever decided in North Dakota, and it is certainly the most pivotal modern boundary case, since it expressly defines the Court's view of the purpose and proper use of adverse possession and acquiescence, and dictates how those essential doctrines will be applied by the Court going forward. In this case, which was authored by the Chief Justice at the time, and concurred in by the succeeding Chief Justice, the Court clearly sought to permanently establish the parameters and lay the groundwork for consistent application of the law, with respect to boundary disputes, in the future. The forceful language of the decision, pointing in one definite direction, to the exclusion of all other directions, with respect to the nature and meaning of acquiescence in the eyes of the Court, represents the proverbial crossing of a river of no return, with respect to that principle, and subsequent decisions citing this case conclusively bear that out. Here, the Court announced it's intention to permanently align itself with those relatively few states, such as Wisconsin and Minnesota, that reject the concept of acquiescence as a form of practical location, which can define

existing boundaries without creating a new or different boundary, and adhere instead to the position that any boundary line which differs from a boundary line of record represents a transfer of land and must be treated as fundamentally adverse in nature, not as a practical location based on agreement, regardless of whether the occupation and use of the land up to that line was intentionally adverse or not. Whether or not that decision was the wisest one that the Court might have made on the issue, is a question that has always been, and will always remain, a topic of ceaseless debate, but at this point in time, North Dakota, after drifting amidst uncertainty for several decades, conclusively set it's course for the future resolution of boundary issues. Acquiescence, as it is applied in North Dakota, essentially forms a bridge between the realm of title conflicts and the realm of boundary conflicts, which therefore enters the picture when the question is not in regard to the legal efficacy, quality or nature of the title held by one party as opposed to another, but rather where the boundaries of the titles involved have been long recognized, by the parties and their predecessors, to be located.

> 1928 - A county surveyor set the north quarter corner of a typical regular section. Whether or not he found any evidence of the original quarter corner is unknown, but the monument that he set was recognized as being the quarter corner by all the land owners in the vicinity for several decades.
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> 1929 to 1947 - A fence was built during this period by an unknown party, running south from the quarter corner monument set by the county surveyor, about 570 feet to a highway that ran east and west through the section.
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> 1948 - Heck acquired the portion of the northeast quarter that was north of the highway. Heck treated the fence as his west boundary, maintaining it just as the prior occupants had. The Lohstreter family evidently already owned the northwest quarter at this time. The origin of their title and ownership is unknown, but it was undisputed. There is no indication that anyone else ever owned the northwest quarter, so the Lohstreters may have been the original patentees.
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> 1965 - Heck conveyed his portion of the northeast quarter to Ressler, who also accepted the fence as the west boundary of the northeast

quarter. The Lohstreters continued to use all the land west of the fence, just as they always had. A parcel of land was platted lying along the east side of the fence. This parcel extended about 350 feet east from the fence and extended south to the highway. Production Credit acquired this parcel, evidently from Ressler, at an unspecified time. There is no indication of what use PCA ever made of the land, if any, and no indication that the land ever contained any buildings or was improved in any way.

1966 to 1973 - At an unspecified time during this period, Ressler conveyed his remaining portion of the northeast quarter to Ritz.

1974 - Ritz executed a contract for deed, conveying the same portion of the northeast quarter to Terra Vallee.

1975 - A survey was done, and it was discovered that the point set by the county surveyor 47 years earlier was 23 feet east of the midpoint between the northerly corners of the section. There is no indication of who ordered the survey, no indication of what the section corner locations relied upon during this survey were based upon, and no indication of whether or not any effort was made during this survey to determine whether the point set by the county surveyor was a perpetuation of an original quarter corner monument. Nonetheless, the survey was accepted as being completely true and correct, since none of the parties questioned it in any respect. Because no one suggested that the point set in 1928 may have been a faithful perpetuation of an original GLO monument, and no one disputed the assertion that the point set by the county surveyor must have been incorrectly set, it was dismissed as being clearly erroneous.

1976 - Ritz completed the conveyance to Terra Vallee by executing a warranty deed. Importantly, the deed described the property conveyed as being that portion of the northeast quarter lying north of the highway, except the PCA property. The Lohstreters continued to use all the land west of the fence.

1979 - PCA filed a quiet title action. PCA did not claim any land west of the fence, and sought only to confirm it's title to the existing PCA parcel, just as it had been platted, lying completely east of the fence. PCA successfully quieted it's title against both Terra Vallee and the

Lohstreters, because neither Terra Vallee nor the Lohstreters wanted any part of the existing PCA parcel, so neither of them opposed the action taken by PCA. However, both Terra Vallee and the Lohstreters wanted the 23 foot strip lying along the west side of the fence, so the legal battle would play out between those two parties, with PCA having voluntarily relinquished any claim to the 23 foot strip that it might have had an opportunity to make.

Terra Vallee, as the appellant, argued that it had title to the 23 foot strip, based upon the fact that the description in the deed from Ritz to Terra Vallee described the land that was conveyed as the northeast quarter, with the given exceptions as previously noted, so Terra Vallee asserted that the relocation of the quarter corner in 1975 had effectively extended it's property 23 feet further to the west. The Lohstreters had agreed to convey their quarter to Davis, but the Lohstreters defended their grantee against the assault by Terra Vallee, as intervenors. The Lohstreters argued that they and all of their neighbors had always innocently relied upon the 1928 quarter corner, and all the parties had acquiesced in the 1928 quarter line location, as marked by the fence, for a length of time far in excess of the statutory period of twenty years, so by the time Terra Vallee arrived on the scene, their boundaries had become permanent, and were no longer subject to change based on any subsequent survey. The trial court agreed fully with the Lohstreters and summarily rejected the claim made by Terra Vallee.

The decision of the Court in this case would become a towering landmark in North Dakota boundary law, marking the culmination of a long period of development of judicial thoughts and opinions on boundary issues that extended back at least 50 to 60 years, to the Morgan and Bernier cases, in which the Court first dealt with comparable boundary questions, as we have seen. The position taken by the Court in this case would also establish a broad foundation, relating to the treatment of boundary issues, that would go on to be repeatedly reinforced in future cases, and become the unquestioned controlling legal doctrine in North Dakota, with respect to the application of the powerful concept of acquiescence to boundary resolution. The Court began by describing and expounding upon the apparent conflict between the titles and the boundaries involved in the case. If the controversy were to be viewed purely as a title matter, the Court noted, no conflict

existed at all. Terra Vallee was the only competing party with any title to the northeast quarter and the Lohstreters had title to the northwest quarter only, so no conflict existed between the relevant documents held by the parties. The 1975 quarter corner clearly correctly indicated the limit or extent of the titles currently held by both parties, the Court found, but title is merely one form of evidence of land ownership, and it is certainly not the highest or most reliable form of evidence, as clearly demonstrated by the situation presented in this case. If the documents describing the location of each of the properties were to be treated as the controlling factor, in conjunction with the 1975 quarter corner, then the entire PCA property would have to be shifted 23 feet west, since the description of the PCA property began and ended at the north quarter corner, and Terra Vallee would thereby gain control over the easterly 23 feet of the existing PCA property. The idea of allowing a subsequent survey to have such a shattering effect on established boundaries was distinctly unappealing to the Court.

Citing the Bernier and Trautman cases, both of which presented highly analogous circumstances and issues, as we have already observed, the Court decided that situations such as this, in which a subsequent survey discloses information that was long unknown, and introduces unanticipated issues that had long been in repose, resolution is best accomplished on the basis of boundary control, rather than title control. Where a boundary physically established on the ground had it's origin in legitimate reliance by innocent parties, the land actually occupied by the title holders best represents their mutual opinion, belief and understanding of what their titles mean in reality. A physically established and mutually respected boundary, having been honored and relied upon by multiple parties for the statutory period, is superior to title, on the scale of evidence. While title is valid evidence that one party owns land in one certain area, and the other party owns land in an adjoining area, the area of nexus, where the two distinct areas come together, lies fundamentally within the realm of boundary law, and therefore must be adjudicated in the arena of boundary law, and not in the arena of law relating to title, which is governed solely by descriptions, in isolation from the realities of the physical world. Where one party charges that the adjoining party owns nothing, then title law is in play and may control the result, but where the ownership of some amount of land by each of the parties is openly acknowledged and recognized by the other, and the

dispute involves questions that relate specifically to boundary location issues, the principles of boundary law must determine the outcome. This was the key realization that was at last fully embraced here by the Court.

Having determined that boundary law must be applied to settle the controversy, rather than title law, the Court chose to use this case as an opportunity to clarify and solidify an important aspect of North Dakota boundary law, by definitively declaring it's view of acquiescence, and the relationship between acquiescence and adverse possession. Once again, as we have seen several times before, the Court looked to Wisconsin for support and guidance on boundary law principles. Quoting from a 1970 Wisconsin case, the Court finally made the linkage between acquiescence and adverse possession, which it had suggested in previous cases, complete and total, effectively eliminating the potential for acquiescence to operate as a form of agreement, supporting practical location North Dakota, by announcing it's official adoption of the position that:

> “The doctrine of acquiescence evolved from the doctrine of adverse possession. The doctrine of acquiescence is a supplement to the older and harsher rule of adverse possession which held that adverse intent was the first prerequisite of adverse possession .... courts began to hold that land could be acquired by adverse possession, even though adverse intent was absent, if the true owner acquiesced in such possession .... the period of time required for adverse possession continued to be 20 years even when the acquiescence version of the doctrine was applied."

The Court upheld the ruling of the trail court that Terra Vallee had no valid claim to any land west of the fence, regardless of the fact that the description in the deed to Terra Vallee conveyed title to the northeast quarter, and regardless of the true north quarter corner location, because a binding boundary had been conclusively established on the ground through acquiescence, by operation of law. On that basis, the Court quieted title in the Lohstreters, up to the fence. Just as in the Trautman case, the Court had again used acquiescence as a tool to justify allowing an owner of one quarter to retain an area that had been discovered, by means of a subsequent

survey, to be a portion of an adjoining quarter. Acquiescence had become a vehicle of boundary law that enabled the Court to grant what it viewed as partial or fragmentary adverse possession, of a mere portion of a given property, while reserving the doctrine of adverse possession itself to the field of title law, for use in resolving disputes involving the ownership of entire properties. At the same time, and also just as in the Trautman case, the Court concluded this case by declaring that the fence itself had become the true boundary between the quarters, by operation of law, effectively negating any possible future title claims or disputes based on the 1975 quarter corner, and rendering the 1975 quarter corner relocation harmless to either the present parties or any future property owners.

It's also very important to note that the outcome in this case was in complete harmony with that of the Bernier case as well. In both this case and the Bernier case, the ultimate result was identical to what it would have been had the Court simply taken the position that the line of occupation was in fact the true original line. In both cases, the Court was obviously highly cognizant that the possession, based on a long standing fence line, could very well represent the best evidence of the true original line location, despite being at odds with the results of subsequent surveys. Therefore, in each case, the Court clearly strived to achieve an outcome that had the effect of protecting the innocent reliance of the parties on such a line, which they could physically see on the ground, and which they had no reason to suspect or doubt the validity of. Once again, as in the Bernier case, the evidence presented by a subsequent survey was not controlling, unlike the Bernier case however, in this case the Court took the additional step of expressly indicating that a subsequent survey of the lines of title cannot control ownership under such circumstances, in accord with the Trautman decision. The development and progression of the North Dakota concept of acquiescence had finally reached it's logical conclusion and become a clearly defined aspect of North Dakota boundary law. When viewed from this perspective, it can be seen that the Court, in adopting it's position on the use and application of acquiescence, although not inclined to accept acquiescence as evidence of practical location or agreement, had yet created for itself a useful judicial tool, for which it saw a genuine need, and which it was comfortable exercising. Understanding the importance of this case is crucial, because as we will see, the impact of it ripples through many

subsequent cases, as the judicial tool of acquiescence, forged here on the anvil of justice, would prove to be instrumental in determining the outcome of many similar controversies yet to come.

STATE BANK OF BURLEIGH COUNTY v CITY OF BISMARCK (1982)

Returning to the issue of how a successful legal vacation of public rights can be accomplished, and what does or does not amount to a valid legal vacation, we encounter a case involving a proposed partial vacation of a public alley, that was dedicated by means of a plat, located in the heart of a major urban center. As we have already observed in reviewing previous vacation cases, the vacation of public rights is a process that is relatively rigidly controlled under the law, having been set down in detail in existing legislation, quite unlike legal topics such as acquiescence, and boundary disputes in general, which are primarily governed by the body of common law that has developed from adjudication of boundary controversies over the centuries. In this case, the Court is therefore once again required to engage in the process of interpreting the legislative intent of statutes and amendments to statutes, which is a legally envisioned function of the Court, that constitutes an essential part of the Court's role in our society. In this particular instance, the statutory language being scrutinized for it's true meaning and intent had been in place for over half a century, without ever having been specifically analyzed for it's precise meaning, so the Court had the responsibility to determine and announce what it's legal meaning really was, and how the language would be legally applied in accordance with the intent embodied in it. The most fundamental question in this case, and in fact whenever the vacation of any valid existing public rights is proposed, is which parties have legal standing to request a vacation, and which parties have legal standing to either approve or prevent it. The general tendency of the Court, as we have seen in the 1966 Smith case for example, where the efforts of an individual essentially prevented the attempted abandonment of a public alley by a city, is toward solid and consistent protection of public rights, but that does not mean that any individual trying to prevent a

vacation will always prevail. In the situation put before the Court here, the circumstances are quite different, particularly with regard to the proposed vacation itself, which is intended to serve a purpose that is seen by the Court as inherently beneficial to the public, the establishment of a new banking facility. So here we see the Court interpret and apply the law in a manner that effectively prevents the individual from unreasonably standing in the way of substantial economic progress by blocking the proposed vacation.

> 1980 - The Bank wanted to construct a building in Bismarck. The Bank selected a site, which was located in the north half of Block 72, and designed a building that would fit within the area that the Bank planned to acquire. That block however, contained a platted alley, which would be partially covered by the proposed building, so the Bank wanted to make sure that vacating a portion of the alley would not present a problem, before proceeding to acquire the required land. No evidence was presented concerning what actual use, if any, was being made, or had ever been made, of the alley as an access route, either by the lot owners or by the general public. Whether the existing use of that block was residential or commercial in character is also unknown, but regardless of whether or not the alley ever physically existed, it remained legally valid and public in nature, as platted many decades before. The block contained 24 platted lots, with Lots 1 through 6 & Lots 19 through 24, separated by the alley, being the lots in the north half of the block, which the Bank intended to acquire and build upon. Bismarck was receptive to the idea of vacating a portion of the alley, so a vacation petition was circulated and signed, and a resolution was passed declaring the north half of the alley officially vacated. The Bank then proceeded to acquire all of the lots in the north half of the block and prepared to move forward with construction, which would obviously eliminate the north entrance to the alley, so it would henceforward be possible to enter and exit the alley only at the south end of the block. It was subsequently discovered however, that one of the signatures on the vacation petition was added after the completion of the formal vacation process, presenting a legal defect that was potentially fatal to the validity of the vacation. That signature represented one of the owners of one of the lots located in the south half of the block, whose lot did

not adjoin the portion of the alley that was being vacated. Bismarck believed this was a fatal flaw, and therefore passed another resolution, stating that the vacation was null and void and the alley remained unvacated. By this time, that same lot in the south half of the block had been sold, and the new owner refused to agree to the proposed vacation, so passing another vacation resolution was no longer possible, which forced the construction of the building to be shut down. The Bank filed an action against Bismarck, claiming that the vacation was legal and the second resolution was powerless to undo the completed vacation, so the north half of the alley was still legally vacated.

The Bank argued that only the signatures of the owners of the lots that directly adjoined the portion of the alley that was being vacated were essential to the vacation petition, therefore the failure to properly obtain the signatures of all of the owners of the other lots in the block was not fatal to the petition, so the original vacation resolution should stand as a legal and binding document. Bismarck argued that every owner of every lot that adjoined any portion of the alley had a right to use the entire alley, therefore every lot owner in the block was essential to a legal vacation of any portion of the alley, so each lot owner had the right to prevent the vacation by refusing to agree to it. The trial court ruled in favor of the Bank, holding that the north half of the alley had been legally vacated, since the participation of the lot owners in the south half of the block was unnecessary.

The extent to which local land owners, as holders of some legal interest in a public way, are entitled to participate in any legal process that may result in a loss or sacrifice of existing public rights, varies considerably from state to state. In some states, any party who owns a platted lot can potentially prevent the vacation of any public ways shown anywhere on the plat, even those public ways that are located a significant distance away from the lot owned by the party in question. This concept is based on the fact that every land owner who acquires land with reference to a plat is entitled to all the benefits indicated on the plat, and therefore holds a legal interest in all of the platted public areas, which is higher or greater than the minimal interest held by the general public in all public ways. In some states, this same general principle also operates to provide that all parties

who own platted land retain a private access easement over any public ways that are shown on the plat, even if those access routes are ever subsequently vacated, again based on the fact that buyers of platted lots are entitled to rely fully on the plat, and cannot be required to forsake the rights bestowed on them by the plat, at least not without compensation of some kind. Generally, vacation serves only to eliminate the public element of dedication, with respect to the vacated area, and leaves private access rights intact, particularly in situations where the use of the particular public way being vacated is distinctly beneficial, and therefore clearly appurtenant, to a given lot, parcel or tract. Other states observe a stricter rule, requiring that any local land owner must prove that a genuine need exists for the access route being vacated to remain available for use, in order to have any right to halt the vacation of a public way or any valid claim to compensation for a loss of access. The level of necessity required is often unclear and potentially somewhat variable, depending on numerous factors, and therefore is frequently a source of controversy, requiring evaluation on a case by case basis. This case afforded the Court an opportunity to indicate where North Dakota stands amidst this spectrum of legal positions.

As we have seen in the other cases involving vacation that we have reviewed, the vacation process in North Dakota is guided by statute, and the Court requires proof of strict compliance with the statutory procedure, since important rights are terminated by the vacation process. In that regard, it's important to understand that vacation is entirely separate and distinct from abandonment, which requires no formal legal process, and no documentation whatsoever, and is controlled entirely by the actions and intentions of the party holding the rights in question. Vacation and abandonment are often treated as being synonymous, and the terms are often used incorrectly as a result, but the Court always draws a clear and definite distinction between the two, since vacation is a regimented process, fully controlled by statute, while abandonment is a product of the common law, subject to determination under common law principles by the Court. In this case, the Court noted that the applicable statute was 40-39-05, which deals with plat vacation, noting that it had been revised in 1927 to specifically call for all owners of land adjoining the platted area that is to be vacated to participate in the vacation petition. The Court chose to interpret this language as having been intended to strictly limit the required participants to

those whose lots actually and directly contact the area to be vacated, concluding that:

> "...the statute requires signatures on a petition to vacate a part of an alley only of those owners of property which adjoins that part of the alley which is sought to be vacated..."

The Court thus aligned North Dakota on this issue with those states taking the narrowest possible view of the rights of the owners of platted lots to use nearby public alleys, in effect stipulating that only those lot owners having absolute necessity for the existence and use of a given portion of an alley, to enter and exit the rear of their property, are required to participate in a petition to vacate it. It is sufficient, the Court found, for all other owners of nearby lots to learn of the proposed vacation by means of publication and hearing, which are also provided for by statute. Having decided that the lower court had properly interpreted the statute, the Court upheld it's ruling in favor of the Bank, while stating that estoppel against the city was not a factor in the case. The vacation was legal and complete, and the subsequent resolution stating the contrary was inconsequential and meaningless, since it was based on a mistaken view of the validity and legal effect of the vacation, so there was no need to organize another vacation, and the construction work on the building was free to go forward. In essence, the Court had ruled that necessity was a potentially key factor in determining the allocation and treatment of public rights, taking a somewhat more restrictive view of the scope of public rights than it had in previous cases. Because the lot owners in the south half of the block in question here were still able to use the surviving portion of the alley to access the rear of their lots from the south, and were not completely cut off by this vacation, the Court determined that they had no absolute need to enter or exit the alley from the north, so their interest in the northerly portion of the alley was inferior to the interest in that area held by the northerly lot owners. Therefore, it was possible for the northerly lot owners alone to successfully complete the requested vacation, without the agreement of any other private parties, including even the southerly lot owners. This decision by the Court marked a significant shift away from the strong emphasis placed by the Court on the rights of the general public to the alley that was at issue in the Smith case, just 16 years before, which we have previously reviewed, and

represents an interesting counterpoint when juxtaposed with that case, illustrating the extent to which the rulings of the Court can be based on consequences and outcomes, making each controversy that comes before the Court a unique matter, subject to legal treatment based on the specific circumstances.

ROLL v KELLER (1983)

While most people, including surveyors, are generally aware that easements of some types can come into existence by virtue of long standing uses of land, such as an access easement resulting from a land owner driving the same path over the adjoining property every day for over twenty years, there is a lower level of awareness that easements can also come into existence for other purposes and by other means. With respect to purposes, easements can exist to protect virtually any kind of activity that can be imagined, as long as the activity represents a benefit to one or more lots, parcels or tracts, without which the value of the land deriving the benefit would be reduced. Therefore, uses that occur both above and below the ground can result in easements, just as well as uses that are made on the surface of the ground. Every easement must have a specific purposes or set of purposes however, so no easement can simply be defined as being for all purposes without restriction, because that would amount to complete ownership of the land in fee, exceeding the fundamental limitations of an easement, in terms of scope. Nevertheless, it's important to be aware that any kind of beneficial use of land can create a potentially permanent burden on that land, in the form of an easement, with the scope being determined by the use. Furthermore, the use does not always need to have lasted for any certain length of time, and it does not always need to have been adverse in nature. Easements created by use that is adverse, hostile or prescriptive come into existence because the law places definite limits on the rights of land owners who fail to take any action to protect or defend their land for a certain prescribed length of time. Such limitations exist to enable long standing uses of land to continue, rather than being arbitrarily cut off, just because the origin of the use is unknown, to the detriment of the party or parties who have come to rely on the right to make productive use of the

land in question. Land rights, in the form of an easement, can also come into existence as a direct consequence of an agreement however. While adverse, hostile and prescriptive uses create rights in the absence of any kind of agreement, uses which begin as part of an agreement, or under a general state of agreement, between the parties involved, can also become easements when the relationship between those parties changes. As we will see in this case, any use of land that burdens a certain portion of the land, for the benefit of another portion of the land, can become an easement by means of legal implication, when the two areas come under separate ownership. We will also see here just how important it is for anyone engaging in a land transaction to be aware of their own responsibility to take notice of all the existing conditions and uses of the various portions of the land that is involved in the transaction, and to be aware of the possible legal implications of any such uses.

Prior to 1981 - Roll and Keller were business partners, who owned a tract of unknown size and location, on which they decided to create a mobile home park, so they had a sewer system installed to serve the development. The sewer system only covered about half of the property, but a stub was provided, to which a future extention of the system could be connected, to serve the other half of the property. The development was successful, mobile homes were put in place and the sewer system was put into use. The partners planned to eventually create another mobile home park on the other half of the property.

1981 - The partners had a serious disagreement of some kind and decided to split up. As part of a legal stipulation agreement, dissolving their partnership, they split the property, with Keller getting the developed half and Roll getting the undeveloped half. The details regarding the division of the property are unknown, but the location of the dividing line was evidently clear to both parties and there was never any dispute over the boundary between them.

1982 - Roll decided to proceed with the development of his portion of the property, so he had a sewer system installed, which he believed he could legally connect to the stub that had been previously installed for that purpose, since the stub was on Roll's side of the boundary. Roll completed the construction of his sewer system and connected it to

> the stub, but whether or not he ever had the opportunity to make any actual use of it is unknown, because at some time shortly after Roll made the sewer connection Keller dug it up, removed a portion of the sewer pipe, and capped it off, rendering Roll's sewer system useless. Roll filed an action against Keller, claiming the right to use the existing sewer system on Keller's property and seeking damages.

Roll argued that he had the right to connect his sewer system to the existing system, because the stub had been put in place expressly for that purpose, with the full knowledge and agreement of both parties, at the time when the original sewer system was built, therefore he was entitled to an easement for sewer purposes over Keller's land and Keller had no right to prevent him from connecting to the original sewer system and making use of it. Keller argued that the stipulation agreement, which was made and signed by both parties when they dissolved their partnership, was a complete and binding agreement, which effectively superseded and terminated all previous agreements that the former partners had ever made with each other, and since it was silent with regard to the sewer, Roll no longer had any right to use the existing sewer system at all, and Roll had never acquired any sewer easement over Keller's land. The trial court determined that Roll had a sewer easement over Keller's land, which had been created by legal implication, so Roll could connect to the existing sewer system and use it, and Keller had no right to prevent him from doing so.

The circumstances presented by this case provided the Court with an ideal opportunity to introduce the concept of easements by implication, also known as implied easements, to North Dakota. Easements are most typically created by means of a written instrument of some kind, expressly stating the intentions of the parties to create an easement, and defining any details relating to the easement, to whatever extent the parties see fit to do so. Easements can be legally created in a number of other ways however, even in the absence of a written document specifically stating the intention to create the easement, and without any specific description of the size or location of the easement. In fact, all that is minimally necessary for the creation of an easement is evidence indicating the intent to create an easement, the land upon which the easement shall exist, and the intended

purpose of the easement. Given the presence of these three factors alone, a legally supportable easement can be found to exist under the law. The intention to create an easement is vital to easement creation, because no permanent burden upon any land can be created if the evidence is clear that none was intended, but evidence of use and conduct can supply the requisite intent. The exact location and size of an easement are not seen as vital to it's creation under the law, all that is essential with respect to location is the identification of the burdened property, known as the servient estate. If no specific description of an easement exists, it will either be presumed to cover the entire servient estate, or it's location and dimensions will be legally determined and fixed by the actual use that is made of it, provided that it is used in a manner that is reasonable and appropriate. Lastly, the element of easement creation that is most often overlooked is it's intended purpose. No easement can be created without a purpose, because an easement is limited to use of the land for a specific purpose, so the limitation on the use supplied by the purpose is what distinguishes an easement from fee ownership of the land. Because the purpose often seems obvious, surveyors sometimes fail to clearly spell out the purpose in sufficient detail, leading to conflicts between subsequent parties and other unfortunate results, but in fact the purpose, like the intent to create, is often evidenced by use and conduct. We have already seen classic examples of easements created or supported by means of acquiescence, prescription, necessity and estoppel, in the Rothecker, Berger, Casey and Brandhagen cases respectively, and here we reach the last category of easement creation recognized by the Court.

Implied easements are fundamentally supported by the concept of agreement. Whenever two or more parties have reached a meeting of the minds, and acts of any kind have been performed in reliance, made in good faith, on an agreement between them involving land rights, the Court will inevitably strive to give effect to that agreement, as we have repeatedly seen in the enforcement of the performance exception to the statute of frauds. In this case, Roll and Keller clearly acted together as partners to construct a sewer system, and they specifically designed and built it in such a way that it would serve the entire property that was under their joint ownership at that time. From their actions, the Court deduced that it was clearly their intention to burden certain portions of the property with the sewer for the benefit of

other portions of the property, and this construction was obviously intended to be permanent, so the intention to create an easement was clearly present. Since no easement was created in writing, no description of it had been created, but the location and extent of the easement were very clearly defined by the sewer system itself. The purpose of the easement was likewise very obvious in this case of course, so all of the required elements were in place for the creation of an easement. No easement was created however, at the time the original sewer system was built, because the property was united in the ownership of the partnership. An easement could only come into existence upon severance of a portion of the property, the Court noted, since only a separation of ownership interests could create the need for an easement to exist. The principal question, the Court indicated, was whether or not Roll had the right to presume that the agreement between Keller and himself, relating to the future use of the sewer, which was originally made at a time when they were still partners, was still in effect at the time the property was split between them. Therefore, the dispositive factor in the outcome of the controversy would be the evidence relating to the intentions of the parties at the time they became separate owners of two distinct adjoining properties.

Keller contended that although he and Roll had once agreed that the entire property would eventually be connected to the original sewer system, and they had built it together when they were partners, he had the right to change his mind and deny Roll the right to use it. Since the language of the stipulation agreement read "...the parties forever release and discharge each other from all claims...", Keller believed that he had no legal obligation to Roll whatsoever, and that he was therefore free to close off the stub. Keller pointed to the general rule that a written agreement supersedes all prior unwritten agreements, asserting that since the sewer system was not mentioned at all in the written agreement between Roll and himself, and it was entirely on his side of the dividing line, except for the stub, he was entitled to complete and exclusive control over the sewer system. The Court however, found that the absence of any reference to the sewer system in the written stipulation agreement actually worked against Keller, rather than in his favor. The Court held that Keller bore the burden of including his intention to exclude Roll from any use of the sewer system in the written agreement, and he had failed to do so. In so doing, Keller had failed to give

Roll any notice that he would not be allowed to use the sewer system. The mere fact that the stipulation agreement did not mention the sewer at all, the Court decided, had not operated to terminate the intended future use of the sewer, but had instead left the original agreement between Roll and Keller concerning the sewer undisturbed, because a written agreement has no effect on any matters that are not specifically addressed in the text of the agreement. Here yet again, as is so often the case, the true intentions of the parties were simply not fully captured or disclosed in their written agreement. Since the right to make use of the existing sewer system was appurtenant to the land acquired by Roll, an easement for that purpose had passed to him, even though it was not spelled out in any documents of conveyance, without any violation of the statute of frauds, because the statute of frauds has no application to appurtenant rights of any kind. Having so decided, the Court upheld the ruling of the lower court and approved the imposition by the lower court of a sewer easement by implication in favor of Roll over Keller's land, to whatever extent necessary to provide adequate sewer service to Roll's property, by means of the existing underground system. This case came back to the Court in 1984, when Keller appealed the punitive damages that he was saddled with, as a consequence of his destructive act, and the Court once again ruled against him, sending a strong message that ignorance with regard to easements can be very expensive. Keller claimed that he should not be compelled to pay punitive damages, because he could not be expected to know all of the laws relating to easements, but the Court was completely unsympathetic to this suggestion, so Keller learned the hard way that ignorance of easement law is no excuse for actions resulting in damage, and basic knowledge of easement law is essential for anyone who chooses to participate in the land development industry.

TORGERSON v ROSE (1983)

We have seen that a large percentage of the adverse possession cases that have taken place in North Dakota have involved parties who are not strangers to each other. Adverse possession is frequently claimed by one

who is either a relative or a cotenant of the opposing party, and also frequently claimed by one who is in either a grantor and grantee relationship or a mortgagor and mortgagee relationship with the opposing party. All of these relationships can be important factors in adverse possession cases, and we have seen examples showing how the presence of any such relationship can seriously impact the outcome of any given case. This case is particularly interesting and unusual because it involves the presence of two of these relationships. Generally, the presence of an existing relationship of any kind between the parties, prior to the outbreak of a dispute over land rights, tends to operate against the adverse claimant, because it introduces the possibility that the occupation or use made of the land in question by the adverse claimant was not truly adverse, having potentially resulted from some kind of tacit or otherwise unknown agreement, connected in some way to their existing relationship. However, this case clearly demonstrates that even the existence of a very close lifelong bond between the parties does not preclude the possibility of a successful adverse possession claim by one of them against the other, or by the successors of one against the successors of the other. Cases such as this serve very well to illustrate that the Court sees adverse possession as a fundamentally equitable remedy, and will apply it whenever justice commands that it be applied, rather than deciding the fate of the parties and their land on some cold and sterile arbitrary legal basis. In addition, this case also provides an important clarification of the circumstances under which the after-acquired title doctrine is applicable, and when it is inapplicable, which is also a function of the status of the relationship between a grantor and a grantee. The main lesson to be taken from this case is that when land rights are in dispute, the existing relationships between the parties must be fully understood, since such relationships are very often highly significant in determining land rights and resolving controversies over land rights.

> 1939 - Torgerson and his sister lived together on the homestead where they had grown up, which they had inherited from their parents, who were both deceased. Torgerson, who was a young man, leased a nearby quarter section in Rolette County and began farming it.
>
> 1941 - Torgerson acquired the quarter section by warranty deed, recorded the deed, and began paying the taxes on the quarter, which

he did all the way up to the time of the trial. The validity of this deed was undisputed. There is no indication that anyone ever lived on this quarter, or that anything was ever built on it, evidently it was used exclusively as cropland.

1944 - Torgerson gave his sister a warranty deed to the quarter. She never made any use of the quarter herself however, and she never made any open claim that she was the owner of it. This covertly held deed would become the source of the controversy.

1947 - Torgerson's sister married a man named Rose and they moved to Oregon. Torgerson continued to live on the homestead, which was not involved in the controversy, and he continued to farm the quarter section in question.

1948 to 1965 - Torgerson's sister, now Mrs. Rose, raised a family with her husband in Oregon. Meanwhile, back in North Dakota, Torgerson continued to farm the quarter, and also executed oil leases, behaving in all respects as the owner of the quarter.

1966 - Torgerson became blind and one of his sister's sons came to North Dakota to help with the farming operations for several months, but then returned to Oregon. Torgerson also executed a wetlands lease covering a portion of the quarter.

1967 - Torgerson needed help again and this time two of his sister's sons came to North Dakota to help with the farming, then after several months they returned to Oregon.

1968 - Knudson, a tenant farmer, took over the farming operations from Torgerson, and he continued to cultivate the quarter up to the time of the trial.

1969 to 1979 - Torgerson's sister and her sons visited Torgerson several times, but never stayed for more than two weeks.

1980 - Torgerson's sister died and Rose, one of her sons, who was the executor of her estate, discovered the 1944 deed among her private papers. Her will made no reference to the deed, or to the quarter itself. Rose had the deed recorded in Rolette County and informed Torgerson that the quarter was owned by the Rose Estate. Torgerson filed an action to quiet his title to the quarter.

Torgerson argued that he had never intended to convey the quarter to anyone and did not recall giving a deed to his sister. He asserted that the deed had to be a forgery. Further, he argued that even if he had deeded the quarter to his sister, he had regained complete ownership of it through adverse possession. Rose argued that the deed was legitimate, the land had been conveyed to his mother, and she had told him that she owned it. He further argued that adverse possession was not applicable, because all of the use of the land by Torgerson had been made with the permission of his mother. In addition, he argued that it was impossible for Torgerson to have regained ownership of the land, after conveying it to his mother, because under the doctrine of after-acquired title, any rights to the land obtained by Torgerson would have automatically inured to the benefit of his late mother. The trial court did not agree that the deed was a forgery, but ruled that even if the deed was legitimate it was now of no significance, because Torgerson had regained the quarter by adverse possession, quieting title in Torgerson.

The Court first addressed the issue that had been presented involving after-acquired title. The court took this opportunity to clarify the purpose and operation of the doctrine of after-acquired title, since it is seldom argued and frequently misunderstood. The after-acquired title doctrine serves to prevent a grantor from deriving any benefit from his own inability or failure to convey any land that he has ever agreed to convey. Under this rule, any land that the grantor purported that he was conveying to his grantee, but never actually conveyed, because he did not really own it at the time, cannot be later acquired and kept by the grantor. The grantor, pursuant to this rule, cannot avoid the effect of his original conveyance, so if he ever subsequently does acquire the land that he promised to convey, he does not have the option of keeping it, it passes on to his grantee immediately. The rule generally applies to deeds of all varieties, with the exception of quitclaims, since a quitclaim is not a promise and is limited to the rights held by the grantor at the moment it is executed. Torgerson however, the Court found, had given his sister a warranty deed, which had completely and unequivocally conveyed the quarter to her, in it's entirety, upon delivery in 1944. So the conveyance was not within the parameters of after-acquired title, because Torgerson had fully conveyed all the land to his sister and she had become the sole owner of the quarter at that moment. If the 1944 deed had been faulty in some way, and failed to convey the quarter, the rule

pertaining to after-acquired title would have applied, because Torgerson would still be obligated to complete his originally intended conveyance, but since the transfer of ownership to his sister was successfully completed, Torgerson had fully met his obligation to convey the land, so he was free to acquire it again at any time in the future. Neither did the fact that Torgerson conveyed the quarter by warranty deed mean that he could never again acquire it for himself, the Court ruled, once again turning to Wisconsin for support and quoting a 1978 Wisconsin case to that effect. As soon as the conveyance to his sister was complete, the Court indicated, adverse possession was in play, including adverse possession by Torgerson himself. The Court decided:

> "...that the warranty covenants in a deed will not defeat title by adverse possession and that a conveyance does not, of itself, prevent a grantor from reacquiring title by adverse possession as against his immediate and remote grantees."

In attempting to defend against Torgerson's adverse possession claim, Rose was unable to present any evidence that his mother had actually given Torgerson express permission to use the quarter, which obviously would have destroyed Torgerson's adverse possession claim. Since Rose's mother was no longer available to testify, Rose maintained that permission was implicit in the genuinely close brother and sister relationship that existed between Torgerson and Rose's mother, which was duly acknowledged by the Court, and implicit in their relationship as grantor and grantee as well. Rose had a potentially strong position on this issue, since the Court had indicated that such relationships can prevent adverse claims from being successfully made in some cases, such as the 1920 Stoll case, as we have seen. However, in this case the Court held that Torgerson's sister had numerous opportunities to assert her rights to the quarter, yet there was no evidence at all that she had ever done so. Had Rose's mother still been alive, and explicitly testified that she had either given Torgerson permission to use the quarter, or that she had maintained some form of control over the use of the land, Rose's case could have been successful. But in the absence of any testimony to support his claim that his mother had effectively maintained her ownership of the quarter by exerting some type of control over it, his case was doomed. Rose's own testimony about what his mother had told

him, regarding her ownership of the land, was barred as hearsay.

The Court fully upheld the lower court ruling, agreeing that Torgerson had held the land adversely for the requisite period of twenty years by 1964. The visits by the Rose family were insufficient to break the continuity of Torgerson's adverse possession, the Court determined, but even if their use of the land had been sufficient to interrupt his possession, that use had come too late, since their visits and their work on the quarter did not begin until 1966. By that time, Torgerson had already successfully established full ownership of the quarter in himself once again, by his complete control over the land for the full statutory period. Its also very important to note that if Torgerson had conveyed only a partial interest in the quarter, rather than full ownership of it, to his sister, there can be little doubt that his adverse possession claim would have failed, because he and his sister would have been cotenants of the quarter, so the burden would have been much heavier upon Torgerson to show that his use of the land was truly adverse to a party who was simply allowing him to maintain the land on her behalf. But since the ownership of Torgerson's sister was outright and complete, they were not cotenants, and they were therefore dealing with each other, in the eyes of the law, just as either of them would deal with unrelated strangers, regarding land rights. So ironically, the descendants of Torgerson's sister would have been in a better position if she had acquired only a fractional interest in the quarter in 1944, rather than acquiring all of it. But in reality, judging from the lifelong conduct of Torgerson's sister, the truth is likely to be that she never really accepted ownership of the quarter, and never considered herself to be the real owner of the land in the first place, and that she had kept the deed only intending to make use of it if her brother should happen to die during her lifetime, to make sure that the land was not thereby lost to the family. If that was the case, then obviously, the result sanctioned by the Court was fully justified.

WARD v SHIPP (1983)

This case represents another important step in the development and solidification of the North Dakota doctrine of acquiescence, as here we find the Court first applying the description requirement, in order to support a successful claim of acquiescence. Since acquiescence is nothing more than partial adverse possession in North Dakota, it's logical that the Court must be comfortable that the area at issue is properly defined, before title to that area can be quieted in a successful claimant. Where adverse possession occurs, no description is necessary, since the entire property is lost and no slivers or fragments requiring a new description are created. But under the Court's doctrine of acquiescence, every instance of acquiescence creates a new boundary, obviously requiring description to provide certainty of location. In this case, the Court interprets the relevant statute, 32-17-04, to indicate the need for the adverse claimant to provide the dimensions of the area they are claiming by means of acquiescence, rather than simply describing it as being bounded by some physical object, such as a fence, or just roughly estimating the size of the area. Obviously, any surveyor would suggest that a survey and a legal description should be required in such a situation, in order to provide genuine certainty. The Court however, does not require the adverse claimant to provide either a complete survey of the area or a complete legal description, and allows the claimant to make and record the required dimensions themselves. This is in line with the Court's previous rulings, in which we have seen that the Court is always reluctant to order parties to obtain a survey, since the Court knows that a survey entails potentially significant extra expense. Nevertheless, it's very clear that in all cases of this nature, a survey illustrating and describing the exact dimensions of the area being claimed would be of substantial benefit to the party asserting ownership of the area by means of acquiescence, and would certainly be welcomed and appreciated by the Court, as a useful aid to the adjudication process. So the opportunity for surveyors to contribute to the resolution of boundary conflicts in this manner is clearly available, even though the Court has not made it an absolute requirement.

1941 - The Ward family owned the east half of a typical regular section and the Shipp family owned the west half of it. How or when

they acquired their land is unknown, but their ownership of the two halves was undisputed. Both properties were typical family farms. Members of both families participated in constructing a fence between their halves. How the location in which to build the fence was chosen is unknown, no evidence was presented in that regard. There is no indication that any surveys were done, or that any measurements were made, or that any survey monuments were looked for or found. There was no evidence that either family ever used any land on the opposite side of the fence subsequent to this time.

1980 - Shipp decided to sell his land, so he had it surveyed. The east boundary of the Shipp property, according to the survey, was east of the fence, by varying amounts in various places along the fence, up to a maximum of 70 feet. Whether the line indicated by the survey was based on existing quarter corner monuments or on measurements and calculations is unknown, since no details relating to the survey were provided, but no one raised any issues or concerns about the survey, so it was accepted as being a completely true and correct representation of the location of the line in question. Shipp promptly relocated the fence to the line indicated by the survey, without contacting Ward. Although Shipp removed the entire fence, it's original location was still clearly visible, and the posts where it had tied into other fences, at both the north and south ends, were still in place, so the original fence location was not lost. Ward filed an action to quiet his title up to the original fence location.

Ward argued that the parties had agreed to the fence location in 1941 with the intention that it would form a permanent and binding boundary, and all members of both families had acquiesced in that location as a boundary ever since, and no one had ever questioned or disputed the idea that the fence was the boundary, so Shipp was not entitled to any land east of the fence. Shipp argued that the fence had not been intended as a boundary, but merely as a barrier for practical purposes, such as keeping crops and livestock separated, so it had no effect on the location of the boundary between the halves, and he still had the right to claim his full half at any time, just as he had done. The trial court agreed with Ward that the fence had become the true boundary between the properties by virtue of acquiescence, but held that Ward had the burden of describing the portion of

the west half that he was claiming, and since Ward had failed to provide the court with the width of the strip, the court was unable to quiet title to the strip in Ward, so the court ruled in favor of Shipp.

The Court began by reiterating the position that it had taken in the Terra Vallee case, just two years earlier, on the fundamental question of acquiescence. The trial court had found that the parties had agreed that the fence would be their boundary in 1941, and had treated it as their boundary in all respects ever since, so the original fence line had become their true boundary. The Court agreed with the overall conclusion reached by the trial court, with respect to the true boundary location, but made it clear that the boundary was established by acquiescence for the statutory twenty year period, as a form of adverse possession, and not as the result of any agreement that the parties may or may not have made in 1941. As we have already seen from previous cases, the Court had adopted the position that neither practical location of a boundary, nor any verbal, informal, or unwritten boundary agreement was binding on the parties, until cemented in place by the passage of the statutory twenty year period, so the parties were not bound by any agreement they may have made in 1941. Therefore, any evidence as to whether or not they had made an agreement in 1941 was irrelevant, the controlling factor was not their alleged intentions in 1941, but their subsequent conduct. They were bound by the fact that they had allowed the conditions which were initiated in 1941 to continue for twenty years, so since 1961 the fence had been their legal boundary by virtue of acquiescence. Although the trial court had arrived at the correct boundary location on a mistaken basis, the Court upheld the position of the trial court on that particular matter, since lower court rulings that are ultimately deemed to be correct by the Court are not reversed by the Court on the mere grounds that some kind of mistaken reasoning was involved in the process of making such correct rulings.

Having decided that the boundary was established at the original fence location by acquiescence, the Court moved on to the new issue that was presented by this case. The trial court had ruled against Ward solely because of the alleged deficiency of his attempt to describe the portion of the west half that he was seeking to have quieted in him. This issue had not previously been put before the Court, as grounds for a refusal to quiet title.

Ward and his attorneys, in their written assertion of title to a portion of the west half, had simply described the area in question as "about 60 feet", and made reference to the original fence location, but had not had a survey of the strip made, or even made any measurements of it's actual width themselves. The trial court, observing that according to statute, land must be described with certainty before a court can quiet title to it, was not comfortable with Ward's attempt to describe the strip, and had refused to quiet title in Ward without evidence that the strip had been physically measured. The Court determined that the trial court had correctly found that Ward's description was inadequate, but the trial court had wrongly refused to allow Ward additional time to make measurements of the width of the strip and present those measurements as additional evidence. The Court expressed it's position with respect to the statutory description requirement as follows:

> “The Wards never had the narrow strip of land surveyed, and the only evidence presented at the trial as to the dimensions of the disputed strip were conflicting estimates by plaintiffs witnesses. A reference to "the old fence line" is insufficient, without more, to adequately describe the property .... we conclude that the trial court acted in an unreasonable manner when it refused to continue the trial until the Wards witness arrived with more definite measurements of the land in question."

The Court had come very close to declaring that Ward must have the strip surveyed, in order to perfect his claim to it, and make it possible for the trial court to quiet title to the strip in him, but had stopped short of doing that. The Court was unwilling to require an adverse claimant to present a survey as evidence supporting an adverse claim to land. All Ward had to do, according to the Court, was measure the width of the strip himself and submit his measurements to the trial court, in order to secure title to the land. The obvious question of whether or not he was capable of measuring the strip properly himself, without the benefit of a survey, was not raised and therefore was not addressed. Clearly, a survey would have been very helpful and valuable to Ward, since it would have saved him from having to appeal the case in order to prevail, but the Court decided that it was not a

legal requirement or a necessity. The Court reversed the decision of the lower court to quiet title to the strip in Shipp, ruling that Ward's failure to describe the strip adequately was not sufficient grounds upon which to deny him ownership of it. Once again, consistent with it's decisions in the Trautman and Terra Vallee cases, which also involved the centerline of a section under very similar circumstances as we have seen, the Court ruled that a subsequent survey, although it may accurately depict the theoretical location of the relevant lines of title, has no power to alter any boundaries that have been established by operation of law. At the most, such a survey serves only to assist in defining the extent of the area that constitutes the subject matter of the controversy. In other words, a survey that shows only corners and lines of title is merely a survey of the corners and lines of record, which may no longer control the rights of the property owners, and is not necessarily a survey of the current boundaries of the property owners, since their boundaries are not governed solely by their descriptions. The boundaries of the property owners are controlled, first and foremost, by their own acts, or failures to act within the time period provided by the law. Shipp, just like Trautman before him in 1965, had been mistaken in relying on the survey to relocate the fence, and had brought potential liability down upon himself, if he did any damage to the strip, or prevented Ward from using it, as a result of his unilateral action. At a minimum, he was responsible for any expense involved in relocating the fence again, back to where it had been.

MANZ v BOHARA (1985)

Having observed the Court's acceptance and development of a legal process for the resolution of disputes and other conflicts over boundaries of land, we inevitably arrive at a point where the Court has to draw a line and provide guidance, regarding what is acceptable, and what is not acceptable to the Court, as evidence of a boundary established by physical objects and land use patterns. In developing, implementing and exercising the North Dakota doctrine of acquiescence, the Court had responded to a need for the creation of a legal tool that it could employ to do equity in cases involving

claims of adverse possession that extended over only a fraction of a given tract of land, rather than the entire tract. In so doing, the Court had never intended to abandon or disrespect the lines of the PLSS of course, and continued to honor and uphold all the lines of the original GLO surveys, including aliquot lines within sections, in principle, as we have seen particularly in the riparian cases. In this case, which is once again focused on a line originally platted as running between quarter corners through the center of a section, just as in most of the previous acquiescence cases, we observe a set of circumstances which the Court finds to be less acceptable than the conditions that were present in the earlier successful acquiescence cases. A comparison of those conditions reveals that the Court places great emphasis on physical visibility and definiteness of location, as being fundamental to providing the essential element of open physical notice, that is so crucial to any land rights claim. In addition, here again we see that the Court places little or no value on evidence of verbal boundary agreements between adjoining land owners, as a line which had it's origin in such an agreement meets it's demise here, even though it was put into effect by those adjoining owners and respected by their successors for half a century. Also, once again here, we see survey evidence treated summarily by the Court, being accepted and applied without scrutiny in this case, since it's validity went unchallenged. It's important for surveyors to understand that the decision, as to whether or not any line indicated on a retracement survey, such as the quarter line in this case, does or does not control the true boundary location, is not made by the Court based on any detailed methods or procedures involved in the performance of the survey. The decision regarding which line controls the boundary between the parties is made by the Court based solely on the strength or weakness of the evidence that is presented, with respect to the allegedly established boundary. The quarter line indicated by a retracement survey prevails in this case, not because the survey evidence presented here was superior to the survey evidence that was presented in the successful acquiescence cases, but simply because the evidence of acquiescence here was deemed insufficient and the location of the quarter line indicated by the survey was uncontested.

1925 - The parents of Manz acquired the northwest quarter of Section 4 from Walz. The west half of the northeast quarter of the section was owned by Parmenter at this time. How Walz and Parmenter had

acquired their land is unknown, they may have been the original patentees. Walz and Parmenter had built three substantial rock piles along their boundary and a trail meandered around sloughs between the rock piles, and around the rock piles themselves. The rock piles were spread out, with several hundred feet between them. Walz and Parmenter told the Manz family that the rock piles and the trail were intended to mark the boundary, so the parents of Manz cultivated all the land west of the trail, just as Walz had. There is no indication that anyone had ever looked for, or found, any original GLO monuments or that any retracement surveys had ever been done anywhere in this section. Parmenter never lived on the land or used it himself, but leased it to a series of tenant farmers. Neither Parmenter nor any of his tenants ever raised any issues or concerns about the rock pile boundary.

1947 - The northwest quarter was conveyed to Manz by his parents. The rock piles and trail continued to be treated as the boundary by all the parties. The middle rock pile had been built up by the joint efforts of the parties farming on both sides to the point where it was 25 to 30 feet in width.

1957 - Rathjen acquired the west half of the northeast quarter from Parmenter and continued leasing it. Rathjen never raised any issues or concerns about the boundary.

1962 - The north rock pile, which was on or near the township line, was obliterated when a road was built running along the township line. However, it's location was perpetuated by a field entrance that was built where the rock pile had been to serve as an access point for both the northeast and northwest quarters.

1965 - Rathjen executed a contract for deed to Bohara, who began farming the land east of the rock piles and trail.

1978 - Bohara began extending his cultivation to the west, around the rock piles, plowing up the trail in the process. The size of the south rock pile was not indicated, but the middle pile was now about 50 feet wide.

1981 - Manz, out of concern over the apparent encroachment by Bohara, ordered a survey of the quarter line. The survey indicated that

> the north quarter corner was 80 feet west of the former location of the north rock pile, the middle pile was 60 feet east of the line running south from the quarter corner, and the south pile was on the centerline of the section. There was no indication of how the location of the north quarter corner was arrived at during this survey. Bohara accepted the survey and built a fence on the line that had been staked during the survey. The surveyor also prepared a description of the area that had been historically farmed by the Manz family, lying east of the quarter section line shown on the survey, which Manz then used when he filed his action seeking to have title to that area quieted in him.

Manz did not argue that the survey was in error, or question it in any way, he simply argued that the rock piles and trail had functioned as a boundary, and been recognized as such by all parties, for a length of time far in excess of the twenty years required to create a boundary by acquiescence, so Bohara had no valid claim to any land west of a line running through the center of each rock pile, including the former location of the obliterated north rock pile, as currently evidenced by the center of the field entrance. Bohara argued that neither the rock piles nor the trail were sufficiently distinct and permanent physical features to support a boundary by acquiescence, therefore he had the right to claim the entire west half of the northeast quarter, as indicated by the 1981 survey. The trial court agreed with Manz and ruled in his favor, quieting title in him to the portion of the west half of the northeast quarter described as indicated above.

At first glance, the outcome of this case might seem to be easily predictable, particularly if one has just read the previous acquiescence cases presented herein and observed the general disposition of the Court, with respect to controversies of this variety. The Court had shown itself to be generally very open to accepting evidence supporting claims relating to the occupation and use of land in good faith, that had extended over long periods of time, and had been generally willing to uphold such claims. The use of the land by Manz, who had accepted the rock piles and trail as his boundary, based on the reliance of his predecessors on those objects, gave no indication of being anything less than legitimately innocent, so one might understandably expect the Court to come down on his side. There can be

little doubt that the trial court was acutely aware of the decisions in the Terra Vallee and Ward cases that we have just reviewed, which had been handed down by the Court within the previous few years, upholding lines of occupation as boundaries in very similar circumstances, and intended to follow those decisions in ruling upon this case. In addition, the presence of the Manz family on the land had actually extended over an even longer period of time than had the possession of the successful adverse claimants in those cases, by the time this case reached the Court, so Manz may have been highly confident that he would ultimately prevail. However, Bohara and his legal team made a very astute and convincing argument, that called attention to subtle flaws in the evidence, which others might have missed, or thought to be unimportant, and thereby persuaded the Court that this case was different in certain important ways, from the aforementioned cases.

In the Trautman case 19 years earlier, as we have seen, the Court had accepted a line of rocks, essentially forming a wall, placed by one owner, in an effort to mark his own boundary, as a valid basis for acquiescence, because it provided a clear sign of a claim to an adjoining owner, even though it bent and wound around sloughs. One might think that case would tend to support the claim made by Manz in this case, since the placement of rocks was involved in both situations, and that it would not be a case that Bohara would want the Court to follow in deciding this case. But on the contrary, Bohara used that case to his advantage, by pointing out the critical differences between the two situations. In this case, the rocks did not form a distinctly visible line, they were in separate piles, at great distances from each other, giving no indication to an observer that they represented a boundary. In addition, they had no definite location, since they were constantly being expanded by additional material, which could have been added on one side only, effectively shifting the location of the center of each pile by a material amount over the decades. As for the trail between the piles, the decision in the Trautman case also clearly supported Bohara's argument over that of Manz on this point, because the Court had stated in the Trautman case that a road which varies even marginally in location over time cannot represent a boundary by acquiescence, since acquiescence can only occur with respect to a highly stable physical feature or object, which provides clear notice that a claim to the land is being made, with reference to a definite line or series of lines.

Bohara also successfully used the testimony of some of the witnesses who testified on behalf of Manz to his own advantage, pointing out that although they all agreed that the rock piles and trail were generally respected as a boundary, none of them testified that the boundary had remained constant, in any one unique or specific location. Some of the witnesses recalled that the location of the trail and the sloughs varied somewhat over the decades, and portions of the areas directly between the rock piles were used by one side in some years and by the other side in other years, depending on how big the sloughs were, with substantial variance in both the use of portions of the area between the piles and the location of the trail, from wet years to dry years. Bohara successfully called enough attention to the fact that the boundary contained some degree of ambiguity to persuade the Court to rule that it had never been a distinct boundary, occupying one permanent location. Although Manz had provided a valid and legally sufficient description of the area that he was claiming, which had been prepared by a surveyor based on an actual survey, and which was in fact more than Manz was legally required to present in support of his claim, the Court was unconvinced that the description represented the identical area that had actually been historically used by the Manz family. The Court acknowledged that the description was a reasonable approximation of the area of historic use, and was probably the best approximation of that area that could be made, yet since the area had fluctuated materially in size over the decades, no description could serve to adequately define it. So because the alleged boundary had been both variable and essentially invisible, although it had been honored by all parties in a general manner for over half a century, the Court reversed the ruling of the lower Court and quieted title in Bohara, up to the quarter line, as indicated by the 1981 survey.

RADSPINNER v CHARLESWORTH (1985)

This case represents a classic example of the unfortunate consequences of negligence on the part of a grantor, in the context of both boundary and easement issues, and also emphatically drives home the

importance of properly and fully documenting the true and complete intentions of the parties. Although the grantor in this case was evidently a trusting person who acted in complete good faith, he wound up deeply regretting his decision not to consult a professional land surveyor who was familiar with land rights issues, to insure that the description used in his conveyance would serve to accomplish his intentions, since he ended up suffering the consequences of his failure to take the precautions necessary to avoid subsequent misunderstanding of his intentions. People often fail to understand or appreciate the importance of exceptions and reservations in a conveyance. Generally, exceptions and reservations should be treated as being just as important as the subject property itself, and in fact, many courts have stated that exceptions and reservations must be properly described in order to have any effect. This is typically a burden placed upon the grantor, since the grantor has the basic responsibility of presenting a document to his grantee that is clear and complete, and fully spells out the grantor's true intentions. The Court will not enforce secret, hidden or otherwise undocumented intentions that operate to burden an innocent grantee or his successors, so if the grantor leaves any matters unaddressed or unclear in a deed that he has prepared, or that was prepared under his direction, the consequences of that shortcoming will typically stand as a burden upon either the grantor himself or his successors. Beyond preparing a bare survey drawing that shows only the boundaries of the subject property, or a minimally adequate legal description of the land, the professional surveyor can provide a much more valuable service, by discussing and understanding the client's intentions and making sure that those intentions are well illustrated and noted on the drawing provided to the client. The surveyor can then reference the recorded survey drawing in any legal descriptions that are prepared for conveyance purposes, in order to make sure that the client's grantee is put on notice of any burdens or limitations that the grantor intends to place upon the land being conveyed. Had that procedure been followed here, it's probable that no dispute would have come about, and the grantor would have been able to obtain protection from the Court if one did.

> 1979 - Radspinner owned a tract of an unspecified size. Radspinner cut a one acre parcel out of his tract and conveyed it to Charlesworth. Radspinner included no exceptions or reservations in the deed. How

or when Radspinner acquired his land is unknown, but his ownership of the tract was unquestioned, so that was not an issue in the case.

1980 - Charlesworth planned to build a house on the one acre parcel, but was informed that the acre he had acquired was not big enough to support his plans, so Charlesworth acquired an additional half acre from Radspinner. Again, Radspinner included no exceptions or reservations in the deed.

1981 - Radspinner and Charlesworth entered into a mutual access agreement, by means of which each party granted a thirty foot wide access easement to the other party. The contents of the legal descriptions of the parcels and the easement are unknown, but there is no indication that there was ever any disagreement as to either the boundaries of the parcels or the location of the access easement.

1982 - After a quarrel between the parties over some other matter, the Charlesworths decided they did not want to live next door to the Radspinners, so they abandoned their plans to use the parcel and conveyed all the rights that they had acquired from Radspinner to their son. Their son decided to build a driveway in the access easement, so he cut down several trees that were located inside the easement area, without consulting Radspinner. Radspinner objected and filed an action against the Charlesworths, seeking to have the deed from the Charlesworths to their son ruled null and void, and to require Charlesworth to convey all of his rights back to Radspinner.

1983 - Radspinner lost his case against Charlesworth, but appealed the decision to the Supreme Court.

1984 - The Supreme Court reviewed the case, but found that the ruling of the trial court was incomplete and poorly documented, so the Court could neither reverse nor uphold the ruling. Accordingly, the Court vacated the judgment and ordered the trial court to provide clarification. The trial court complied with these instructions from the Court and provided the Court with a more complete and detailed ruling, upon receiving which, the Court took up the case once again.

Radspinner argued that he and Charlesworth had made an oral agreement, in which Charlesworth had agreed to sell the parcels back to

Radspinner, in the event that Charlesworth decided not to use the land himself. Radspinner also argued that he had intended that only a certain portion of the land conveyed to Charlesworth could be used for building purposes and that Charlesworth had agreed that a certain portion of the land conveyed would remain undeveloped. Lastly, Radspinner argued that he had not intended the trees in the easement area to be cut, and there was no need to remove them in order to use the easement, so the Charlesworths son had damaged the Radspinner property by removing the trees unnecessarily and was liable for having done so. Charlesworth argued simply that their had been no oral agreements made, so he was free to convey all of his rights acquired from Radspinner to his son, and his son was free to use all of the land and the rights that had been conveyed. The trial court ruled in favor of Charlesworth in all respects, except that it awarded damages to Radspinner, because Charlesworth's son had piled up the debris that resulted from the tree clearing on the Radspinner property, leaving Radspinner to pay to have it hauled off.

Not surprisingly, Radspinner's assertion that the language used in the deeds, by which he had conveyed portions of his land to Charlesworth, did not fully express his own intentions, found no sympathy from the Court whatsoever. The Court had made it eminently clear, in numerous previous cases, that an executed contract is always presumed to fully express and correctly represent the true and complete intentions of the parties. While parol evidence is always acceptable for the purpose of enlightening the Court, as to the manner in which the parties used or understood various terms that may appear in a deed, it can never add any new ideas or clauses to the deed, that are patently and utterly absent from the deed, as it was composed. As we have seen in several previous cases, such as the Royse case of 1977, the Court is not inclined to look kindly upon grantors who attempt to claim that they either did not mean what they said, or that they neglected to say what they really meant, in selecting the language to be used in a deed. While the primary legal burden upon grantees is to take prudent notice of all things that may be relevant to a conveyance, and make diligent inquiries about whatever they observe, the primary burden upon grantors is to represent what is actually being conveyed correctly and completely, so the grantee can clearly observe and understand what is, and what is not, being conveyed. The Court has consistently adhered to the position that

grantors cannot be allowed to obfuscate matters relating to conveyances, and are bound to stand behind the language that they have chosen to use in conveying their land. Citing the Royse case, the Court agreed with the trial court that Radspinner could not be allowed to present any form of evidence that would tend to diminish, reduce, or contradict his grant to Charlesworth. Radspinner had failed to protect his own interests, such as the right to require Charlesworth to convey the land back to him, by failing to spell out any such intentions that he might have had, when composing the deeds. Regardless of any verbal agreements that there might have been, Radspinner, as the grantor in charge of conducting the conveyance, had to bear the consequences of any inadequacies in the language found in the deeds.

Likewise, the Court dealt sternly with Radspinner's claim that he had intended to reserve a portion of the land conveyed to Charlesworth from development. Radspinner had attempted to present evidence, in the form of maps and aerial photographs of the subject property, in a effort to show that a certain area which he identified as "the park" existed, and that at least part of it was within the boundaries of the parcels that he had conveyed to Charlesworth. The Court ruled that any such evidence had been properly excluded as irrelevant, because it made no difference whatsoever where that particular area was located, or how much of it, if any, was actually on the Charlesworth property. Once again, Radspinner had utterly failed to carry his burden as the grantor, to make his intentions fully known to his grantee, by announcing his intentions prominently in the language of the deeds. Although Charlesworth admitted in his testimony that "the park" had been discussed, and the idea that it might be beneficial to both parties to keep it undeveloped was talked about during negotiations about the land, that made no difference in the outcome. If Radspinner had desired to impose such a burden on the land, making it permanently undevelopable, he could very easily have done so, while he still owned all the land and had the authority to dictate it's use, by spelling out his wish to that effect in the deeds, along with a description of the area that was intended to remain in it's natural state. But from his failure to do so, Charlesworth was entitled to conclude that Radspinner had chosen to drop that idea, and was conveying the land to him free of any such burden. The Court agreed that Charlesworth's son was entitled to build on any portion of the land acquired from Radspinner, whose

assertion to the contrary was dismissed by the Court with the statement that:

> "...no constructive trust may be imposed upon realty when the party seeking imposition of the trust has totally failed to provide a description of the property. A court cannot impose a constructive trust upon an undefined area..."

All that remained to be addressed was Radspinner's claim that Charlesworth's son had cut down some trees unnecessarily. While this might seem to be a relatively insignificant matter, nothing could be farther from the truth. In 2002, in Calaveras County, California, a property owner pulled out a gun and murdered two of his neighbors in cold blood, in front of their children, because they were clearing brush from an access easement, which they had the right to use to cross his property, but he believed that they were clearing more than what was necessary and were damaging some of his trees in the process. The question of how much of the width of an easement, which is described as having a specific width, an easement holder is actually entitled to use, has been a source of great contention and numerous legal battles in many states. Generally, the easement holder is not entitled to monopolize every inch of the stated width of an easement. This can vary however, depending upon the language creating the easement, the circumstances at the time of it's creation, or the use of the easement that was anticipated by the parties at that time. Generally however, an easement holder is entitled to use only so much of an easement as can be shown to be necessary to accomplish the purpose for which it was created. Even where the width is clearly defined, it can often be shown that there was no intention to devote every inch of that width exclusively to the anticipated use, to the exclusion of all other uses, and courts have often ruled that the stated width merely defines the outermost limits of the area within which the use can take place. Radspinner evidently intended the thirty foot wide access easement only to define an area within which a narrow, winding path or trail could be made and used for access, and he did not anticipate any tree clearing in the area. Charlesworth's son however, decided that he wanted a wide straight driveway and took the liberty of clearing the full width. The Court did not go into any detail in ruling on this issue, because it did not need to do so in this case. Yet again, Radspinner had simply failed to state his intention to preserve the trees in the easement agreement. The Court

agreed with the decision of the trial court on this issue as well, and therefore fully upheld the lower court's ruling, quieting title in Charlesworth's son, free of any of the restrictions or limitations suggested by Radspinner.

COOK v CLARK (1985)

Amidst the surge of acquiescence cases that took place during the 1980s, following on the heels of the Terra Vallee case, the Court encountered a case which required it to consider, for the first time, the application of that doctrine to land held by North Dakota and administered by the Board of University and School Lands. The general rule that adverse possession has no effect on land held by any government entity for the benefit of the public was obviously involved in this case, but the application of that rule was called into question, as a result of the fact that the Board had indicated it's willingness and intention to relinquish the land, by conveying it into private ownership. This position taken by the Board, with respect to the land in question, set the stage for an equitable conversion of the ownership interest in the land, and had the effect of removing the reason supporting that general rule from the equation, in the eyes of the Court, as we will see. The decision by the Board to sell the land, and more specifically the initiation of the actual conveyance process by the Board, putting in motion the process that would ultimately terminate the public rights to the land, operated to make any judicial efforts to enforce or preserve those public rights immaterial, in the view of a narrow majority of the Court. It has been frequently indicated, by a number of courts, that when the reason behind a rule or law ceases to have any relevance, it's legal force likewise ceases, the principle upholding the law or rule no longer being present, or no longer having any meaning or value. This case represents a good example of a situation in which the reason for banning adverse possession of public land was eliminated by the acts of the Board and the parties, creating a set of circumstances under which the Court is left with no motivation to declare the doctrine of acquiescence legally inoperative here. This case also represents an extention of the acquiescence doctrine, for a different reason, in that it supports the use of acquiescence for boundary

resolution, even in a situation where no evidence is presented to show that the fence in question was actually treated and referenced by both parties mutually as a boundary. The requirement for mutual recognition of an established boundary however, would not be abandoned by the Court, and we will see it return to prominence in the future.

1951 - North Dakota owned all of Section 11, as original grant school land, held in trust for the people of North Dakota by the Board of University and School Lands.

1952 - Huffman acquired the southwest quarter by means of a contract for deed. Cook acquired portions of the northeast and northwest quarters by means of a contract for deed.

1953 - Cook acquired the southeast quarter by means of a contract for deed.

1954 to 1964 - Cook built a fence along his south and west boundaries at an unspecified time during this period. There is no indication of how he determined where to build the fence, and no indication that any survey was done or that any monuments were looked for or found. There is also no indication of how either Cook or Huffman used their land, there was no evidence that either of them cultivated or otherwise improved or developed any of the land in the vicinity of this fence.

1967 - North Dakota issued a patent to Cook for his portions of the northeast and northwest quarters.

1970 - North Dakota issued a patent to Cook for the southeast quarter.

1971 - North Dakota issued a patent to Huffman for the southwest quarter.

1985 - Clark entered a contract for deed to acquire the southwest quarter from Huffman, and ordered a survey, which revealed that the fence built by Cook was encroaching on both the north and east sides of the southwest quarter by unspecified amounts. There is no indication of what evidence the survey was based on, and there was no discussion relating to how the survey was performed or what monuments were found, if any. Clark removed the fence along the north side of the southwest quarter and planned to move the fence

along the east side as well. Cook filed an action claiming that the fence had become the boundary by means of acquiescence.

Cook argued that the fence represented his boundary, and since it had stood unquestioned for over twenty years, acquiescence applied, making it a binding, permanent boundary, so Clark had no right to move any portion of it, and Cook owned all the land north and east of it. Clark argued that it was not possible for Cook to successfully claim adverse possession against the state, so his possession could only have become adverse in 1971, when the southwest quarter was patented to Huffman, and since Cook could not show that he had held any portion of the southwest quarter adversely for twenty years, Clark owned the southwest quarter, as surveyed, and had the right to move the fence to the quarter lines indicated by the survey. The trial court agreed with Clark and ruled in his favor, on the basis that acquiescence could never operate against the state.

This proved to be a somewhat troublesome case for the Court, not because of any complexity, since the facts were relatively simple and were not in dispute, but because of the position that the Court had previously adhered to on the issue of the equitable conversion of ownership. As we have already seen in a number of cases, the Court has consistently upheld the rights of equitable owners, those who had not yet acquired full legal title to the land, but were in the process of acquiring it, and who were either occupying it or using it in a productive manner. The fundamental principle supporting the Court's position on equitable conversion of ownership is that those parties who are functioning as the de facto owners of property should share, along with the legal holder of the record title, both the benefits and the responsibilities of their ownership interest in the land, albeit only a partial or incomplete interest. In the 1917 case of School District No. 109 of Walsh County v Hefta, the issue that would return to trouble the Court once again, nearly seven decades later, had first arisen. Hefta had entered a contract for deed to acquire a portion of a school section, and there was a functioning schoolhouse on the portion of the section that he was acquiring. He never made any use of most of the land described in the conveyance, and he never suggested that the schoolhouse should be relocated, he just let it continue to operate. After more than twenty years, he finally obtained a patent and he decided that he wanted to use all of the land, so he was no

longer willing to allow the schoolhouse to remain. The school district argued that it had adversely possessed the land, and now owned it, and the Court agreed. The Court ruled that adverse possession had begun to run against Hefta as soon as he became the equitable owner of the land, and he could not shield himself from adverse possession by claiming that the state was the true owner up until the time of the patent. The Court had thus adopted the position that adverse possession can run against an equitable owner who contracted with the state to obtain a land patent. In other words, the Court had decided that an equitable owner cannot reap the benefits of being an owner, while dodging the responsibilities that come with ownership at the same time.

The Court first acknowledged that adverse possession generally will not operate against the public, because any lands held in trust for the public are entitled to special protection. Public lands are often vast and remote, making them highly vulnerable to encroachment and loss through adverse possession, if they were not given additional legal protection against such loss. Private lands are not entitled to such protection however, because private land owners have a personal stake in protecting their own rights, by monitoring any activity on their land, and the law expects each owner to carry his burden to vigilantly protect his own land. In addition, loss of private land, as a result of neglect on the part of a private owner, has no adverse impact on the general population, and in fact serves the purpose of insuring that land is made productive and kept productive, which is generally considered to be beneficial to society. In this case, the Court found, citing the Hefta case, that no interests of the state were harmed in any way by the use that was made of the land by the various equitable owners. The interest of the state in the land itself had essentially ceased, once the equitable owners took control of it. Unless one of them should default, and lose the land for failure to complete their payments, which had not happened, the state had in reality already fully relinquished it's interest in the land, at the time of the last contract for deed, in 1953, by agreeing to convey all of the land into private ownership. Therefore, the Court determined that the action taken by Cook, in fencing his land, was in no way adverse to the state, and was only adverse to adjoining private parties, such as Huffman. Like Hefta, Huffman bore the burden of being a diligent land owner, and could not successfully claim that the state alone was responsible

for maintaining the land up until the moment that it was patented. The Court decided that since Cook had held the fenced area adversely to Huffman for well over twenty years, the fenced boundary could become the permanent boundary by means of acquiescence, despite the presence of the state as the grantor, reversing the trial court, and directing the lower court to consider and rule upon Cook's evidence supporting acquiescence. Clark, just like Shipp and Trautman before him, as we have already seen, was premature in disturbing his neighbor's fence, and by so doing he had put himself at risk of being held responsible for replacing it, in it's original location. Once again as well, the surveyor will observe that the limitations upon the effect that a survey of aliquot lines may have on rights of ownership are also very much in evidence in this case.

The Court was divided in reaching this decision however. Two of the five Justices dissented, including the Chief Justice and the Justice who would later become Chief Justice. The basis for their objection was the language of a statute, 15-06-01, which indicated then, as it still does in 2010, that lands held by the Board of University and School Lands "retain their character" until such time as they are fully and ultimately relinquished by means of patent. The effect of this dissent was mitigated to some extent however, by the fact that the true intent of the statute was unclear, as had been pointed out by the majority, and even the dissenters were not entirely comfortable with the general and ambiguous statutory language, indicating that:

> “Although the interpretation placed upon the statute by the majority opinion may permit a more equitable result than adherence to the language of the statute would allow, that equitable result is one which should be sought by legislative action rather than by judicial gloss."

JURGENS v HEISLER (1986)

Returning to our review of the Court's treatment of dedication issues, we find the Court once again required to rule upon the nature of rights created by means of a plat, which was evidently prepared with minimal

effort and little diligence, and which was therefore substantially incomplete and ambiguous in it's intent. Nevertheless, the Court typically deals only with the evidence that is placed before it, whatever the condition or quality of that evidence may be, and the Court generally makes it's decision on the basis of principles rather than details, so the fact that a plat may be of poor quality may have no real impact on the nature of the rights that are created by it, the lack of quality being potentially damaging only to the party or parties responsible for it's creation, and their successors. In this case, the controversy stems from conflicting interpretations of the meaning of the plat, by the opposing parties, one construing it as a source of public rights, the other maintaining that it created no public rights. In addition, we see once again here, that although testimony concerning a grantor's true intent is generally highly valuable, the testimony of a subdivider, as to the intent of his own plat, will be disallowed if it stands in contradiction to a logical conclusion that a reasonable person might make, after looking at the plat. In other words, a subdivider is not allowed to represent conditions in a certain manner on a plat, and then maintain that he actually intended something different. A plat, in the view of the Court, amounts to a covenant between the subdivider and those parties who are expected to rely on it, as a consequence of the subdivider's use of the plat in subsequent land transactions. The responsibility of the subdivider to produce a clear and perfectly understandable plat, for use in his land transactions, is once again enforced by the Court here, effectively preventing the subdivider from denying any intention to create public rights. While grantees always have a burden of inquiry, as has been well demonstrated in a number of cases already reviewed herein, a grantee typically has the right to take a plat at it's face value, as being a proper and complete representation of the subdivider's intent. The grantee of any platted lot, not having been involved in the preparation of the plat, is seen by the Court as the innocent party in such situations, so the consequences of any shortcomings of the plat operate as burdens upon the subdivider and his successors, not on the buyers of platted lots. Here, the subdivider once again astutely escapes, by the use of a quitclaim deed, leaving the successor holding an empty deed, just as did the subdivider in the Putnam case, twenty years before, also reviewed herein, again revealing how dangerous it is to attempt to acquire supposed or purported remainder rights of a grantor.

1974 - Brown, Ivers & Monteith (BIM) owned a substantial tract of land, which was rectangular in shape, and they decided to create a residential subdivision. This tract was bounded on the west by another residential subdivision, about which no details are known. BIM had a plat of their proposed subdivision prepared, showing 42 lots, with a 60 foot wide strip, having the appearance of a street, extending the full length of the subdivision from north to south, down the center of the platted area. Whether this strip represented an extension of an existing public street, or connected to a public street outside the platted area at either end, is not indicated on the plat and is unknown. The plat also showed two short strips, also 60 feet in width, branching off of the central strip and extending westward. One of these strips formed a cul-de-sac, in the northwestern part of the platted area, which was not involved in this case. The other short 60 foot strip however, extended due west to the boundary of the plat, in the southwestern part of the platted area, and this was the strip in controversy in this case. Whether or not a surveyor was involved in the creation of this plat is unknown, but the plat did contain a dedication statement, signed by BIM, which certified that the streets shown on the plat, although not given any names or numbers to identify them, were all "dedicated to the public use forever". This plat was approved by the appropriate township planning commission and subsequently recorded.

1975 - The central strip running through the BIM plat came to be used as a public street, and another roadway about 30 feet in width was either built, or simply developed from use, in the 60 foot strip located in the southwestern part of the BIM plat, branching off from the central street. How this 30 foot roadway came into existence is unknown, but it was not the result of any construction work done by any public authority, and the township officials did not recognize or treat it as a public street. This roadway was evidently being used only as a driveway by the owner or owners of adjoining lots in the subdivision to the west of the BIM plat at this time.

1976 - Heisler purchased the lot which sat on the southwest corner of the intersection formed by the central street and the branch street, and this lot extended west to the boundary of the BIM plat. Heisler began

using the branch street to access his lot and he built a driveway connecting to it.

1979 - Jurgens purchased three lots in the other subdivision, adjoining Heisler's lot on the west, and began using the branch street to access his lots, as his predecessors had done. A controversy evidently developed between Jurgens and Heisler over the use of the branch street, and each one of them apparently questioned the right of the other party to use it.

1982 - Jurgens obtained a quitclaim deed to the entire 60 foot strip, as platted, from BIM. Jurgens did not like Heisler's use of the strip and felt that Heisler had no right to use it, so he evidently erected a barricade of some kind blocking Heisler's driveway, making it impossible to drive directly onto the branch street from Heisler's lot, as Heisler had been doing..

Jurgens argued that the branch street was actually just a private road, which had never been officially adopted as a public street, and since he had acquired the entire 60 foot strip, he was entitled to treat it as his own private driveway and prevent anyone else from using it. Heisler argued that the 60 foot strip, although never given any name or number, and never adopted as a public street by the township or by any other authority, was legally dedicated as a public street, by virtue of the dedication statement on the BIM plat. He further argued that the sale of the lots in the subdivision created by BIM had operated as a legal acceptance of all the streets shown on the BIM plat as public streets. He conceded that Jurgens was entitled to use the street, but asserted that the quitclaim deed from BIM to Jurgens had no effect and conveyed nothing, so Jurgens did not own the strip and had no right to obstruct Heisler's use of it in any way. The trial court ruled that because the township had never done any actual work on the branch street, it was a dedicated street that had never been legally accepted as a public street, so it remained privately owned, and BIM was free to sell it to Jurgens, as they had done, and Jurgens having acquired it, was free to exert complete control over it, since it was now his private property.

As we have already seen in a number of cases involving dedications made by means of a plat, the Court typically guards such rights, held by

both the lot owners and the public, very staunchly. Just as any uncertainty, lack of clarity, or other ambiguity in a description, or any other terms used in a deed, is typically held against the grantor, as the party responsible for the existence of that uncertainty, any relevant items or information found to have been omitted from a plat will also often result in problems for the party who is responsible for the manner in which the subdivision was designed and the plat was published, which is typically the same party who becomes the grantor of the platted lots, once the plat is approved and the lots are ready to be sold. In this case, the plat was little better than a stick figure, with very minimal information, obviously indicating that relatively little thought and consideration went into it's preparation, which was very often the case many decades ago, before modern platting standards went into effect, as most surveyors already know only too well. Nevertheless, the Court does not reject plats simply because they were poorly prepared, and it does not treat the rights of the people who acquire poorly platted lots as being inferior in any way. From the Court's perspective, the rights of all innocent lot buyers are to be protected with equal diligence. The Court was quite cognizant that the evidence indicated that Heisler was an innocent purchaser of a platted lot, which had been depicted in an unclear manner on the plat, particularly with regard to the areas shown adjoining the lot on the plat, and specifically with respect to the access that he was intended to have to his lot. Jurgens, on the other hand, while also an innocent lot purchaser, had acquired lots in another plat, so his rights with respect to the plat created by BIM were inferior to those of Heisler, since Heisler's acquisition from BIM, of a lot that had been platted by BIM, had bestowed upon him the fundamental right to rely on all of the benefits that the plat appeared to provide to him, as a buyer of a lot described with reference to that particular plat. In other words, within the boundaries of the BIM plat, the rights of Jurgens were no stronger than the rights of any other individual representing the general public, but the rights of Heisler were those of a party who was entitled to rely directly upon BIM, to stand behind the integrity of the plat that BIM had created. With that in mind, it's not difficult to forecast the outcome of the case.

The Court very adroitly subdued the obvious question, of whether or not the nameless strips of uniform width were actually intended to be streets at all, by observing that if they were not in fact streets, then the dedication

statement on the plat was utterly meaningless, because no named streets appeared anywhere on the plat. The only logical conclusion was that they were intended to be streets, or else none of the lots had any access at all, so the critical issue was whether or not they could have been intended to be private in character, rather than public. The core of the argument made by Jurgens was that public acceptance of a dedication is necessary to make the dedication effective, and such acceptance cannot be affirmatively verified or confirmed in the absence of evidence that the authorities having jurisdiction over the dedication in question have officially adopted the dedication, either by a formal legal statement to that effect, or by performing physical acts that support the acceptance of the dedication. Under the view held by Jurgens, the appropriate authorities must either expressly state that the dedication has been accepted, or perform actual work on the roadway, to validate the dedication. The trial court had found this position persuasive, and ruled that the absence of any such explicit acceptance, combined with the absence of any public road improvement work, was convincing evidence and was sufficient to prove that the streets in question were never intended to be public. The Court however, upheld the contrary position, that acceptance of a dedication does not require road improvement work performed by public employees, or directed by public officials, or supported by public funds. The acceptance of a dedication can also come by means of plain and open use of the roadway in question by the public, or by the sale of lots to the public, which occur without any clear statement or other indication giving the lot buyers definite notice that the platted streets are not public. In this case, the Court observed, the presence of the dedication statement on the plat would very naturally lead any typical lot buyer, such as Heisler, to believe that the streets were either already public or would become public, and the lot buyers were entitled to rely on that presumption. To the extent that Heisler was entitled to rely upon the plat, the Court held, the plat fully controlled the nature of all the rights that were either depicted on it or implied by it. Heisler's right to rely fully upon the plat, such as it was, proved to be the dispositive factor in the case.

By the same token, the Court found it impossible to uphold the quitclaim deed from BIM to Jurgens, because BIM had no authority to sell, and Jurgens had no right to buy, a public right-of-way, for the purpose of closing it, in derogation of the existing rights of others. The fact that BIM

chose to use a quitclaim deed to make the alleged conveyance to Jurgens revealed that BIM was not confident of the true status or ownership of the strip in question, and was therefore unwilling to stand behind it's alleged conveyance of the strip to Jurgens. BIM did testify, on behalf of Jurgens, that the streets were actually intended to be private, and the trial court had accepted and relied on that testimony. But the Court concluded that this testimony was of no value or merit, and the lower court had erred in accepting it, because a grantor cannot be allowed to present testimony that has the effect of diminishing or destroying the value of his own previous conveyances. In essence, the Court decided, BIM was estopped from asserting the right to sell any of the platted strips, after having sold lots to innocent purchasers, without giving those purchasers any notice that the strips were intended to remain under the complete control of BIM, and were subject to closure at any time by BIM or it's successors. In addition, the failure of BIM to name or number the streets, the Court determined, was not sufficient to indicate to innocent lot buyers that they were not intended to be public, even if that really was the true intent of the subdivider. Citing the Ramstad case of 1915, the classic case in which the Court had established a strong precedent for broad interpretation and enforcement of public rights created through the use of a plat, the Court reversed the lower court's decision that Jurgens could convert the branch street into his own personal driveway, and sent the case back to the lower court for the purpose of determining the amount of damages due to Heisler, as a consequence of the deliberate and illegitimate blockage of his driveway by Jurgens. It's also important to understand that the fact that Heisler arrived on the scene and was using the strip before Jurgens came along is irrelevant, the outcome would have been no different if Jurgens had come along and obtained his deed to the strip from BIM and used the strip for many years first. The right to use the strip, which was acquired by Heisler along with his platted lot, was founded in the plat, and had existed since the plat was approved, and no use or blockage of the strip by Jurgens or by anyone, for any length of time, could prevent Heisler from asserting his right to use the strip as a lot buyer, regardless of how long his lot may have sat unsold. It's quite possible that Jurgens may have been a victim himself to some extent, however. For example, his grantor may very well have lied to him about the branch street, leading him to believe that it was a driveway intended solely for his use. But be that as it may, Jurgens learned the hard way that things are not always as

they appear, and the potential land rights of other parties must always be researched and respected.

BENSON v TARALSETH (1986)

In this case, we observe how the Court deals with an adverse possession claim that had it's origin in the negligence of two adjoining land owners, but subsequently came to involve numerous innocent parties. As is so often the case, we are not provided with a truly complete picture of all the factors that lead up to the conflict and set the stage for a serious controversy, years or even decades before the innocent lot buyers ever arrived on the scene. Many possible questions that a surveyor would like to ask, regarding errors and mistakes that were made by previous owners of the land, or by earlier surveyors of the land, all go unanswered, and the Court is simply left to deal with the results of those long bygone and forgotten blunders, misconceptions and misunderstandings. The Court, in it's wisdom, realizes very well that attempting to exhume bits of evidence from the vault of time typically proves futile and resolves nothing satisfactorily or conclusively, and it's for this reason that adverse possession is often employed as a means of legally placing stale issues and claims into a state of permanent repose. The rationale behind the time limit imposed by the adverse possession statutes, stems from the older concept of laches, which is one of the most fundamental doctrines of equity, and which can be applied to land rights conflicts as well as many other controversies. Laches simply provides that a party cannot successfully assert or maintain a claim which that party could have made successfully at an earlier time, when there is clear evidence that the delay itself, committed by that party in asserting their rights, is the source or cause of injury, damage, or some other form of harm, to an innocent party. Laches shares it's roots in the garden of our law with the equally fundamental concept of estoppel, which we have seen the Court exercise in a number of land rights cases, both being fundamentally grounded in the need for judicial protection of innocent reliance. Both of these very basic principles of equity simply block a party from successfully making an otherwise legitimate claim, when doing so would lead to serious

unjust consequences for an innocent party. While estoppel focuses on specific acts and omissions, laches focuses directly on the detrimental effects of the passage of time. Here we see a classic application of laches, as a party who heedlessly ignored the fate of his land is prevented by the Court from stepping out of the shadows of the past and exerting his long dormant rights as a weapon to displace those who have innocently made use of the neglected land. The lesson is both elementary and universally applicable, where harmony reigns, misfortune awaits he who would capriciously set it asunder for his own benefit.

1951 - The Benson family acquired a tract of undeveloped land in a rural area.

1956 - Taralseth acquired an undeveloped tract of unspecified size, adjoining the Benson tract.

1960 - Taralseth had his tract subdivided and platted into rural residential lots. This subdivision mistakenly included a substantial portion of the Benson tract. How this error occurred is unknown, since there is no discussion of any survey work involved in creating the subdivision, but Taralseth was unaware that he did not own all of the subdivided land. Both Benson and Taralseth were taxed on the area in question and both paid their taxes, evidently based on erroneous acreage recited in their respective descriptions, each being unaware that another party was being taxed for the same area.

1963 - Taralseth conveyed Lot 22 to Handeland.

1964 - Taralseth conveyed Lot 17 to Aitcheson and Lot 21 to Handeland.

1965 - Aitcheson built a cabin on his lot. Taralseth conveyed Lot 18 to Skaaden. Skaaden made no use of his lot. Taralseth also conveyed Lot 19 to Olson and Lot 20 to Erling & Martinson.

1966 - Olson built a cabin on his lot. Erling & Martinson also built a cabin on their lot.

1967 - Olson conveyed his lot to Roland.

1972 - Handeland built cabins on both of his lots.

1974 - Roland conveyed his lot to Zahn.

1978 - Benson inherited the Benson family tract.

1979 - Skaaden conveyed his lot to Klimpel.

1980 - Klimpel built a cabin on his lot.

1981 - Taralseth somehow discovered that Lots 17 through 22 were encroaching on the Benson tract and informed Benson, who had evidently never made any use of his land and was completely unaware that any such problem existed. The dimensions of the disputed area are unknown, and there is no indication that anyone had the disputed area surveyed, but it evidently included a large percentage of each of the six lots mentioned, if not the entirety of the lots.

1982 - Benson filed an action to quiet title to his entire tract, as it was described in his deed, against Taralseth and all of the current lot owners.

1983 - Klimpel's cabin burned down. There was no suggestion that Benson had any involvement with this event.

Benson argued that he had never visited the area and was completely unaware that anything had taken place on any portion of his tract, so he should not be held responsible for the mistakes of others. He also argued that he had faithfully paid all of his taxes, so his ownership of the land should be protected for that reason as well. Taralseth argued that adverse possession was applicable to the situation, since he had also paid his taxes faithfully and had developed the land innocently, with no reason to suspect that any conflict involving any portion of the land existed. Taralseth no longer held any interest in the land however, having sold all of it, so the primary legal battle was waged between Benson and the current lot owners. Each of the lot owners argued that they were entitled to their respective lots, as platted, by adverse possession under color of title. The trial court ruled in favor of each of the lot owners, except Klimpel, because he was the only lot owner who was unable to show that his lot had been actually occupied for a full ten years. The trial court also awarded damages to Klimpel, requiring Benson to compensate Klimpel for the loss of his lot.

The fact that adverse possession was applicable was quite obvious in

this case. Absentee owners who treat their land in a negligent manner, such as Benson and his predecessors had, by leaving it unused and unattended for decades, are among the parties specifically targeted by the principles of both policy and law supporting adverse possession. Although it is certainly true, as is often said, that no man can be compelled to make any use of his land against his wishes, the failure of the record owner of the land to attend to it's protection remains a valid source of concern to society, as much in modern times as in earlier times, because that failure effectively opens the door to serious conflicts over land rights. It's widely recognized that it may very well be highly beneficial to society for a property owner to choose to preserve land in it's natural state, rather than exploit it, but no such benefit can occur if the land owner fails to protect the land and allows encroaching parties to make various surreptitious uses of it. Society benefits if the land is used appropriately, and society also benefits if the land is properly preserved by the record owner, but no benefit results from negligence on the part of the record owner, only conflict results. If the record owner fails to accomplish his goal of preserving the land, due to his own failure to observe that it has been put to productive use by another party, the fault for that failure lies not with the user, but with the delinquent owner, in the eyes of the law. Benson's effort to preserve his land in a wild and unused state, if that was in fact his intention, was inadequate, because he never even attempted to determine whether or not any use was being made of the land. He failed to protect his boundaries, primarily because he was unwilling to go to the expense of having the land surveyed, so he could have some idea of what area he was entitled to protect. The Court summarily shot down Benson's claim that Taralseth and the others were obligated to tell him that they were using his land, citing a number of previous cases supporting the proposition that all the adverse possessor is required to do is provide an opportunity for a diligent property owner to take notice of the adverse activity taking place on the land. An absentee owner who fails to enlighten himself as to the nature of open activity that is taking place on his land for the statutory period, the Court noted, relinquishes his opportunity to halt the activity at some future time.

The Court next considered Benson's charge that the lot owners needed to show twenty years of occupation and use, rather than merely ten years, because they could not prove that they had paid all the taxes on the area in

dispute, since he had clearly paid some of the taxes on it himself. To dispose of this issue, the Court examined the purpose for which payment of taxes was included in the ten year statute relating to adverse possession. Statutes are not to be read mechanically, as if they existed in a vacuum, they are to be implemented in the manner intended by their legislative authors. The intent behind requiring adverse possessors to pay taxes is not to force them to pay the full value of the land, it's to demonstrate that they are occupying the land in the good faith belief that they own it. The benefit gained by the adverse possessor from payment of taxes is the shortening of the statutory period, which is justified under the law by the fact that one who makes use of land in good faith deserves that benefit, as opposed to one who is deliberately usurping land that is known to belong to others, and who therefore must complete the full twenty year period. One who is unaware, and has no good reason to suspect, that anyone else is paying taxes on the same land, has fulfilled the requirement of the law, by doing what the law stipulates that an owner shall do. The amount or proportion of the taxes paid by such an occupant is irrelevant, as long as they paid whatever amount they were told to pay. Citing cases from California and New Mexico ruling to that effect, the Court decided that the lot owners were fully qualified to invoke the ten year statutory period.

Lastly, the Court addressed the trial court's award of a lien upon Lot 18, against Benson and in favor of Klimpel. The lien had the net effect of requiring Benson to compensate Klimpel, before title to Lot 18 would be quieted in Benson. Unlike the other lot owners, Klimpel had built his ill-fated cabin too late to complete the ten year period. The Court ruled that each lot owner's adverse possession began only at the moment when clearly visible occupation and use of each particular lot actually commenced, which in each case was the time when a cabin was erected. However, although Klimpel was destined to lose his lot for this reason, the Court did not lose sight of the fact that he had acquired his lot in good faith, along with the other lot owners, albeit for a shorter time period than the others. The Court fully upheld both the decision and the authority of the trial court to make such an award to Klimpel, as an unsuccessful adverse possessor, and to make it a condition with which Benson, as the owner of record, must comply in order to obtain the outcome he was seeking, with respect to this particular lot, on the basis that a record owner who has been negligent in

guarding his land, as the law envisions, should not be allowed to benefit from his own delinquency. The Court never addressed Taralseth's failure to properly subdivide his property, because this issue was not raised. Presumably, this issue would have been rendered moot by the passage of more than twenty years since the subdivision was created, and was not raised for that reason. It would have been interesting to see how the case would have played out if Taralseth had been found liable for improperly subdividing his property, because he may then have charged the surveyor who platted the subdivision with negligence, but how that would have turned out, we will never know.

LINDVIG v LINDVIG (1986)

Although the Court has taken the position that practical location of boundaries by adjoining land owners amounts to a transfer of land that violates the statute of frauds, and for that reason has been unwilling to adopt that boundary resolution doctrine, which supports physical evidence of undocumented boundary agreements, we have also seen, from the earlier statute of frauds cases we have reviewed, that the Court is determined to protect and uphold conveyance agreements, even when only marginal compliance with the statute of frauds is present. For example, in the 1976 case of Rohrich v Kaplan, a letter from the alleged grantor, making reference to the subject property only as "that farm of ours", was found by the Court to be sufficient to satisfy the description requirement of the statute of frauds. Citing the Goetz and Hoth cases that we have previously discussed, the Court held that the statute of frauds does not require a true or complete legal description, but requires only some form of notation that is minimally sufficient to identify the subject property, and went on to rule that a valid and binding conveyance of the entire farm in question had taken place in that case. In the case we are about to review, the Court went beyond the scope of it's previous decisions involving the statute of frauds, and sanctioned the creation of an entirely new parcel, without the benefit of any written description whatsoever, the boundaries of which the Court determined based expressly upon physical evidence of occupation. This

decision to honor the creation of a new parcel, as a performance exception to the statute of frauds, is based upon evidence that the land required to build the house in question was an oral gift from a father to a son, which the grantor and all of the successors to the grantor's remaining land are estopped to deny or contradict. Once again here, we see the power of a physical presence, in this case a house and it's surrounding grounds, to control land rights, by providing clear and absolute notice to any subsequent grantees that rights to a given area have been established, despite the absence of any documentation to that effect, and we observe that those rights are not eliminated or diminished by a subsequent written conveyance that includes the same area.

> 1946 - Henry Lindvig owned a farm, consisting of a quarter section that comprised the Lindvig homestead, along with an unspecified amount of adjoining cropland. Henry had two sons, Lawrence and John, who both lived with their parents on the homestead and helped him operate the farm.
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> 1947 - Both sons became married. Lawrence moved out of the family home and into another house that was also located on the home quarter, which had apparently been unoccupied for some period of time, along with his wife. John built a new house, also located within the home quarter, and he moved into that house along with his wife.
>
> 1949 - Henry allegedly orally conveyed a portion of the home quarter, containing John's new house, to John.
>
> 1958 - Henry and his wife conveyed a portion of the home quarter containing about 19 acres, which included John's house, but evidently did not include either Henry's house or Lawrence's house, into the joint ownership of Henry and Lawrence, by warranty deed. There is no indication that any survey of the 19 acres was ever done, there is no indication of it's shape or location within the quarter, and how it was described in the deed is unknown. John had no involvement in this transaction, but he and his wife continued to live on the 19 acres and they used their house and yard just as they had previously.
>
> 1964 - Henry, his wife and Lawrence's wife, all quitclaimed the 19 acres into the sole ownership of Lawrence. John made no protest regarding this transaction either, he and his wife simply continued to

live on the land, using and maintaining it, and Lawrence did nothing to change John's ongoing use of the area in any way.

1973 - Henry died. Lawrence told John not to erect any more permanent structures on the 19 acres, but John ignored him and went right on using more of the land, evidently constructing additional utility buildings and various other such improvements typically found on a farm, after this time.

1985 - Lawrence and his wife filed an action against John and his wife to quiet title to the 19 acres.

Lawrence argued that John's use of the 19 acres had all been by means of permission only, given by both Henry and himself, so none of it had any effect on Lawrence's outright ownership of the land. John argued that the entire 19 acres had been orally conveyed to him by Henry, so the deeds were invalid and conveyed nothing to Lawrence. The trial court awarded John and his wife ownership of about 2 acres, occupied by their house and yard, including the mineral rights to that area, and quieted title to the remaining 17 acres in Lawrence.

Following the law as established by a number of it's earlier rulings, the Court agreed with the trial court that the statute of frauds does not prevent the enforcement of an unwritten conveyance agreement. The statute of frauds, being intended only to operate upon agreements that have not yet been ratified by performance, does not destroy agreements that can be supported by cogent evidence, merely because no complete or proper written document of conveyance describing the agreement ever existed, as we have seen in reviewing several previous cases. Where sufficient performance of a conveyance agreement has taken place, providing clear and definite evidence that an agreement was actually made, the agreement will be upheld as binding upon all parties. Physical possession of the land, and improvements constructed upon the land, can be persuasive and convincing evidence that an unwritten conveyance of the land was intended. Where strong physical evidence that a conveyance took place can be shown, and that physical evidence is supported by behavioral evidence showing the parties intentions for the use of the land, an estoppel against the record owner can arise. Where such conditions indicate an intent to convey, the

record owner of the land may be found to have relinquished the right to deny that any conveyance ever took place. In this case, John had clearly occupied and used a certain area entirely as his own, functioning precisely as an owner of record would function, in terms of his conduct in using and maintaining his portion of the home quarter. Due to the complete absence of any written description however, the Court was required to determine what area, if any, was intended to be conveyed by Henry in 1949.

In all previous cases ruled upon by the Court, involving the statute of frauds, at least some shred of written evidence relating to the description of the property intended to be conveyed had existed, as will be observed from a careful reading of the cases already reviewed. In this case, for the first time, the Court was confronted with the creation of an entirely new and previously undocumented parcel of land, because the resolution of the claim presented by John ultimately involved only a small portion of the home quarter, rather than all of it. John had claimed the entire 19 acre parcel, but the trial court had ruled that the evidence did not support his assertion that Henry intended to convey 19 acres to him, and had therefore created an entirely new 2 acre parcel, the boundaries of which were based solely upon John's use of the land. The Court accepted the resolution proposed by the trial court, on the basis that the conveyance was an unwritten gift from Henry to John, adopting the position that:

> “...if the donee has taken possession of the land and made improvements thereon, so that avoidance of the gift would work a substantial injustice, the statute of frauds will not defeat a parole gift of land. The donee, however, still has the burden of establishing the requisite elements of a valid gift."

Pursuant to it's ultimate goal, of insuring that justice and equity are served, the Court decided that a new parcel of land can be created, even in the complete absence of any written description whatsoever. The trial court had ruled that since the 19 acre parcel had not come into existence until 1958, John could not prove that Henry intended to convey that entire area to him in 1949. The trial court also noted that John had no valid claim to the 19 acres based on adverse possession, because most of the area was mutually used by all of the family members for farming purposes, so John's use of it

was neither exclusive nor hostile. The Court agreed with both of these positions taken by the trial court, leading to the question of how much land, if any, John had actually held full dominion over. After 1949, neither Henry, nor anyone other than John and his wife, had ever used the area occupied by John's house and yard. Therefore, the Court found that the trial court, in setting the boundaries of the 1949 conveyance, had correctly determined the extent of the 1949 conveyance. The area occupied by John's house and yard, the Court agreed, was the best available evidence of the boundaries intended to be conveyed to John by Henry in 1949. On that basis, the Court approved the creation of the new 2 acre parcel, owned in fee by John, as an involuntary exception to the written conveyances later made by Henry. In other words, Henry could not have conveyed the 2 acre parcel to Lawrence, because he had already conveyed it to John. In addition, since John had acquired his parcel by oral conveyance, and not by adverse possession, the Court also agreed that John owned the mineral rights beneath his parcel.

Having fully upheld the decisions of the trial court, relating to the ownership of the various portions of the 19 acre area, and relating to the boundaries of the parcel created by oral conveyance, the Court concluded by modifying the lower court's decision, adding an easement in favor of the 2 acre parcel over a portion of the 17 acres that was quieted in Lawrence. This was necessary, the Court decided, because the septic tank and drainfield serving John's house was outside John's 2 acre parcel. While the Court determined that this use of the land was not sufficient to bestow ownership of the area so used upon John, it was certainly appurtenant to his parcel, and therefore he was entitled to an easement, allowing this specific use of the area containing the drainfield to continue permanently. The Court remanded the case to the trial court, instructing the lower court to accept additional evidence for the purpose of determining the extent of the easement, which constituted a burden upon Lawrence's parcel and a benefit to John's parcel, and to declare it's legal existence. Presumably there was no dispute over access to either of these parcels, as the issue of access rights was never raised.

BAHMILLER v DIETZ (1988)

Once again here we encounter the consequences of poor platting, and we see how the Court treats a situation in which language in one location on the face of the plat in question appears to contradict or operate to obscure language that appears in another location on the face of the plat. The controversy centers therefore on the true intended purpose of the ambiguously platted easement, and as we will see, the Court maintains it's position, consistent with previous decisions we have reviewed, that the primary concern in such cases must be the protection of the rights of an innocent lot purchaser. The Court reaches no final conclusion in this case, leaving the final outcome uncertain, but an important lesson is learned nonetheless, by virtue of the fact that the Court requires the party asserting that an easement exists, and that it was intended to operate for their benefit, to provide sufficient evidence of that allegation, in order to carry their burden of proof and prevail on their claim. Although the Court staunchly protects existing easements, once legally created, and strongly upholds the rights of holders of legitimate easements of all kinds, as we have repeatedly seen, the Court has always been very reluctant to burden any property with an easement, if the evidence relating to the easement's creation is not clear and strong, and quite justifiably so. Here, the evidence presented by both sides is especially weak and highly incomplete, leading the Court to stipulate that the party alleging the right to use the easement in question must present stronger evidence, in order to prevail. Importantly, the Court here observes the same rule with respect to extrinsic evidence, in the context of an easement dispute, that is applied to boundary disputes. Whenever any ambiguity, lack of clarity, or apparent contradiction is present in the documentary evidence, the door is opened to the presentation of extrinsic evidence, for the purpose of getting to the truth of the matter, which has been left in a state of uncertainty by the incomplete or contradictory evidence of record. Just as a deed may fail to express and carry the full intent of the parties, leading to the use of extrinsic evidence to resolve a boundary dispute, in this case the plat in question is found to have failed to properly carry the full and complete intentions of the platting party, requiring the introduction of extrinsic evidence, to determine the true intended purpose of the easement in question. The obvious lesson for both surveyors and land owners here is that whenever land rights issues arise,

complete reliance on any individual document containing any questionable language is unwise, and all relevant evidence must be sought and treated as highly important and highly valuable.

1978 - Midgette, who was the owner of an unspecified amount of land, platted a residential subdivision of unspecified size. Lot 1 of this subdivision was bounded on the west by Lot 1 of another residential subdivision of unknown size and vintage, which had been platted by another land owner named Strothman. The size of these lots is unknown, since none of the lot dimensions were presented as evidence, and whether or not either of these lots had direct access to any public streets is also unknown, since no evidence describing any portions of the platted areas beyond the boundaries of these two lots was discussed. The Midgette plat clearly showed an easement however, over the southerly 24 feet of Lot 1, which was labeled on the plat as an "access and utility easement". How far beyond Lot 1 this easement extended, if at all, is unknown, and whether or not it connected with a public right-of-way at some point is also unknown. Importantly, the dedication statement on the Midgette plat was silent with respect to access, and stated only that all easements shown on the plat were dedicated for utility purposes, so the true intended purpose of the 24 foot easement across Midgette's Lot 1 was unclear.

1979 - Dietz acquired Midgette's Lot 1, except the westerly 14.7 feet thereof. Dietz was evidently the first purchaser of this platted lot, so why he did not acquire the entire lot is unknown, there was no evidence of any encroachment, or boundary dispute, or any other reason explaining why this small strip was severed from the westerly side of this lot and was not acquired by Dietz.

1980 - Bahmiller acquired Strothman's Lot 1, along with the aforementioned westerly portion of Midgette's Lot 1. Whether or not Bahmiller was the first owner of this property is unknown, since the year in which Strothman platted his land and sold his lots is not stated. Whether or not any easements of any kind existed on Lot 1 of the Strothman plat is also unknown, since no details regarding the Strothman plat were presented or discussed.

1981 to 1988 - How the land was used by Bahmiller and Dietz during

this period, and how they accessed their properties during this time is unknown, but by the end of this period a controversy had developed between them over the true legal character of the 24 foot easement shown on the Midgette plat. There was no evidence pertaining to any houses, buildings, driveways or other physical features that may have existed on either lot, so whether either of these lots had been developed or remained vacant during this period is unknown. Bahmiller evidently either used, or attempted to use, the southerly 24 feet of the Dietz property to access his property, and Dietz objected, so Bahmiller filed an action against Dietz, claiming that Bahmiller had the right to access his property by means of the 24 foot platted easement across Midgette's Lot 1. There was no evidence that any physical roadway, path or trail of any kind existed in this location, and no evidence that any surveys had been performed, or any lot corner monuments had been located by either of the parties, so how Bahmiller knew exactly where this easement was actually located on the ground is also unknown.

Bahmiller argued that the Midgette plat had created an access easement, burdening the lot that had been acquired by Dietz, which appeared to be intended for the benefit of Bahmiller's property, by virtue of the fact that it extended to his property, therefore he was entitled to use the 24 foot strip for access. Dietz argued that no access easement could have been created across his lot, because Midgette's dedication statement on the plat said nothing about access, and mentioned only utilities, so Dietz had no obligation to allow the 24 foot strip to be used for any purpose other than utilities. The trial court summarily rejected the position taken by Dietz, without any consideration, and ruled that the 24 foot strip was legally available to Bahmiller for the purpose of access, so Dietz could not obstruct the easement or otherwise prevent Bahmiller from using it for that purpose.

The argument made by Bahmiller in this case was remarkably similar to the argument made by Jurgens, just two years before, so the Court's treatment of this situation provides an interesting compliment and counterpoint to the Jurgens case, which we have previously reviewed. Although the Jurgens case involved a platted strip of land that was not a part of any platted lot, which was ruled to be a public street, and this case does

not involve any public streets, Bahmiller's argument was still essentially of the same nature as that of Jurgens, because both Jurgens and Bahmiller were claiming rights that were based on another plat, rather than the plat in which their own lots were located. As we have seen, this factor was crucial in the Jurgens case, since the Court found in that case that Heisler, as an owner of a lot that was located inside the plat that was in question, held rights based on that plat which were fundamentally superior to any rights that Jurgens could claim, as a stranger to the plat. In other words, Heisler had the right to rely on all of the rights that were shown on, or created by, the plat that had created his lot, because those rights were directly appurtenant to all of the lots created by that plat, including Heisler's, but since Jurgens had acquired lots that were created by a different plat, and had never acquired any of the lots shown on the plat in question, he could not claim a right of reliance on the plat that created Heisler's lot, equivalent in strength to the right of reliance on that plat held by Heisler. Even though Bahmiller did happen to own a small sliver of land that was located in the Midgette plat, which was the plat being scrutinized in this case, his lot was located in the adjoining Strothman plat, and had been created by means of that plat, not the Midgette plat, so like Jurgens, he was attempting to benefit from an easement that was not created by means of the plat in which his lot was located. Bahmiller's burden of proof was therefore a high one, because the Court had indicated in the Jurgens case that it was not inclined to presume that an easement created by a plat was intended to operate as a burden upon the owners of the lots located in that plat, for the benefit of lots located in a different plat. The court has always been disinclined to allow easements to burden land unnecessarily or excessively, beyond the scope of the burden that was clearly intended to be imposed on the land, so it should not be surprising that the Court seriously questioned the validity of the interpretation of the easement that was proposed by Bahmiller.

The principal issue, the Court determined, was whether or not the right to use the easement for access, which was asserted by Bahmiller, was expressed on the plat with sufficient clarity to withstand or overcome the contrary assertion made by Dietz, that the easement was never really intended for access purposes at all, and moreover that it was not intended to serve any parties such as Bahmiller, who had acquired lots that had never been owned, platted or sold by Midgette. At the core of the argument made

by Dietz was the same principle, regarding the grantor and grantee relationship, that had been successfully argued by Heisler in the Jurgens case. Dietz rested his case on his right to rely upon his grantor to fully and clearly lay out, illustrate and describe any burdens which that grantor had intended to create upon the land being conveyed by that grantor to innocent grantees, such as Dietz. The contradictory language on the Midgette plat proved to be the key factor, enabling Dietz to successfully persuade the Court that the lower court had erred in dismissing his argument out of hand. The fact that the Midgette plat appeared to indicate that the easement in question was intended for access in one location, while neglecting to mention access at all in it's easement dedication language, the Court decided, created a level of ambiguity that made it impossible to declare with certainty that Midgette had intended the strip to constitute an access easement, and there was nothing on the plat to give lot buyers, such as Dietz, notice that the strip was created for the benefit of owners of lots outside the Midgette plat. Because Midgette had failed to express his intention for the lot subsequently acquired by Dietz to bear such a burden, if in fact that was Midgette's true intent, the Court was not willing to impose the burden of an access easement on the lot owned by Dietz. Dietz, as an innocent grantee, was entitled to presume that Midgette, as a grantor, had no intention to create a hidden or surreptitious burden upon his grantees, in derogation of his own grant, for the benefit of strangers. Of course, Midgette most certainly could have placed any type of easement or other burden upon any or all of the lots that he platted, for the benefit of the public or even for his own benefit, but the Court would not allow any such burdens to be created in a manner that was masked or disguised in any way, holding that any such burdens must be created with complete openness and absolute clarity, for the protection of innocent grantees, if they are to be created at all.

Having concluded that the easement in question was fundamentally ambiguous in nature, as to it's true and complete purpose, as to who was actually intended to benefit from it, and therefore as to what extent it constituted a burden upon the lot acquired by Dietz, the Court reversed the summary judgment issued by the lower court and remanded the case back to that court for a complete trial, with the presentation of all relevant evidence, and a judgment to be based upon the merits of the litigant's arguments.

Citing the Jurgens case, as an example of a situation in which the plat controlled, because it provided definitive evidence that the subdivider intended the area in controversy to serve as an access easement for the benefit of his grantees, the Court ruled that since the intent of the Midgette plat, with respect to access, was unclear, extrinsic evidence relating to the circumstances and conditions in the platted area must be accepted and considered by the lower court, in order to properly adjudicate the rights of the parties associated with the easement. The key distinction between the positions taken by the Court in the Jurgens case and in this case was the fact that in the former case the plat created an easement that amounted to a benefit to the innocent lot purchaser, Heisler, while in this case, the plat allegedly attempted to create an easement that would amount to a burden on the innocent lot purchaser, Dietz, if allowed to stand as alleged by Bahmiller. While the Court had found the plat in the Jurgens case to be sufficient, to protect the rights of Heisler as an innocent lot purchaser, the Court here found Midgette's plat to be unclear and therefore insufficient, once again for the purpose of protecting the rights of an innocent lot purchaser, Dietz in this case. In reality, easement rights are very often poorly defined, as they were in this case, both on plats and in deeds, so disputes of this kind are not at all uncommon, and they can have very dire consequences, as noted in the Radspinner case that we have recently reviewed. Land surveyors can certainly help to prevent easement conflicts such as this one from taking place, by creating both descriptions and plats that diligently portray and depict the true and complete intentions of the relevant parties, with respect to the intended use of any easements being created, as well as the location and dimensions of those easements. This case never returned to the Court, so the final outcome is unknown, and it's quite possible that the matter was settled by the parties between themselves, based on the guidance provided by the Court in this decision, without any further litigation.

DEICHERT v FITCH (1988)

In this case, which is focused on the responsibilities of a grantor and a grantee, we have a classic example of the kind of consequences that can occur when both parties feel that having the land being conveyed surveyed

prior to conveyance is unnecessary. Of course it's true that a survey is not an absolute legal necessity, and an otherwise valid conveyance will not be ruled void simply because no survey was performed. As always, the Court will deal with the existing evidence and determine the relative rights of the parties in such a situation, as we see done here. But as all surveyors know, a survey adds value to a conveyance by putting all parties on notice of the existing situation, and at least in theory, by eliminating any false impressions or assumptions under which the parties may be laboring, regarding the boundary locations or other related issues. To that extent, this case may be very useful to surveyors who encounter resistance to the idea that a survey constitutes valuable information and is therefore a prudent expense, whenever a conveyance of land is proposed. This case demonstrates very clearly that the existence of a valid description of the land is not enough to guarantee a problem free conveyance, in the absence of a survey, because even descriptions that are error free are often misunderstood, resulting in mistaken ideas about where the described boundaries are actually located on the ground. In this case, the Court indicates that a grantor can be held accountable for misrepresenting boundaries to a grantee, if it can be shown that the misrepresentation operated as an inducement, which caused the grantee to acquire land that the grantee might otherwise have chosen not to buy, or as an inducement to pay more than the land actually conveyed was worth. However, the Court ultimately rules to the contrary here, holding that standards of negligence can be applied to a grantee as well as a grantor, and demonstrating that there are limits to the protection that the Court is prepared to extend to a grantee who fails to act in good faith.

> 1982 - Fitch owned a tract of land that was described as containing 4.65 acres more or less, but he was uncertain as to where the boundaries of the tract were located. The shape and location of the tract are unknown, how long Fitch had owned it is also unknown, and there was no evidence that it had ever been surveyed. so he had only an approximate idea of where his boundaries were. There was a house on the tract, but there is no indication that the tract was physically enclosed or that there were any kind of visible boundaries. Fitch was interested in selling his tract and Deichert was interested in buying it. Fitch and Deichert intended to walk the perimeter of the tract, but

evidently on their walk they inadvertently went too far, so Deichert got the impression that the tract was much larger than it really was. Deichert acquired the tract under a contract for deed from Fitch.

1985 - Deichert evidently decided to split off and sell a portion of the tract, so he had the tract surveyed. The boundaries marked during the survey indicated that Deichert had not acquired the whole area that he had been shown by Fitch. What type of evidence the survey was based on is unknown, but it was never questioned in any respect by anyone, so it was accepted as correctly indicating the true boundaries of record. Even though he knew, after the survey was done, that the tract was smaller than he had believed it to be, Deichert completed his payments under the contract for deed and obtained a warranty deed from Fitch.

1986 - Deichert informed Fitch that the boundaries Fitch had shown him had proven to be incorrect, and Deichert believed that Fitch should refund a portion of the purchase price to him for that reason. Instead, Fitch responded by filing an action against a neighbor, in which Fitch claimed that the tract had been extended by adverse possession, but Fitch lost that case, and then refused to refund any money to Deichert, so Deichert filed an action seeking to compel Fitch to give him a refund.

Deichert argued that since Fitch had misrepresented the actual physical size of the tract, Deichert was entitled to a refund of a portion of the price that he had paid for the tract. Fitch argued that the price paid by Deichert was the fair market value of the tract, as it was described in all of the documents of conveyance, at the time of conveyance, and he had delivered to Deichert everything that the documents of conveyance purported to convey, and Deichert had not been harmed in any way by Fitch's mistake regarding the boundaries, so Deichert was not entitled to any refund. The trial court agreed with Fitch that Deichert was not damaged in any way by Fitch's mistake, and decided that Deichert was entitled to no refund.

Generally, grantors bear a heavy burden, to thoroughly inform their grantees of what is being conveyed, and to avoid providing any misleading

information. A number of cases that we have already reviewed serve to illustrate the fact that grantors are typically required to bear the consequences of any mistakes they make in conducting a conveyance. The Court views the grantor, in a typical conveyance, as the party who knows the most about the property being conveyed, and as the party with the best opportunity to insure, through proper conduct and communication, that the transaction is carried out in a fair and just manner. The grantee has responsibilities as well however, and in every case, one thing that the Court always watches for and carefully scrutinizes is the presence of good faith. When the Court observes that the balance of good faith appears to tip distinctly in favor of either party, and against the other, the Court will invariably respond by protecting the party whose actions were genuinely innocent, although perhaps mistaken in some way, and by placing the greatest measure of the burden upon the party whose actions tend to call their good faith into question. In this case, Fitch had acted foolishly, by pointing out boundaries that he was uncertain about to his grantee, and by failing to obtain a survey, in order to provide reasonable certainty as to the boundaries of the tract. But as foolish as that decision on his part may have been, the Court was disinclined to punish him for it, primarily because Deichert made a series of decisions which showed that he had either been at least equally foolish, or perhaps he had even sought to take advantage of Fitch's innocent ignorance for his own benefit.

Deichert did himself no favors with his own testimony, and in the end this worked strongly against him. Fitch's legal team extracted testimony from Deichert, regarding the valuation of the subject property, that served to contradict and effectively destroy Deichert's claim that he was entitled to a refund. Under the circumstances present in this case, in order to prevail, Deichert had to present evidence that the price he had paid was appropriate for a tract of the size that Fitch had showed him, but was excessive for a tract of the size that was actually conveyed to him. In other words, the Court required Deichert to prove that Fitch had failed to deliver a tract that gave Deichert his money's worth. If Deichert could not show that he had been either cheated or harmed in some way, as a result of the admitted errors made by Fitch, then Deichert could obtain no relief. Deichert had not built anything on the tract, so he could not claim that he had experienced any direct harm from the boundary location mistake, which he might have been

able to successfully claim, if he had built a structure in reliance on a boundary location specifically shown to him by Fitch, and subsequently discovered that the structure was over a property line. Deichert's testimony, regarding his expectations in acquiring the tract, was therefore key to the outcome.

Deichert testified that the primary reason he was unsatisfied with the tract, was the fact that one property line had turned out to be much closer to the existing house than he had expected, based on the approximate boundaries that Fitch had shown to him. The Court found that this was not a sufficient basis upon which to demand a refund. Although Fitch failed to order a survey, Deichert had the opportunity to either order a survey himself, or require Fitch to do so, before he agreed to acquire the tract, so in that respect Deichert had been at least equal to Fitch, in terms of negligence. In addition to that, the fact that Deichert freely chose to complete the transaction, even after being informed of the boundary error, the Court observed, was an indication that he was not particularly upset about the situation at that time, and only decided to make an issue out of Fitch's error after later realizing that it could prove to be a way of getting the tract for less money. Cast in that light, his fate was probably already sealed, because it was clear that the balance of good faith was not in his favor.

Finally, Deichert made the critical mistake of agreeing, on the witness stand, that the tract was worth the amount that he had paid for it, even though it was not as large as he had anticipated. He essentially admitted that he had gotten a fair bargain, even though he had not gotten the full area that he thought he was going to get. In the eyes of the Court, this was fatal to his case, because this testimony made it evident that by insisting on a refund, he was really just trying to get a better bargain, rather than trying to correct a genuine injustice. The Court fully upheld the decision of the trial court in favor of Fitch, and Deichert was left to ponder the consequences of his own failure to realize that, without the benefit of a survey, he had no assurance that the area Fitch had shown him was in fact the 4.65 acres described in the deed. Fitch had never claimed to know the exact location of the boundaries in question, and Fitch had indicated to Deichert that his knowledge regarding the boundaries was only approximate, so Deichert was on notice that the general boundary locations pointed out by Fitch were not a valid

basis for absolute reliance on his part. Under those circumstances, the Court ruled that Fitch was not guilty of misrepresentation, and Deichert was entitled to rely only on the existing description of the land. Both parties had made bad decisions and mistakes, but Deichert had made more bad decisions and mistakes than Fitch, and in so doing, he had lost his status as an innocent grantee.

KNUTSON v JENSEN (1989)

In North Dakota's centennial year, the Court was confronted with a boundary dispute that had it's origin in a set of circumstances which were both unusually well documented and quite unique. The event that would finally result in this dispute took place a decade before statehood and then lay dormant, like a land mine waiting for a victim, for over half a century, before setting in motion the process that would finally develop into a land rights controversy, after the passage of another half century. Since the sequence of events leading up to this conflict was particularly well supported by testimony, the question before the Court was primarily one involving not the determination of what had happened, but rather the determination of the effect of the events that had transpired on the rights of the parties. In this case, we will see how the Court views and deals with the consequences of a clear and definite mistake, made by a known party, in the context of boundary establishment. We will also see, once again, the value that the Court places on efforts to respect and follow an original GLO survey, albeit a misguided effort, made by an entryman acting in good faith. In that regard, it's noteworthy that this decision of the Court is fully consistent with the language of the BLM Manual, which upholds the validity of the bona fide rights of entrymen, where such rights can be shown to have been established through the exercise of "ordinary intelligence", meaning in the absence of the knowledge that a surveyor would be expected to apply under the same circumstances. In addition, we will again observe that the Court invariably acknowledges evidence of boundaries established by operation of law as being worthy of protection, even after a retracement survey has identified a specific error made by an entryman in the process of

laying out his original aliquot boundaries on the ground. Most witness corner monuments set by the GLO have no doubt served their intended purpose admirably, but in this case we learn about a situation of which it may be fairly said that the complete absence of any monument might have been preferable to the presence of the one that was found and, not at all surprisingly, used in an unintended manner. Had the Court envisioned a typical scenario under which acquiescence could be most appropriately applied, when adopting that equitable doctrine, it would have looked very much like the one presented in this case.

> 1879 - During a GLO survey subdividing a certain township, a witness corner was set. This witness corner was set two and a half chains south of the quarter corner between Sections 2 & 3, because while running line northward between those sections, the GLO survey crew encountered a marsh at this point, and they decided that setting a monument at the true quarter corner location, which was in the marsh, would be difficult and would serve no purpose. Little could that survey crew have suspected or imagined what the consequences of their decision would be, several decades later.
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> 1880 to 1930 - During this time, all of the land in Sections 2 & 3 was patented. By 1930, Jorgenson owned the north half of Section 2, Johnson owned the south half of Section 2, Saunders owned the northeast quarter of Section 3, and Knutson owned the southeast quarter of Section 3. When the use of the land as cropland actually began, was beyond the memory of any of the parties, so anything specific that may have been done on the land prior to 1930 is unknown.
>
> 1931 to 1939 - Saunders decided to build a fence during this period, so he went looking for the east and west quarter corners of Section 3. He found the original GLO monuments marking both of those corner locations, but he evidently failed to realize that the monument on the east line of the section was not at the true quarter corner location. Saunders built a fence, running westward from the witness corner, straight toward the west quarter corner, extending half a mile. This fence was no longer in existence in 1989, and how long it existed is unknown, but it was undisputed that the crop line had always

remained in the location originally established by this fence.

1940 to 1949 - Jorgenson decided to build a fence during this period. He found the original quarter corner on the east line of Section 2 and ran his fence westward from that point, straight toward the east end of the fence built by Saunders, to which he connected.

1950 to 1973 - All of the families farmed their respective lands, up to the lines established by the fences.

1974 - The fence built by Jorgenson was mostly taken down, but some of the posts were left in place, so that the crop line would remain in the same location each year, and these posts were still in place in 1989.

1975 to 1984 - Jensen acquired the three quarters formerly owned by Saunders and Jorgenson at some time during this period, and the historic land use pattern established by all of the families, based on the fences, continued unchanged.

1985 - Knutson and Johnson ordered a survey of the north boundary of their three quarters, which revealed that the boundary of those quarters, as platted, actually ran through the marsh, 165 feet north of the point where the Saunders and Jorgenson fences had met, at the witness corner. Knutson and Johnson filed an action to compel Jensen to relinquish all of the land in both sections that he had been using, that was south of the quarter lines indicated by the survey.

Knutson and Johnson argued that the fences had been built in the wrong location, they had never agreed to adopt either the fence lines or the crop lines as boundaries, and they had always maintained that they had the right to order a survey of the true boundaries at any time, and the right to require Jensen to stop using any portion of their land, at such time. They did not assert that they had ever granted either Jensen or his predecessors permission to use their land, they argued that they had simply reserved the right to claim all of the land lying within the boundaries of their quarters, at whatever time they saw fit to do so. Jensen argued that all of the members of both the Knutson and Johnson families had acquiesced in the existing boundaries for several decades, ever since the existing boundaries were established, and neither of them any longer had any right to deny the

existence of the established boundaries, or deny that they were permanent, regardless of any subsequent surveys. The trial court ruled in favor of Jensen, finding that the North Dakota doctrine of acquiescence had foreclosed any opportunity that Knutson or Johnson might once have had to protest either the location, or the permanence, of the existing boundaries, for any reason.

As we have seen, the North Dakota doctrine of acquiescence, which had been very slow in developing and very little used for many decades, sprang suddenly into prominence in 1981, upon being clearly defined by the Court in the Terra Vallee case, and immediately became the decisive factor in several cases that reached the Court during the 1980s. By 1989, the doctrine was well settled and thoroughly entrenched, as the principal means of resolution to be applied to boundary disputes. In some of the previous acquiescence cases, the origin of the line that was either acquiesced in, or allegedly acquiesced in, was obscure or unknown. In this case however, it was obvious that the long standing crop lines had originated in a mistake, made by one individual, which was either never recognized, or never pointed out to that individual, by any of the adjoining property owners. So one major issue for consideration by the Court in this case was what the effect and consequences of such a mistake should be. Again, consistent with all of it's earlier rulings, the Court found that such a mistake was perfectly understandable and was not fatal to a land rights claim. In the Terra Vallee case, as we have already observed, property owners had relied on a quarter corner set by a county surveyor, which had later been relocated, during a survey performed using more modern measurement technology, and the Court ruled that the property owners had acted in good faith, in relying on the county surveyor's quarter corner, since they had no way of judging how accurately he had done his job, and they had no reason to question his work. Quite similarly, in this case, Saunders and Jorgenson had both built their fences in reliance on a survey monument, unaware that it did not mark the true quarter corner location, so their reliance on that monument represented a good faith attempt on their part to comply with the law, by using the original monuments, wherever they found them. From this evidence, the Court concluded that their improper use of the witness monument was an innocent mistake, which formed no obstacle to the boundary claim made by Jensen.

Knutson and Johnson attempted to equate the circumstances of this case to those in the Manz case of 1985, in which the claim of Manz, that a few rock piles and a variable trail constituted a definite boundary, was rejected by the Court. The Court disposed of this assertion quite readily, by pointing out that the lines involved in the present case were far better defined than the line that was in controversy in the Manz case, and in addition, it was never shown that any effort to find or use any original survey monuments had been made in the Manz case. Still, the fact that both fences were gone, and portions of the boundary had been marked only by crop lines for many years, was somewhat troubling to the Court. In the Odegaard case of 1969, as we have seen, the Court found that a crop line that had shifted over the years, and could not be positively shown to be a faithful perpetuation of a fence line that had once existed in the same area, could not be distinctly identified as a definite established boundary. However, in this case, the Court found the evidence and testimony more convincing, and accepted the proposition that the crop line had not been variable, to any material extent, and had been faithfully maintained in it's original location, by the efforts of all the parties over the years. Citing the 1931 Bernier case and the 1983 Ward case, as well as comparable cases from Indiana, the Court indicated that under North Dakota law:

> “To establish a new boundary line by acquiescence, it must be shown by clear and convincing evidence that the parties recognized the new boundary line as a boundary .... Acquiescence has been defined as a release or an abandonment of one's rights .... failure of a party to protest the use by others of land is an indication of acquiescence, as is cultivating up to, but never over, a line marked by a fence, trees and shrubbery."

With respect to the claim of Knutson and Johnson that no one in either of their families had ever agreed to give up any portion of their quarters, and that they had always intended to reserve the right to claim their original boundaries, the Court determined that whether or not they had ever agreed to the existing boundary was irrelevant. Since acquiescence in North Dakota has it's basis in adverse possession, and is equivalent to adverse possession of a portion of the adjoiner's title, no agreement between adjoining owners is necessary to create a boundary by operation of law

through acquiescence. Although acquiescence operates as a form of practical location, and therefore represents a form of implied agreement, in most other states, that is not the case in North Dakota. In essence, the doctrine of acquiescence in North Dakota is simply the judicial embodiment of the general rule that actions speak louder than words, in matters relating to the determination and resolution of boundaries. The Knutson and Johnson families had conducted their farming operations as if they were fully satisfied with the long standing crop lines for generations, so their opportunity to successfully protest and overturn the existing conditions had long since evaporated. The Court fully upheld the ruling of the lower court, that the crop lines constituted a valid and binding permanent boundary between the parties, regardless of the true original location of the quarter lines, as shown by any subsequent survey.

HAAS v BURSINGER (1991)

By 1991, ten years after the pivotal Terra Vallee case on acquiescence, the Court had become comfortable exercising that doctrine on a routine basis, yet at least one nuance of it, concerning the vital element of notice, was evidently still not completely clear to the lower courts, and the Court took the opportunity presented by this case to provide further guidance in that regard. As we have seen, the principal burden on a grantee is to observe reasonably apparent existing conditions and promptly question any observable irregularities that could prove to have legal consequences. This typically means that the grantee has the obligation to seek clarification of the meaning and legal significance of any use or possession of any portion of the land being conveyed, prior to conveyance, and failing to do so can reduce, or even completely negate, the value of the acquisition. For example, in the 1945 case of Pierce Township v Ernie, Ernie obtained a deed to a tract that included a gravel pit operated by the township, for which the township held an unrecorded deed. The Court ruled that the presence of township trucks hauling gravel from the pit was sufficient to put Ernie on notice that the township owned the land. The Court expressly held, in that case, that a grantee is not entitled to ignore open and apparent use of the

land that he proposes to acquire and rely solely upon documents of title to determine who owns the land, and that one who closes his eyes to observable conditions will not be protected by the Court as a purchaser in good faith. In a number of subsequent cases, the Court has reiterated this same sentiment, often putting it in forceful terms, to make it perfectly clear that good faith on the part of a grantee is as important as good faith on the part of a grantor. In the 1989 case of Anderson v Anderson for example, the Court yet again stated that those grantees who claim to be ignorant of superior rights of others to the land in question will not be allowed to prevail, if it can be shown that their alleged ignorance is "deliberate and intentional", rather than honest and genuine. In other words, one who sets out to acquire land is obligated do so with his eyes open, and without any covert intentions. In the case we are about to review, we will see that one who chooses to acquire land bearing any physical indication of use or possession by others that may represent a boundary, ignores that physical boundary evidence at his own peril.

1947 - Bursinger acquired the southwest quarter of a certain Section 6. It was described in the typical aliquot manner in the documents of conveyance. Bursinger saw that there was a fence running the full length of the east side of the quarter and he asked his grantor about it. The grantor told Bursinger that the fence was on the east boundary line of the quarter. The origin of the fence is unknown. No survey was done at this time and there is no indication that the quarter line had ever been surveyed. Who owned the southeast quarter at this time is unknown, but there was no dispute over the fence location.

1948 to 1990 - At some time during this period, Haas acquired the southeast quarter of the section. The fence was in place when Haas acquired his quarter and it was still in place at the time of the trial. The type or extent of use that was made of the two quarters is unknown, but Haas, like his predecessors, used only the land east of the fence, and Bursinger used all the land west of the fence throughout this period.

1991 - A survey was done, which indicated that the south end of the fence was over 200 feet east of the south quarter corner, and the north end of the fence was about 90 feet east of the center of the section.

> Who ordered the survey is unknown, and what evidence the survey was based upon is also unknown. There is no indication of whether or not any survey monuments, original or otherwise, were found anywhere in the section. No one raised any issues concerning the accuracy of the survey however, so whether it was based on original monuments, or platted dimensions, or some combination of monuments and dimensions, it was accepted as being completely true and correct in it's depiction of the location of the line in question. Haas filed an action against Bursinger, claiming ownership of the entire southeast quarter, up to the quarter section line indicated by the survey.

Haas simply argued that he owned the whole southeast quarter, which was described as such in his deed, regardless of the fence location. He evidently saw the fence as being insignificant and made no effort to discover or present any evidence regarding it's origin. Bursinger argued that the fence had become the true east boundary of his quarter by means of acquiescence, and the true original location of the quarter section line was therefore no longer of any significance. The trial court decided that the fence was of no significance and ruled in favor of Haas.

The Court took the opportunity presented by this case to clarify the legal meaning of some very important terminology, relating to the use, occupation and ownership of land, in order to provide clear guidance for the lower courts on these issues that are so frequently involved in land rights claims. Although physical possession of the land west of the fence by Bursinger had lasted for over forty years, and the maximum statutory possession period is twenty years, the trial court had decided that Haas was really in possession of the area in dispute, west of the fence, at all times, by virtue of constructive possession. Because the title held by Haas included the area in dispute, the lower court felt that he was free to claim that he had always possessed it, even though he had never occupied or used any of it. The Court deemed it necessary to advise the lower court to the contrary. The Court sought to drive home the point that physical possession is the most essential element of adverse possession, and since acquiescence in North Dakota is nothing but adverse possession limited to a portion of an estate, rather than extended to the entirety of the estate, physical possession is also

the most essential element in play whenever a claim is made that a boundary has been established through acquiescence. Although every title holder is presumed to hold all the land described in his title, physical possession of a portion of the described land by another party can destroy that presumption, and in fact conclusively destroys it, the Court held, once the statutory period has elapsed. In other words, constructive possession is subordinate to actual physical possession, in the eyes of the law. Constructive possession exists, the Court observed, only where the owner of record can show that he has exerted dominion and control over all of his land, despite not being in physical possession of a portion of it. The Court disposed of the fallacy that mere title, or ownership of record, is equivalent in force to physical possession, which had afflicted the lower court, as follows:

> “The term "seized" in the statute is not used in contradistinction to "possessed", so as to admit of an interpretation that the legal title or ownership only would be sufficient to prevent the statute running as against the true owner, though a stranger be in the actual occupancy, pedis possessione, of the land in dispute .... in a proper legal sense the holder of a legal title is not seized until he is fully invested with the possession .... possession is the crucial factor..."

Having found that the statutory period was fully satisfied by the possession of Bursinger, the Court ruled that Haas was barred from claiming any land west of the fence, and Bursinger owned all the land west of the fence, reversing the decision of the lower court. Although the origin of the fence was shrouded in the mist of time, the Court was perfectly comfortable upholding it as a boundary, since it represented a distinctly visible line of division, which had remained intact and unchallenged for decades, and for that reason the Court saw no need to probe it's origin. The fact that the parties had relied on the fence as their boundary was emphasized by the Court. Such reliance lends credence to the idea that the fence may have actually been built in reliance on authority of some kind, albeit undocumented. Perhaps, for example, it was built at a time when the original quarter corners were still in existence. But even if in fact the fence location was never established by any kind of authority, and the parties all relied on it simply out of indolence or carelessness, for such a protracted

period, then under the law, they had allowed the opportunity to protest it's location to pass away. Haas, as the successor to a land owner who had acquiesced in the existing fence location for decades, had acquired only the rights that his predecessor still had at the time of conveyance, which did not include the right to deny the validity of a boundary that had been established by operation of law, and which had been fully observable to Haas at the time he had agreed to acquire his land. If he made his acquisition with the covert intention of subsequently insisting that the fence must be moved, rather than openly questioning it's validity as a boundary prior to his acquisition, the Court made it's disapproval of that idea quite clear to him.

The emphasis on reliance in this case is noteworthy, because it may appear, on the surface at least, to be in conflict with the ruling in the Deichert case, handed down by the Court just three years earlier. The Court had decided in the Deichert case that the grantee had no right to rely on boundaries pointed out to him by his grantor. Yet the Court had no problem, in this case, with the fact that Bursinger relied on the statement by his grantor that the fence was on the property line, even though Bursinger never made any effort to verify whether or not that statement was correct. In both cases, the grantee simply trusted his grantor and accepted the boundaries he was shown, without question. On closer examination however, the distinction between the cases becomes quite clear. In the Deichert case, no fences existed, the boundaries shown to Deichert were indefinite and approximate. Under those circumstances, the Court found that it was not prudent for a grantee to accept such boundaries, and ordering a survey would have been the appropriate thing to do, to clarify obviously uncertain boundaries. In this case however, a definite line, in the form of a fence, existed along the boundary in question, and Bursinger observed that it was already functioning as a boundary. Under those circumstances, since a grantee is under no obligation to order a survey, and Bursinger had no reason to suspect that the fence might be in the wrong location, he was not unjustified in trusting the statement regarding the boundary made his grantor, and his failure to order a survey did not represent imprudent behavior on his part. Moreover, since the fence provided actual physical notice to any and all adjoining owners that a line of division had been established and was being asserted, Bursinger was entitled to accept it, just as the adjoining owners had accepted it, and they all became bound by it,

upon passage of the statutory period. As can clearly be seen in the contrast between these cases, the presence or absence of a visible line, representing an established boundary, makes a major difference in whether or not a survey of the corresponding line of record will prove to be legally controlling. Once again in this case, the existing physical boundary evidence was sufficient to control the ownership and the outcome, rendering the survey ineffective to control the boundary location, even though it's accuracy was never disputed.

GREEN v GUSTAFSON (1992)

Here, we come to our last case on the statute of frauds, which is one that very well illustrates how the Court deals with attempts to abuse the statute, by using it in bad faith as a tool with which to accomplish the entrapment of innocent parties. Throughout the Court's history it has always consistently sought to protect and uphold conveyances, rather than declaring them void, whenever the totality of the evidence indicates that protection of innocent parties is appropriate and upholding a conveyance is necessary to do justice. In this case, we see the Court support a claim to an unpartitioned partial interest in land, clearly made in good faith, against an attack suggesting that the alleged conveyance should be set aside for failure to comply with the statute of frauds. In that regard, this case provides a good summary of the principles and lessons that can be gleaned from the earlier cases concerning the statute of frauds that we have reviewed. We have learned that no document, in the form of a deed, is required to prove ownership of land, since the Court is open to accepting any kind of evidence, written or otherwise, regardless of it's form, that serves as evidence of the true intentions of the parties to an alleged conveyance. As a corollary, it can be seen that a deed is not conclusive evidence of ownership of land, in any case where it's validity is subject to question. An old deed that was originally valid can become invalid due to the operation of law, and likewise, a new deed appearing to be valid may never have had any value or effect to begin with, if it represents an attempt to convey land or rights that have previously been conveyed or otherwise lost. Surveyors often tend to

put considerable faith in deeds, as an indication of who owns certain land and who holds particular land rights, and we feel safe in doing so, since most deeds are valid, so such assumptions will usually not result in any liability or other problems. Yet it's important to recognize that deeds cannot always be trusted and relied upon as a definite indication of ownership, when claims to the land made in good faith by others are present, and particularly when physical circumstances observed by the surveyor indicate that conflicting rights may exist. The statute of frauds cases inform us that the prudent surveyor should respect all evidence encountered, that might be an indication of a boundary location, ownership by others, or other land rights, rather than proceeding as if deeds represent the only evidence that can control land rights. In addition, this case demonstrates that appealing a generally or partially favorable lower court decision can be dangerous, as Green's decision to appeal here, even though he was initially victorious at least in part, in order to try to get everything that he was after, ends up serving only to provide the Supreme Court with the opportunity to strip him of his initial victory.

1947 - Green's grandfather, who had two sons, decided to acquire a tract, having an unspecified size and shape, which contained a house. Green's father, uncle and grandfather each acquired one third of the tract, which was never physically partitioned between them.

1963 - Green's uncle died, so his one third of the tract passed into the ownership of his children, who were Green's cousins.

1972 - Green's grandfather died, having willed his one third of the tract to his surviving son, who was Green's father. Heigaard became the executor of this estate.

1975 - Green's father died intestate, leaving Green as his sole heir. Heigaard put the tract up for sale and Gustafson agreed to buy it. Gustafson gave Heigaard a check, as a partial payment on the tract, and immediately moved into the house, which was very rundown, and began rehabilitating it. Heigaard did not cash the check, he held onto it, pending the legal settlement of the two estates. This check was the only written evidence of the conveyance agreement between Heigaard and Gustafson.

1980 - The estate of Green's father was settled, passing his one third

of the tract to Green. The estate of Green's grandfather however, remained unsettled. Heigaard filed a quiet title action against Green's cousins, and he prevailed in that action, so the cousins lost their rights to the tract, and ownership of two thirds of the tract was quieted in the estate of Green's grandfather. Gustafson was not involved in this action however, so this ruling had no effect on Gustafson's rights.

1986 - Gustafson was informed by the county that no taxes had been paid on the tract for several years and the property was subject to loss for that reason. Gustafson paid the back taxes and paid all taxes on the tract thereafter as well.

1987 - Green informed Heigaard that he had decided to keep the tract for himself, so he did not want Heigaard to complete the conveyance of the tract to Gustafson. Heigaard then finally settled the estate of Green's grandfather, by issuing a deed conveying the tract to Green.

1988 - Heigaard returned the uncashed check that Gustafson had given him 13 years before to Gustafson, informing Gustafson that the sale of the tract was off, and Green filed an action against Gustafson, seeking to quiet his title to the tract and have Gustafson evicted.

Green argued that he had never agreed to convey the tract to Gustafson and he was therefore under no legal obligation to do so. He also argued that the statute of frauds prevented Gustafson from successfully claiming ownership of the tract. In addition, he insisted that Gustafson should have to pay him rent for all the years that Gustafson had occupied the tract. Gustafson argued that he had performed his part of the transaction with Heigaard and had therefore become the owner of the tract, even though he had no deed. The trial court determined that Green was entitled to the entire tract, but in order to quiet his title, he must pay Gustafson for the improvements that Gustafson had made in good faith to the house, which was a substantial sum. Both parties were unsatisfied with this outcome, Green appealed, claiming that Gustafson had not acted in good faith, so Green should not have to pay Gustafson anything, and Gustafson also appealed, still maintaining that he had legitimately acquired the tract.

Putting the debate over the money aside, the Court went straight to the most fundamental issue that was in play, which was whether or not the

attempted acquisition by Gustafson was legitimate, in order to determine what rights to the land, if any, Gustafson had acquired. First, the Court found that Heigaard did, in performing his legal role as an executor, have the authority to convey the rights to the tract that had been placed under his control. The answer to that question however, only lead to the question of whether or not the conveyance by Heigaard was void, because he had attempted to convey the entire tract, when in fact he did not have full legal control over the entire tract. Citing several earlier cases, including a United States Supreme Court case, the Court determined that the conveyance was not completely void, merely because Heigaard was unable to deliver all of the rights to the tract to Gustafson, as Heigaard had intended. In such a case, the Court stated, the grantee simply gets whatever the grantor can legally deliver, and the grantee then has the right to pursue a remedy, in the form of damages, against the grantor for his failure to deliver ownership of the entirety of the subject property. Interestingly, in so ruling, the Court noted that although a statute tending to indicate the contrary existed, the statute formed no obstacle to the Court's ruling, because statutes addressing legal principles found within the body of common law, are merely restatements of the common law, which were written with no intention of altering the existing common law. The emphasis placed on this point by the Court provides significant insight into the manner in which the Court views many of the statutes relating to land rights and interprets their meaning.

Having established that it was possible for Gustafson to have acquired rights to the tract, without any involvement or agreement by Green, the Court next disposed of Green's claim that the statute of frauds barred Gustafson's claim. Citing a number of previous cases in which alleged conveyance agreements were presented for consideration, the Court decided that the occupation and improvement of the tract by Gustafson was ample performance, on his part, to supply evidence that an agreement had been made, which was intended by both parties, Heigaard and Gustafson, to be permanent and binding. The Court reiterated the following relevant passages from earlier cases:

> “The general rule is that contracts for the sale of real property and transfers of real property interests must be made by an instrument in writing. However, part performance of an oral

> contract which is consistent only with the existence of the alleged contract removes it from the statute of frauds .... partial payment together with other acts such as possession or the making of valuable improvements may be sufficient to take the contract out of the statute of frauds .... part payment of the purchase price and substantial improvements to the property may remove an oral contract from the statute of frauds and create an enforceable contract."

Its especially important to note that in taking this position, with respect to the intended effect of the statute of frauds, the Court repeatedly emphasizes that an oral agreement is a contract, which is no less entitled to be enforced than a written contract, provided there is definite evidence proving that the agreement existed in the first place, in the form of actions taken in reliance upon the agreement. The mere fact that an agreement was oral, rather than written, does not mean that it can be ignored and need not be enforced, the existence of clear evidence supporting the existence of the agreement is the key to the outcome, in cases involving agreements of this nature. The Court has long adhered to this position, as we have seen, and consistently applied it to do justice, in those cases where one party seeks to employ the statute of frauds as a weapon of injustice. Green had stood by and watched Gustafson steadily improve the subject property for over a decade, greatly increasing it's value, before attempting to snatch the tract for himself. The Court, here once again, exercised the equitable tool of performance as a way to prevent an innocent party from being victimized by a rigid and unintended application of statute law. The agreement between Heigaard and Gustafson was valid and remained binding, the Court concluded, even though Heigaard had subsequently conveyed the tract to Green. Citing the Clapp case of 1903, which we reviewed early on, as the foundation of the principle of equitable conversion, the Court determined that Green had acquired only the bare legal title to the tract, and he was bound to convey the two thirds that he had acquired from Heigaard to Gustafson, carrying out the agreement that Heigaard had failed to complete. This decision rendered the debate over compensation for rent moot, and left only the question of what should become of the rights to the remaining one third of the tract, still held by Green.

Having reversed the ruling of the trial court, and ruled that Gustafson could not be evicted from the subject property, the Court was confronted with the prospect that this ruling would very likely lead to another legal battle, should the parties attempt to partition the tract, in order to allow Green to take possession of his one third. Since Green absolutely refused to sell his one third interest to Gustafson, it appeared inevitable that Green would demand that one third of the tract should be physically split off, into a separate parcel under his ownership, which was a demand that he had the legal right to make. Envisioning the issues that would arise from this decision by Green, particularly regarding who would get the portion of the tract containing the house, the Court saw fit to attempt to nip any further controversy in the bud, by providing guidance on this anticipated partitioning of the land. The Court thus directed that in partitioning the tract, the interest of Gustafson, including the improvements he had made, must be protected, and if it should be found absolutely necessary to include any of the improvements made by Gustafson in the portion of the tract to be granted to Green, compensation from Green to Gustafson for such loss would be necessary, all in keeping with the established principles of equity that have long been observed and honored by the Court with respect to the rights of cotenants of land.

AMES v ROSE TOWNSHIP BOARD OF SUPERVISORS (1993)

Here, we conclude our study of the development of the law in relation to the section line right-of-way, with the case that finally completed the process of defining the limits of it's use and the rights of the owners of the underlying land. Interestingly, another case that was decided after the period of legislative focus during the 1970s on the section line right-of-way, which we have already reviewed, is also worthy of note at this point, although it was not a land rights case. In the 1982 case of De Lair v La Moure County, one question was whether or not the county bore any liability for injuries suffered by De Lair when he drove his motorcycle into a gate across a roadway running along a section line. The crash took place on a section line that marked the city limits of Marion. Because those portions of the original

section line right-of-way lying within any incorporated city, town or village had been legally vacated by legislative action since 1899, the Court ruled that the section line in question did not represent a public right-of-way, so the county had no liability for the accident. In so ruling, the Court also stated that townships and counties bear only the burden of legally recognizing and enforcing the existence of the public right-of-way along section lines that are within their jurisdiction, and in addition, the townships and counties have no responsibility to build new roadways, or improve existing roadways, on any section line. Then in 1987, another amendment to the relevant statute, 24-07-03, effectively accomplished the additional legal vacation of any section line right-of-way lying within any existing platted townsites, additions, or subdivisions, that had already been recorded at that time, basically limiting the section line right-of-way to the remaining rural areas. In 1991 however, Attorney General Spaeth indicated his opinion that plats created after 1987 should recognize and depict the existence of any section line right-of-way lying within the platted area, since the 1987 amendment was not intended to allow the mere creation of future plats to automatically extinguish any portions of the section line right-of-way that were still in existence at the time of that amendment. So it was in the light of those legal developments that the Court took the opportunity presented by the case we are about to review, to strike what it saw as an equitable balance, between the rights of the public to travel all rural section lines, and the rights of private land owners to make such use of certain portions of the section line right-of-way, as could be deemed reasonably necessary to the legitimate use of their land.

> Prior to 1993 - Ames acquired some tracts of farmland, that were separated from each other by lands of others, so in order to farm all of his land, he needed to move his farming equipment along certain section line roads that ran between his tracts. The section line roads that he intended to use were evidently already in existence, so there was no need to perform any road construction work. Ackerman owned some of the land lying between the tracts owned by Ames, and in at least one location, Ackerman maintained a fence crossing a section line that blocked a section line road which Ames wanted to use. Ames asked Rose Township to require Ackerman to clear the section line in question and make it available for his use. Rose

Township issued the requested order and Ackerman removed the fence. Ackerman then filed a written request with Rose Township for permission to erect cattle guards and livestock gateways in the section line right-of-way in question, Rose Township granted his request, and Ackerman built cattle guards and gateways across the section line right-of-way in three locations on his land. The cattle guards were 12 feet wide and the gateways were 24 feet wide, which were the dimensions that Ackerman had listed in his application for permission, and these dimensions had been approved by the township. When Ames attempted to drive down this section line roadway with his farming equipment, he discovered that the cattle guards were not wide enough to allow his machinery to pass. He also discovered that even the larger openings provided by the livestock gateways were not wide enough for some of his machinery to get through, so he filed an action against both Ackerman and the township, demanding that the township require Ackerman to make his cattle guards and gateways wide enough for Ames to drive all of his machinery through them.

Ames argued that he was entitled to drive his large vehicles along the section line roads without obstruction, so he had the right to demand that the entire portion of the section line right-of-way required by the width of his vehicles must be kept clear of obstructions. He argued that no size limits for cattle guards or gateways had ever been legally established, and the law required the entire public right-of-way to be unobstructed if necessary, so Ackerman's cattle guards and gateways must be rebuilt and made wide enough to allow the widest existing vehicles to pass, or they must be completely removed. Ackerman argued that the cattle guards and gateways he had built were of typical size, did not impede normal public travel, and had been fully approved by the township, therefore they were legally sufficient and he should not be required to rebuild or remove them. Rose Township argued that these cattle guards and gateways had been approved because they were adequate to allow normal public use of the section line road in question, and the law did not require that cattle guards and gateways must be wide enough to allow unobstructed passage by oversized vehicles. The trial court decided that Ackerman had fully complied with the requirements of the law, and the township had properly exercised it's

judgment and authority in approving Ackerman's work, so the cattle guards and gateways were in full compliance with the law and need not be altered, and Ames would have to transport his machinery in some way that did no damage to the cattle guards or gateways.

In this case, the Court was once again confronted with a controversy resulting from an attempt to make modern use of a section line right-of-way, in a manner that had not been originally anticipated, when the section line right-of-way concept had been first put into effect well over a century before, and had not been specifically addressed in any subsequent legislation. Modern technology, once again, had created an opportunity that was not originally envisioned and had never yet been legally dealt with in detail, resulting in the present conflict over the meaning and interpretation of the law, as it stood at this point in time. The factual situation was very clear and there was no dispute at all over what had taken place, the only dispute was over whether or not what had been done was within the law. Therefore, the task for the Court was to interpret the existing language of the law, with the goal of determining the spirit of the law, as it currently stood, which required examination and analysis of the development of the law up to the time of the case. The originally intended purpose of the section line right-of-way, as a legal concept, created by a federal grant in 1866 and adopted and applied to section lines in the Dakota Territory in 1871, the Court stated, was to create a basic right of public passage, and that basic right of free passage had always been diligently protected. In 1977 however, in response to controversies similar to this one, that had developed over modern uses and conditions involving various portions of the section line right-of-way, particularly those adjudicated in the Small and Saetz cases in the 1970s, legislative action had been taken, and the applicable statutes had been revised, to update and adapt the law to accommodate those modern uses and conditions. The Court observed that the motivation behind the 1977 statutory revisions was the desire to strike a reasonable balance between the right of land owners to control and use their land, and the right of the public to have access to land, and that achieving such a balance was a worthy and important goal, being necessary to the development of a functional modern society. In fact, the legislation in question had followed the guidance provided by the Court in the Small and Saetz cases, previously discussed herein, mandating that public travel along section lines cannot be

impeded or obstructed in any material way, and that county and township officials cannot legally neglect their duty to enforce the right of the public to freely travel any section line right-of-way.

The Court agreed with Ames that no definite standards for the size or width of cattle guards had ever been legally established, but the Court found that no such standards were absolutely necessary. In such instances, where particular details are found to be absent from general statutory language, the goal of the Court is typically to support, uphold and clarify the intent of the legislation, provided that the language of the legislation can be interpreted in a manner that produces a reasonable result, and is not perverse or obnoxious in some way to the Court's sense of justice. In this case, the Court was perfectly satisfied that the statutory amendment concerning cattle guards was adequate in all respects, and had served to accomplish it's basic goal of permitting the construction of cattle guards where necessary or appropriate. The fact that the law was silent regarding the width of a typical or standard cattle guard, in the eyes of the Court, was insignificant, because like all other such laws, this law carried with it the implication that it must be applied in a reasonable manner. The Court took notice of the fact that the law requires a maximum vehicle width of 8.5 feet, for vehicles intended for use on public roads, so obviously vehicles of that size must be able to safely use cattle guards, under a reasonable interpretation of the law. Since Ackerman's cattle guards were 12 feet wide, which testimony indicated was the width that had been typically used when building cattle guards on one lane roads in the area in question, the Court determined that they were legally acceptable and could not be deemed to be unreasonably restrictive. Ames pointed out that the law relating to vehicle width expressly exempted his vehicles from the width restrictions, describing them as "implements of husbandry", therefore they were not illegally or excessively wide, urging the Court to declare that cattle guards must be wide enough to allow even the widest legal vehicles to pass. But the Court, seeing that the law already provided for protection of the basic public right of passage, was unwilling to extend it as suggested by Ames. Although the vehicles operated by Ames were not illegal, and they were allowed to use public roads, they were allowed to do so only as an exception to the law, and they were therefore not entitled to the same absolute right of unimpeded passage that applied to normal vehicles.

The argument presented by Ames was fundamentally based on the concept that whenever necessary, the entire width of any right-of-way must be made and kept entirely unobstructed. This concept is definitely not absolute in it's application however, as Ames learned in this case, being governed by the larger legal principle requiring that all uses of any right-of-way must be reasonable, and no unreasonable uses can be justified. In other words, the mere fact that a given right-of-way has a stated width, does not mean that every foot of that right-of-way must be treated as having been automatically and conclusively devoted to the appointed use. Just as it had done in the Otter Tail case of 1942, and a number of subsequent cases, the Court here again strongly upheld the rights of the servient property owner to make reasonable use of that portion of the right-of-way lying outside the actual roadbed. The law, as it stood in 1993, had already taken the value and significance of the full 66 foot section line right-of-way width into consideration, the Court acknowledged, by mandating livestock gateways along with cattle guards in 1977, to insure that both livestock and farm equipment could use and travel the public right-of-way, alongside those passing through it in typical motor vehicles on the actual roadway, without either activity being unduly impeded or blocked by the other. This, the Court ruled, was a legally satisfactory state of affairs, not requiring additional input from the Court, so the Court declined to mandate any specific width for livestock gateways. Having so ruled, the Court fully upheld the decision of the lower court, agreeing that Ackerman's construction was in full compliance with the law, Rose Township was justified in approving it, and that if Ames needed or desired to cross Ackerman's land on the section line roadway in question with his machinery, he was legally required to haul it on a flatbed truck, elevated above Ackerman's fences, or dismantle it if necessary, to avoid damaging Ackerman's cattle guards, gateways or fences in any way. At this point, the modernization of the law relating to the public section line right-of-way in North Dakota was substantially complete, so here we end our review of it, although we will revisit this concept once more, in the context of it's relation to a prescriptive easement claim.

NORTH SHORE v WAKEFIELD (1995)

In the three decades that passed between this case and the riparian cases of the 1960s that we have reviewed, a few precedent setting decisions involving rivers were handed down. In 1978, in Amoco v State, the Court formally adopted the rule that the horizontal center, also known as the thread, of any non-navigable stream must always be presumed to represent the boundary of any land described with reference to such a stream, rather than the thalweg, or deepest portion of the stream, which is often materially offset from the center, following the United States Supreme Court, and the ownership of each bank of the stream extends to the center thereof, pursuant to statute 47-01-15. In 1992, a long legal battle waged by North Dakota, over the ownership of the bed of the Little Missouri River, ended in failure in federal court, when the Eighth Circuit Court of Appeals ruled that the river was non-navigable, under federal law pertaining to navigability, and therefore the bed had never been granted to North Dakota by the United States, marking the conclusion of a struggle over that river that had continued for well over a decade, rising all the way to the US Supreme Court in 1982, and which had been instrumental in the 1986 revision of the Quiet Title Act. In 1994, in State v Mills, the Court announced it's adoption of a new position regarding rights to the beds of navigable streams. In that case, the Court decided to modify and clarify the many previous rulings in which it had stated simply that upland ownership extends to the ordinary low watermark, by declaring that the rights of the state, as the owner of the bed of any navigable stream, extend to the ordinary high watermark. The Court arrived at this conclusion based on the fact that North Dakota law on this issue has it's basis in New York law, noting that Minnesota and South Dakota had also taken this same position, following an 1853 New York ruling. The area between the ordinary high and low watermarks on navigable streams in North Dakota is therefore now an area of overlapping rights, termed the "shore zone" by the Court, in which both the state and the upland owner hold rights that are coexistent, which must be mutually respected. The Mills case eventually returned to the Court in 1999, and at that time he Court further ruled, following decisions from California, Florida and Iowa, that the boundaries of a navigable stream are ambulatory and are constantly subject to change, potentially even from certain artificial causes, as well as natural causes. The case we are about to review deals with

riparian issues that are important to land surveyors in the context of a lake, the interpretation of riparian deeds and the division of lake frontage, on the infamously fickle Devils Lake.

1975 - Walford owned a large tract of land, including portions of Sections 14 & 23, lying along the northwest shore of Devils Lake. Walford created three subdivisions in this area and began conveying lakefront lots. One of these platted lakefront lots, lying in Section 23, was purchased by Schafer.

1978 - Walford died.

1981 - Walford's heirs conveyed his remaining unsubdivided land, which was north of Schafer's lot, and which also extended to the lake, to North Shore. The tract acquired by North Shore was described as being bounded on the south by the south line of Section 14. A strip of land, about 40 feet wide, also extending to the lake, remained between the north boundary of Schafer's lot, in Section 23, and the south boundary of the tract acquired by North Shore.

1982 - Walford's heirs conveyed the 40 foot strip to Kostecki. The 40 foot strip served to connect another tract acquired by Kostecki, lying to the west, with the lake. However, the description in the deed to Kostecki described the strip using metes and bounds, which ran to the meander line, and the deed specifically called for the meander line as the east boundary of the strip. The meander line had been established nearly a century earlier, at a time when the water level of the lake was quite a bit higher. The meander line was therefore several hundred feet west of the current lakeshore. Just two weeks after making the acquisition from Walford's heirs, Kostecki conveyed a portion of his land to Wakefield, including the 40 foot strip. The description of the strip in Wakefield's deed was identical to that which appeared in Kostecki's deed.

1983 to 1995 - During this time period North Shore began planning and building a lakefront subdivision on it's tract. In an effort to maximize the amount of lake frontage available for use in creating this development, North Shore obtained quitclaim deeds from Kostecki and from Walford's heirs. These deeds described the area between the meander line and the current edge of the lake in Section

> 23, which was several hundred feet east of the meander line. North Shore then began bulldozing that area, piling up dirt, rocks and debris between the lake and Schafer's home, impairing his view of the lake, and obstructing access to the lake by both Schafer and Wakefield. When objections to this activity arose, North Shore filed an action to quiet it's title to the portion of Section 23 covered by the quitclaim deeds.

North Shore argued that no portion of the area between the meander line and the current lakeshore was ever conveyed to either Wakefield or Schafer, and North Shore had acquired it, by means of the quitclaim deeds, and North Shore was therefore entitled to use the area however it saw fit to use it. Wakefield and Schafer argued that they had each acquired portions of the same area claimed by North Shore, and their properties ran all the way to the lake itself, not just to the meander line, so North Shore was liable for the damage that it had done to their land. The trial court agreed with Wakefield and Schafer, quieting title in them and awarding them damages against North Shore as well. In addition, the trial court established the extended boundaries of the parties, between the meander line and the lake, by means of proportional lake frontage.

The first issue to be addressed by the Court was the obvious question of whether or not either Schafer or Wakefield owned any land east of the meander line. If neither of them owned any land east of the meander line, then North Shore had done nothing wrong, and was justified in cutting them off from the lake. It was already well settled law of course, that Devils Lake was a navigable body of water, and that where the shoreline of any navigable body of water gradually moves away from a given tract of land, which was intended to be bounded by the water and to remain bounded by the water, the tract expands to include the land created or exposed by accretion or reliction. The fact that the lake level had changed gradually was also well established, so the only way Schafer could be cut off from the water, since his land was described as a platted lot, was if the plat indicated an intention to reserve a strip between the lakefront lots and the water. Citing the Royse case, one of the Court's most powerful decisions ever concerning the meaning and intent of descriptions, as we have seen, the Court reiterated that the burden is always on the grantor to definitively

reserve any rights he does not intend to convey. In the absence of such an explicit reservation, the grantee gets all that his deed can reasonably be understood to convey. Under that rule, since there was no indication on the plat or elsewhere that Schafer's lot was not intended to extend to the water, he was entitled to a share of the reliction and could not be cut off from the water, however far the shoreline might recede.

The language of Wakefield's deed, however, was a great deal more problematic than that of Schafer's deed. Not only did the description in the deed to Wakefield not make reference to any plat, it began at the meander corner on the section line, ran south down the meander line, and then ran inland, through a number of bearings and distances, before eventually returning to close upon the meander corner. Deeds written in this manner have been held, in some other states, to convert the meander line into an absolute boundary, and to convey nothing waterward of the meander line, regardless of the proximity of the meander line to the water. The Court however, was not inclined to follow such a premise. Having never before ruled that a meander line had become an absolute boundary, and having many times correctly stated exactly the contrary, the Court chose to stay the course, with respect to meander lines, and held that even this description form was insufficient to express a clear intention to prevent access to the water. This decision was also fully consistent with the widely recognized principle that a grantor will never be presumed to have intended to reserve an isolated pocket of land, to which he has no access, and for which he has no practical use, once he has conveyed the adjoining portion of his land. To make such an unusual and otherwise inexplicable reservation effective, the grantor must clearly spell it out, so as to leave nothing ambiguous or speculative about his intentions. Failing to do so, the grantor is deemed to have intended any such area to pass to his grantee, and to have merely neglected to fully or properly describe it. As a result, the Court decided that the deed to Kostecki had conveyed the 40 foot strip all the way to the water, and Wakefield had acquired the identical strip from Kostecki, because no intent to sever the relicted land from the land above the meander line had ever been directly and affirmatively expressed. This decision provides particularly important insight for land surveyors, showing how little significance the Court places upon bearings, distances and measurements in general. The Court makes it's decisions based on evidence relating to intent,

and here we see once again that measurements neither express intent, nor overcome it, in the eyes of the Court. The quitclaim deeds to North Shore were worthless, since the land had already been conveyed to Wakefield and Schafer.

All that remained was to determine the share of the land east of the meander line to which each of the parties was entitled. The Court observed that the proportional frontage method, employed by the trial court, appeared to be quite suitable in this particular instance, and adopted it as the best means of resolving the controversy. To arrive at this solution, the trial court had projected the boundary lines of each party, as platted or otherwise described, to the actual location of the water line at the time of the original survey, in 1883, which was materially waterward of the meander line, since evidence of the location of that original natural boundary was available in this case, due to the fact that the fluctuations in Devils Lake have been very well documented historically. Then, from the true original boundary thus established, the lines dividing the subsequent reliction each run to points established in a proportional manner along the shoreline, as it existed at the time of the trial. Interestingly, and somewhat ironically, under this solution, North Shore actually ended up getting a portion of Section 23, which was part of the same area that it had sought to gain by means of the quitclaim deeds. Even though the tract owned by North Shore was described as being entirely within Section 14, as previously noted, the Court ruled that this did not prevent North Shore from gaining a share of the relicted area that was outside Section 14, because the section line did not constitute an obstacle to the use of the proportional frontage method of dividing accreted or relicted land. Nevertheless, this was a very hollow victory for North Shore, since the Court fully upheld the ruling of the lower court, including the substantial damages awarded to Wakefield and Schafer for the reckless action that North Shore had taken, amounting to trespassing and encroachment, in bulldozing large portions of their property. Here we have yet another lesson, if one is still needed at this point, demonstrating that such precipitous acts, where land rights are involved, seldom prove to have had any basis in wisdom.

FEARS v YJ LAND (1995)

This prescriptive easement case presents another instance in which the evidence provided is so substantially incomplete that no final conclusion regarding the existence of the actual easement being claimed can be reached, and in fact there is not even enough evidence upon which to form any valid opinion at all about the validity of the easement itself. Yet, this case represents a fine example of an essential aspect of the operation of our judicial system, and very clearly illustrates the importance of the superior knowledge and understanding of the law that is supplied by the Court, to protect land rights when injustice is done at the lower levels of the judicial system, as quite often occurs when poorly understood legal principles relating to land rights are in play. At the lowest levels of our judicial system, results are often highly inconsistent in land rights cases, due primarily to the presence of judges who have inadequate experience dealing with land rights and can therefore be swayed by clever legal tactics. In addition, some lower court decisions may even be arbitrary and capricious, where local clout and influence are present, but our system is aware of this, and is specifically designed to rectify any such errors. To that end, the Court takes up those opportunities for correction that arise, and uses them to provide guidance to all, on the true operation of the principles of law relating to land rights. In this case, the reason that the vital evidence is absent is because the trial judge was convinced that a certain legal concept, relating to tax foreclosure, made it impossible for the plaintiff to prevail, and therefore ruled that there was no need for any evidence to be considered, so the absence of the necessary evidence is through no fault of the plaintiff or his legal team, it simply resulted from a typical miscarriage of justice. But the Court, as we shall see, here steps up as usual to correct this fundamentally mistaken application of the law, requiring the evidence and the issues to be fully heard and properly tried. Though land surveyors are obviously not required or expected to become experts on the law, and have no need to understand every detail of the law, it is clearly beneficial to surveyors, their clients, and other land owners, for surveyors to understand at least enough about the law to avoid arriving at mistaken conclusions, as the trial judge did here, about the basic land rights issues and conflicts that they routinely encounter and observe in the course of normal survey work. While the surveyor of course

has no authority to make or announce any binding legal conclusions, all parties benefit when the surveyor is well informed and educated enough to recognize and document the presence of possible legal issues, while remaining objective and not making any potentially misleading statements regarding the rights of the parties based on personal opinion or bias, with respect to either the boundaries of their ownership or the extent of their easement rights, that may tend to encourage them to engage in litigation.

1926 - McLean County acquired a tract of unknown size and description, lying on the east bank of the Missouri River, by means of tax foreclosure.

1927 to 1937 - McLean County conveyed the tract, in the form of several small parcels, to Riedlinger.

1946 - Riedlinger conveyed the entire tract to Hoyer.

1980 - A tax deed covering the tract was issued to McLean County, based on taxes that had been overdue since the 1950s. McLean County then conveyed the tract to Sims, who was Hoyer's daughter. The deed to Sims stated that the tract was being conveyed to her with "appurtenances thereto belonging". There was no indication that Sims or any of the previous owners ever lived on the tract, and no evidence that it had ever been used by anyone, so it may have remained vacant land.

1993 - Sims conveyed the tract to Fears. At an unspecified point in time, another tract of unspecified size, adjoining the Fears tract on the north, was acquired by YJ Land. There is no indication that the tract acquired by YJ had ever been physically occupied either, and it may have been vacant land as well, but an old road, of unknown origin, ran across this tract, connecting the Fears tract to a public highway. Whether or not the Fears tract had any other means of access to a public roadway of any kind is unknown. Although these two tracts may have remained unimproved, there was evidence that the old road had been historically used by the public, presumably for the purpose of accessing the river. YJ evidently intended to enclose or develop the northerly tract and Fears either learned or suspected that the existing access route to his land might be obliterated or become unavailable as a result. In an effort to prevent this possible elimination or blockage

of the road, Fears filed an action against YJ, claiming that the road had become a public right-of-way by means of prescription.

Fears argued that the road had been used by the public to such an extent that it should be recognized as a prescriptive public right-of-way. He appears to have been less than completely confident in this argument however, and to have realized that it could fail, because he also argued that if the road was not public, he had acquired a private prescriptive access easement over the road, by virtue of the use that had been made of the road by his predecessors. YJ Land argued that the 1980 tax foreclosure and sale of the Fears tract had legally terminated any prescriptive right-of-way or easement that may have come into existence by means of any use prior to 1980, so neither Fears nor the public had any legitimate basis upon which to claim any right to use the road. The trial court agreed with YJ that the tax proceedings in 1980 had destroyed any existing prescriptive access rights associated with the Fears tract that may have existed at that time, and therefore refused to give Fears the opportunity to present his case, since whatever evidence he might present pertaining to the use of the road would be irrelevant, so YJ had the right to exert complete control over the fate of the road.

Since Fears was not allowed to present any evidence, to support his assertion that a prescriptive right-of-way had been created over the years by actual use of the road, either by the previous owners of his land or by the general public, it's impossible to assess the substance or potential validity of that evidence, so there is no way of telling how weak or strong his claim concerning the road may actually have been. The trial court deemed it unnecessary to hear his evidence and pass judgment on it, because in the opinion of that court, it made no difference who had used the road, or how often they had used it, or how long they had used it. The trial judge had essentially decided that there was simply no merit in the assertion made by Fears, that an easement existed at the present time, so nothing would be accomplished by listening to his allegations or his proof, regarding the use of the road. At best, the trial judge had concluded, Fears might be able to prove that the road had been used in a genuinely adverse manner for twenty years or more, resulting in the creation of a prescriptive easement. But even if he were able to present such proof, he still could not prevail, because no

rights created at any earlier time could have survived the tax foreclosure proceedings that took place in 1980. YJ had convinced the trial judge that the law stipulated that tax proceedings eliminate all easements attached to the property involved in the tax foreclosure. Having adopted the position put forth by YJ, the trial judge saw that it would be impossible to find that an easement existed, as suggested by Fears, because all of the use of the road before 1980 was irrelevant, and twenty years had not passed since 1980, so no use of the road after 1980 could be of any help to Fears either. In other words, because YJ had shown, in the opinion of the trial judge, that it was legally impossible for Fears to present a successful argument, there was no need to conduct a trial at all, and the judge was therefore entitled to dismiss the case without ever taking any evidence into account. This legal procedure, known as summary judgment, was created to save time and allow courts to work through cases more efficiently.

In this case however, the Court had a problem with the use of the summary judgment procedure. The summary judgment could only stand if the legal premise put forth by YJ, and accepted as correct by the trial court, was in fact a correct statement of the law. If the basis for the summary judgment was faulty, then Fears had been illegally deprived of his opportunity to present a potentially valid and successful case, and a full trial must be held, in order to allow him that opportunity. The legal proposition set forth by YJ was therefore the sole focus of the Court's scrutiny in this case. The basis for the proposition presented by YJ, that a tax deed eliminates all easements related to any tract or parcel that was sold for delinquent taxes, was the case of Conlin v Metzger, which was decided by the Court in 1950. In that case, Conlin and Metzger owned adjoining lots, and Metzger claimed that he had a prescriptive access easement over Conlin's lots. Conlin filed an action to clear his title, which he had acquired by tax deed in 1945. The taxes on the lots acquired by Conlin had gone unpaid from 1909 to 1931, and the county had taken control of those lots in 1938. Metzger claimed that his twenty year period of prescriptive use of a portion of those lots was completed by 1938, so he had established an access easement over those lots during the period of time when no taxes were being paid on those lots. The Court denied his claim, even though he had used the access route in question adversely for over twenty years, on the basis that by means of the tax foreclosure in 1938, the county had acquired

the lots as they stood in 1909, when the taxes first became delinquent. Therefore, the lots acquired by the county in 1938 were unburdened by any easement, just as they had been in 1909, and the unburdened lots were then conveyed to Conlin in 1945, so he had acquired them free of any easements. The essence of this ruling by the Court was that no prescriptive easement can be established over lots that are subject to tax foreclosure, which is in accord with the general principle that a buyer of a tax deed takes the subject property free of any encumbrances, a principle that we have seen applied in previous cases. YJ had successfully convinced the trial judge that the argument made by Fears was essentially the same argument that had been made by Metzger, and since Metzger had lost, Fears must lose for the same reason. The Court however, would not let this clear injustice stand, and was about to correct the mistaken logic of both YJ and the trial judge.

The error in the reasoning behind the proposition made by YJ, and adopted by the trial court, stemmed from a fundamental misunderstanding of the nature of easement rights. Easements benefit land, and they also burden land, but these are two separate and distinct conditions. With respect to all appurtenant easements, the land burdened or encumbered by the easement or right-of-way is known as the servient estate, while the land obtaining the benefit of the easement or right-of-way is known as the dominant estate. The legal implications of the easement for these two estates is quite different in a number of important ways, and one of those differences relates to the impact of a tax foreclosure and sale on the land and the easement in question. The flaw in the position asserted by YJ was that it failed to distinguish between servient and dominant tracts or parcels of land. In the Conlin case, the land that was lost for failure to pay the taxes on it, was the servient estate, the land upon which the easement actually resided, the adjoining land owned by Metzger was the dominant estate, and it's tax status was not an issue in that case. Metzger's claim failed because Conlin had acquired the servient estate, after it had been swept clean of all burdens placed upon it since 1909, by virtue of the tax foreclosure and sale process, including the burden created by Metzger's adverse use of it. In the case at hand however, the exact opposite situation existed, because the land now owned by Fears, which had been the subject of the tax sale in 1980, was the dominant estate, not the servient estate, so in fact it was the land now owned by YJ that was the servient estate in this case, and unlike the estate acquired

by Conlin, the land acquired by YJ had never been cleansed of it's legal burdens by any tax sale. The tax proceedings in 1980, the Court stated, had no effect at all on the access rights related to the land acquired by Fears, because those rights were not a burden on that land, they were a benefit to it, so they passed to each successive owner of the land, just as any other appurtenant rights legally pass with every transfer of land. Therefore, the decision not to allow Fears to make his case was clearly a fatal error, although it was based on a principle that was legally correct, because that principle had been improperly applied to the situation at hand, as the result of a failure to properly understand how easements relate to the land. For that reason, the Court ruled that Fears had indeed been incorrectly and unjustifiably deprived of his right to prove, by the presentation of valid evidence of historic use, that the road in question did in fact represent either a prescriptive public right-of-way or a prescriptive private access easement, providing permanent legal access to his land. On that basis, the Court reversed the lower court's decision and remanded the case back to that court for a full trial of the matter, with the fate of the old road to be determined based on the presence or absence of merit in the evidence of historic use of the road, to be presented by Fears.

LUTZ v KRAUTER (1996)

As we have seen from numerous cases that we have previously reviewed, once any party becomes the owner of any tract, parcel or lot, that party takes on a high level of legal responsibility. During the time the owner uses or holds the land, the owner is legally presumed to know the boundaries of the area owned, and to have control over the use of that area. Therefore, when the time eventually comes to convey the land, and the owner becomes a grantor, the law expects the grantor to be familiar enough with the land to properly describe what is being conveyed, not only with respect to the boundaries, but also with respect to any appurtenances or encumbrances associated with the land, including not only those that have always existed, but also any that were created during the period of ownership. A grantee, on the other hand, is generally seen as being innocent under the law, due to the fact that the grantee is typically unfamiliar with the

land. The responsibility of the typical grantee is limited to observing and questioning matters that are visible and apparent to any reasonable person with their eyes open, and also any other matters that the grantee is expressly informed about. Land rights conflicts frequently have their origin in a breakdown of communication between a grantor and a grantee, and the resulting disputes require the Court to determine who bears the responsibility for the creation of the problem, and who must bear the consequences. In the Royse case of 1977, we saw a classic example of what can happen when a grantor fails to properly understand and describe rights that were created during his period of ownership, with the intention of being appurtenant or beneficial to the land owned by the grantor. In the case we are about to review, we will see essentially the other side of the same coin, as again the grantor fails to properly communicate his intentions, this time with respect to an encumbrance burdening the land, which he intended to create during his period of ownership. Here once again, the alleged existence of a private access easement is at the center of the controversy, and not surprisingly, the past failures of the grantor come back to haunt him. The surveyor cannot take on the responsibilities of either a grantor or a grantee of course, nor would the surveyor ever want to take on that degree of liability, and the decision making authority always remains solely with the parties themselves, but when the surveyor becomes involved, by being engaged to perform surveys or prepare descriptions for purposes of conveyance, an opportunity exists for the surveyor to assist the parties in effectively expressing their true intentions and thereby completing a proper conveyance. The surveyor can help preclude the possibility of subsequent problems of the type seen here, by thoughtfully observing and documenting the existing conditions, pointing out any possible issues that may appear, with respect to appurtenances or encumbrances, as well as boundaries, informing the parties of the potential gravity of failing to deal properly with any such issues at the time of conveyance, and obviously never participating in any schemes intended to hide, disguise or mischaracterize land rights of any kind in any way.

> 1977 - Lutz and his wife acquired Lots 1 & 2, which were located at the south end of the west half of a typical rectangular block of platted residential lots. These two lots fronted upon the street running along the west edge of the block and they ran back from that street for an

unspecified distance to the east. This block evidently contained no alley, so these two lots were bounded directly on the east by the lots lying in the east half of the block. Lutz built a house facing west on the easterly portion of Lots 1 & 2, with a driveway on the south side of the house, running directly west out to the street.

1978 - Lutz acquired the entire east half of the same block, which was evidently vacant or undeveloped, and he then split the east half into two parcels, one being the northerly portion of the east half, and the other being the southerly portion of the east half. The northerly portion of the block is not involved in this case, the southerly portion of the east half of the block would become the focus of the controversy. Lutz had acquired the east half of the block as an individual, without the participation of his wife.

1979 - The Lutzes decided to build a garage on the south side of their house, near the east boundary of Lots 1 & 2. The garage was built with doors on both the east and west sides, so it was possible to enter the garage either from the street lying to the west, or from the street lying to the east. The Lutzes also executed and recorded a document, as cotenants of Lots 1 & 2, in an effort to create "...a 14' easement .... for the purpose of dedication to Lots 1 & 2...". They believed that by virtue of this document they had created an access easement over the south 14 feet of the east half of the block, which had been acquired by Mr. Lutz as noted above. With this easement in place, they believed, they now had the right to use the described portion of the east half of the block, which was located directly east of their new garage, as a second driveway, so they could now legally exit the garage by driving in either direction, either to the west across the lots that they owned as cotenants, or to the east across the south 14 feet of the east half of the block, separately owned by Mr. Lutz.

1987 - The Lutzes quitclaimed the southerly portion of the east half of the block to the Schwindts. The Lutzes made no reservations of any kind in this conveyance and did not tell the Schwindts about the eastern driveway. How often the Lutzes had actually used the eastern driveway is not indicated, but their use of it was evidently infrequent, because no driveway was visible on the ground east of the garage at this time. The Schwindts, therefore, believed that they had acquired

this tract unencumbered by any easements.

1989 - The Schwindts, having made no use at all of the tract that they had acquired from Lutz, sold it to the Krauters. By means of a title search, the Krauters discovered the document executed by the Lutzes in 1979. The Krauters made this discovery before buying the tract, but they decided to go ahead and buy it anyway. They then built a house and fence on the tract. Being aware of the existence of the Lutzes eastern driveway, they built their fence along the north edge of the south 14 feet of their tract, so the Lutzes could continue to use their eastern driveway.

1994 - The Krauters decided that they wanted to expand their yard and start making use of the south 14 feet of their tract, so they extended their existing fence to enclose the 14 foot strip that the Lutzes had been using as their eastern driveway. The Lutzes filed an action against them, claiming that the Krauters were illegally blocking their access easement.

Lutz argued that a legal access easement had been created and recorded, by virtue of the easement dedication statement executed by both his wife and himself in 1979, which had provided complete legal notice of the existence of the right of the Lutzes to use the south 14 feet of the east half of the block in question for access purposes on a permanent basis. He also argued that this alleged easement had never been conveyed to anyone and had never been abandoned, so Lutz and his wife were still fully legally entitled to use the easement and the Krauters had no right to prevent them from using it. Krauter argued that no easement had been legally created in 1979, and the use that was made of the south 14 feet of his tract by the Lutzes, for access purposes for the previous five years, was made by means of his permission and courtesy only, therefore he claimed that he had the right to fence his entire tract and shut down the Lutzes eastern driveway. The trial court agreed with Krauter that no valid access easement had ever been created over the tract in question, so Lutz never had any easement and Krauter was free to fence his entire tract, as he had done.

Much like the Fears case, just previously reviewed, this case is also highly instructive with regard to the value of understanding and appreciating

the subtle, but very important, details relating to easements, in this case particularly with reference to the proper creation of an easement. What the Lutzes desired to accomplish is perfectly clear, and it most certainly could have been accomplished legally, but unfortunately for them, it's equally clear that they had no clue about how to properly create an easement, and they were evidently unaware of the dangers of attempting to create an easement without the assistance of a competent professional familiar with easement issues. The Court began by pointing out that it is axiomatic that an express easement, for any purpose, such as the one the Lutzes attempted to create in 1979, can only be created by a party holding an appropriate legal interest in the servient estate, which the easement is intended to burden, because no party can simply declare the creation of a legal burden upon the land of another, indicating that this basic rule is expressed in statute 47-05-05. For that reason alone, no easement could be created by Mr. and Mrs. Lutz, acting as the owners of Lots 1 & 2, as they had done, over any other tract of land. They had the legal authority to create an easement over any of their own land for the benefit of others of course, but they had no authority to simply declare, as owners of Lots 1 & 2, that they had become the holders of an easement over a separate tract of land adjoining those lots, which was what the document that they had recorded in 1979 specifically stated. In addition, the Court observed, statute 47-05-06 expresses another basic rule applicable to this situation, which is that no party can legally create an easement for their own benefit upon their own land, because the owner of the land already holds all the rights that such an easement would create, rendering the easement meaningless and without value. To the same end, the Court also noted, when a party acquires any land in fee, over which that party already holds an easement, the easement immediately legally vanishes, under the doctrine of merger, because at that moment all of the relevant rights have become merged in the ownership of the acquiring party, so the rights in question no longer have any reason or need to exist separately, in the form of an easement. Since both of the Lutzes had legal interests in all of the land in controversy in 1979, Mrs. Lutz having a spouse's interest in the land acquired independently by Mr. Lutz, all of these legal principles were in play, operating to negate the intended effect of the dedication statement executed by the Lutzes in 1979. The Lutzes had failed to legally create any access easement in 1979, although their true intent was clear, the Court determined, because the document that they had recorded was fatally

flawed in a number of respects and therefore could be given no legal effect.

Nevertheless, the easement claim made by the Lutzes was not yet fully vanquished, because as we have seen in previous cases, easements can be created by other means. The Lutzes were definitely in a disadvantageous position to make a successful claim that an easement in their favor had been created by means of legal implication, being the grantors, but they tried to do so, obligating the Court to address their argument. Citing the 1983 Roll case, which we have previously reviewed, the Court reiterated that creation of an implied easement requires that a use of part of the land, which is necessary or important to the value of another part of the land, and which is intended to be a permanently ongoing use, must have been visible and apparent at the time that the tracts or parcels involved were created by a division of the land, giving rise to the need for an easement to come into existence, to protect the ongoing use. Use of any kind can result in an implied easement, in the Roll case it was a sewer pipe, while in this case the claim related to an access route, but the applicable legal and conditional requirements nonetheless remain the same. The Lutzes, again demonstrating their lack of understanding of easement law, believed that because Krauter had discovered their recorded dedication statement, and therefore knew about the situation at the time he bought the tract in question, he was subject to an implied easement in their favor, regardless of whether or not their driveway across the tract that he was planning to purchase was visible on the ground. The Court pointed out however, that what Krauter knew or did not know was not the decisive factor, because the alleged easement was not created when Krauter acquired the tract. If an implied easement was created at all, it was created when Lutz conveyed the tract to the Schwindts, so the fate of the alleged easement hung not upon Krauter's knowledge, but upon what the Schwindts knew, or did not know, when they acquired the tract in question. Since the Schwindts were completely unaware that the eastern driveway was being used or claimed by the Lutzes, because it was not visible when they acquired the allegedly burdened tract, the Court found that they were innocent grantees without notice, who had acquired the tract unburdened, and no implied easement had been created. Therefore, the tract passed unencumbered from the Schwindts to the Krauters, and Krauter was legally entitled to conclude, as he had done at the time he acquired the tract, that the dedication statement recorded by the Lutzes was legally invalid and

worthless, for the reasons discussed above. Citing and quoting from California law, from which the applicable North Dakota laws had been derived, the Court spelled out it's view of the nature and purpose of implied easements as follows:

> “No easement exists, so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts; but the moment a severance occurs, by the sale of a part, the right of the owner to redistribute properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale .... The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts .... an easement by implication is necessarily an appurtenant easement."

In conclusion, again emphasizing the failure of the Lutzes to carry their fundamental burden as grantors, to enact a clear and complete document of conveyance, the Court ruled that because the Lutzes had chosen to use a quitclaim deed to make their conveyance to the Schwindts, the Lutzes had conveyed any and all rights relating to the tract in question, that they either held or may have held in 1987, to the Schwindts. In this case, the use of the quitclaim form of deed actually operated in favor of the grantee, rather than the grantor, so even if the Lutzes had successfully created an access easement over the tract in question prior to 1987, they had legally forsaken it at that time, by failing to except or reserve it from their conveyance to the Schwindts. Citing the Royse case of 1977, previously reviewed herein, the Court again served notice to all grantors that they need to clearly state exactly what, if anything, they intend to retain and not convey to their grantees, in the relevant document of conveyance. In the absence of any clear and definite exceptions or reservations, prominently itemized and properly described by a grantor in a deed, the grantor will be presumed to have intended to retain no rights to the land conveyed, and the grantee is entitled to act in reliance upon that presumption. Had the Lutzes

eastern driveway been clearly visible on the ground at the time the Schwindts acquired the tract in question, the Schwindts could have been charged with inquiry notice of it, but in the absence of any evidence that the Schwindts had any actual notice of the driveway's existence, or any opportunity to physically see it or observe it being used, the Court saw the balance of good faith as favoring the grantees, as opposed to the Lutzes. Having decided all of the issues contrary to the various assertions made by the Lutzes, the Court upheld the ruling of the lower court that the Lutzes had no valid claim to any easement over the land that had been acquired by the Krauters.

GRIFFETH v EID (1998)

As has been noted previously herein, buyers of land that is sold after having been involved in a tax foreclosure often inherit unknown problems. Some of those problems are less apparent than others, and can leave the tax purchaser in the position of an adverse possessor, as we have seen in previous cases, but sometimes the problems are reasonably apparent, and the tax purchaser simply chooses to ignore them, in the hope of getting a deep discount on the land, leaving any possible problems to be dealt with later. This case provides a perfect example of the latter situation, and access is once again the central issue here. A superficial glance at the law may lead one who is not experienced in dealing with land rights, to come to the conclusion that access to land is essentially automatic in North Dakota, since it is possible to obtain an access easement by means of a proper demonstration of necessity for such an easement. In addition, the spirit of the North Dakota statutes providing public access options and alternatives, such as the section line right-of-way, has always clearly favored the creation of opportunities for access, in order that otherwise unusable land may be put into productive use, not merely for the benefit of any particular party, but for the economic benefit and development of society in general. On the other hand however, just as every easement represents a benefit, it also represents a burden on the land of one or more servient parties, so the creation of easements is certainly not automatic, and is in fact treated as a very serious matter under the law. As we will see in the case we are about to

review, the Court is quite reluctant to burden any land with an easement without genuine justification, and the lack of understanding displayed by the easement claimant here, of the means by which access easements come into existence, leads inevitably to his downfall. In order to find success in an attempt to obtain an access easement by means of legal implication or necessity, there is a need to produce very clear and strong evidence of circumstances appropriate to the creation of such an easement. Before the Court will approve the imposition of such a burden on any land, the conditions must clearly support and justify the easement, and this typically means that the land to be burdened with the easement is the only logical location in which the easement can be created, due to the antecedent relationship between the dominant and servient properties. If a direct and appropriate relationship between the properties involved is not, or cannot, be shown, no easement will be created by means of legal implication or necessity. Here, the unfortunate easement claimant learns that failure to acquire and present the evidence required to properly carry that distinct burden of proof, invariably leads to defeat.

> 1993 - Eid owned a substantial amount of land, in the form of several tracts of unspecified size, some of which contained apartment buildings. For unknown reasons, Eid failed to pay any taxes on one particular tract, known as Auditor's Lot 7, which may have been undevelopable or may have been of no value to Eid for some other reason, so Cass County took control of Lot 7, which was evidently vacant or unimproved land.
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> 1994 - Griffeth purchased Lot 7 from Cass County at a tax sale. Lot 7 adjoined a city park and also adjoined two other tracts owned by Eid, which were known as Auditor's Lot 20 and Auditor's Lot 25. Lot 20 was evidently a strip, of unknown length and width, which contained a private road amounting to a driveway, that provided access to the apartment buildings located on the other tracts owned by Eid, from a nearby public road. Lot 25 did not contain an existing road or driveway and may have also been vacant or unimproved land. There is no indication of how these lots were originally created, or any evidence pertaining to their size, shape or configuration, but Griffeth's Lot 7 was evidently landlocked, having no direct legal access to any public road, so Griffeth could only access his lot by using the

driveway located on Eid's Lot 20.

1997 - Griffeth either attempted to use Eid's driveway for access, or he informed Eid that he intended to use it, and Eid took the position that Griffeth had no right to do so. Eid offered to convey an access easement to Griffeth across Lot 25, in a location where no road existed. This offer would have required significant expense for Griffeth, since he would have had to pay Eid for the access easement, and then also pay to have a driveway built in the access easement, so Griffeth declined this offer. Griffeth filed an action against Eid, claiming that he had a legal right to use Eid's existing driveway, as an easement by implication or as a way of necessity.

Griffeth argued that an access easement in favor of his Lot 7, burdening Eid's Lot 20, already legally existed and had been conveyed to him when he acquired Lot 7 by tax deed, because he had seen trucks using Lot 7 as a turnaround when driving along the driveway on Lot 20, and because the driveway on Lot 20 was the only way that he could physically reach his lot in a vehicle at the present time. Eid argued that no access easement had ever been created in favor of Griffeth's Lot 7, so Griffeth had no right to use any portion of Eid's land for access purposes, until he acquired an access easement from Eid. The trial court found that no access easement over Eid's driveway had ever been created in favor of Griffeth's lot, and although Griffeth's lot had no legal access and was legally landlocked, Griffeth was not entitled to use Eid's driveway.

On the surface, this case may appear to present substantially the same situation as that which we have recently reviewed in the Fears case, decided just over two years before, since both Fears and Griffeth acquired land that had been taken for delinquent taxes, and then conveyed again without any resolution of the access issues relating to the land in question. While it's true that Griffeth faced an access problem that was very similar in that regard to the problem which confronted Fears, there was a critical difference, and that was the fact that Griffeth had no basis upon which to claim a prescriptive access easement, due to the absence of historic adverse use. The roadway that Griffeth claimed the right to use was clearly private and had evidently always been under the full control of Eid, so Griffeth decided to attempt to assert his claim based on the legal implication of access. To that end, he

launched a two pronged attack, claiming first that the driveway serving Eid's apartment buildings had also been intended and used to serve the lot that he had acquired, and secondly claiming that it was absolutely necessary for him to use Eid's driveway to reach his lot. Unfortunately for Griffeth, with regard to his claim that an implied access easement serving his lot had been created at the time when his lot was created, he had no real evidence to support his assertion that the roadway on Lot 20 was ever intended or actually used to serve his lot. Whether he tried to acquire evidence to support his claim and was unable to find any, or whether he thought such evidence was unimportant or unnecessary and never even tried to come up with any, is unknown. Either way however, this failure doomed Griffeth's claim that an access easement, resulting from an existing pattern of prior use, had been created in favor of his lot. If he had been able to prove that Lot 20 had been created for the purpose of providing access to all the lots adjoining it, including his Lot 7, he would have prevailed on this point, because the existing roadway on Lot 20 would have been appurtenant to his lot, but he was unable to do so. Instead, he was only able to testify that he had seen trucks turning around on his lot, while using Eid's private driveway, which was quite unconvincing to the Court. Given the absence of any meaningful evidence that Eid's driveway was ever intended to serve Griffeth's lot, or that it had ever actually been used to serve Griffeth's lot, the Court rejected Griffeth's claim that an access easement appurtenant to his lot existed by implication, based on the conditions at the time his lot was created.

With regard to the second claim made by Griffeth, that he was entitled to a way of necessity, it may appear at first blush that he was obviously so entitled, since all parties involved conceded and agreed that no legal access route to his land existed. The fact that he was in a state of genuine necessity however, was not conclusive on this point, because he had acquired his lot fully aware of the situation, and was therefore unable to claim that he had been duped, tricked or fooled into believing that he would be given free access to it, or that any legal access route to it existed. He had acquired his lot for next to nothing, the Court noted, and had arrived at the conclusion that it must have some means of legal access entirely on his own, without fraud or trickery of any kind, and without being mislead by anyone in that regard. Sheer necessity alone, the Court pointed out, is not a valid

basis for the creation of a way of necessity. The requisite necessity must have existed at the time the lot, parcel or tract in question was created, or severed from a larger body of land. This is the case, because adjoining land cannot be arbitrarily burdened with an access easement without justification. When a grantor conveys a landlocked parcel or tract, and retains the adjoining land that prevents the granted land from having access to a public road, that grantor is legally presumed to have had the intention to provide his grantee with some form of useful access to the land granted. But when a grantee knowingly acquires a parcel that is already landlocked, as Griffeth had done, the situation is entirely different. If Eid had conveyed Lot 7 directly to Griffeth, Griffeth would have had a valid legal claim that Eid could not legally prevent him from accessing his lot over Eid's land, unless Eid expressly stated in the document of conveyance to Griffeth that he had no intention of providing Griffeth with any access route by virtue of the conveyance, because every grantor is presumed to convey all rights necessary to make use of the land being granted, in the absence of an explicit reservation of such rights by the grantor. But since Griffeth had not acquired his lot from Eid, no such intent could be imputed to Eid, so no basis upon which to justify requiring Eid's land to bear the burden of an access easement in favor of Griffeth's lot existed. Once again, the fact that Griffeth was either unable or unprepared to present evidence relating to the intentions or conditions at the time his lot was originally created was fatal to his argument, and accordingly the Court decided that he had not shown sufficient justification to support his assertion that Eid should be legally compelled to fulfill Griffeth's need for access, at no cost to Griffeth.

Rather than allowing Griffeth to successfully claim the right to use Eid's driveway, the Court suggested that under the circumstances, Griffeth bore the burden of exploring all available access alternatives, and proving that Eid's driveway was in fact the only reasonable alternative, before he could be awarded the access easement that he was seeking. The Court also determined that Griffeth must explore the possibility of obtaining an access easement across the city park adjoining his land, and prove that no such route would be feasible, before demanding access from Eid. In addition, the Court also stated that the offer of an access easement over Eid's Lot 25, which Eid had made to Griffeth, was not an unreasonable offer, and the Court indicated that it was more inclined to require Griffeth to accept that

offer, than to require Eid to provide Griffeth with the access route of Griffeth's choice, since the party providing a way of necessity has the legal option of selecting a reasonable location, crossing the servient property, for the access route in question. Holding that due to the manner in which Griffeth had acquired his lot, he was in no position to charge Eid with the burden of supplying him with an access easement at no cost, or in the location of Griffeth's choice, the Court upheld the ruling of the lower court in favor of Eid in all respects. Eid was obviously an owner of land of considerable value, and was presumably a man of means, if not outright wealth, with the benefit of significant business acumen, while Griffeth was evidently quite a bit less experienced in dealing with land rights, and this proved to be a major disadvantage to Griffeth, whose ignorance regarding easement law proved to be his undoing. Eid may very well have deliberately allowed Lot 7 to be lost for unpaid taxes, knowing that whoever bought it would be landlocked, and would then have to come to him for an access easement, which would be of greater value at that point in time than the landlocked lot itself. If that was in fact what Eid had done, Griffeth had played right into Eid's hands, by failing to take the prudent step of investigating the access situation before buying the landlocked lot.

NORD v HERRMAN (1998)

For our last riparian case, we return to Devils Lake, which has been the scene of many controversies, due to it's notoriously dramatic long term variations in water level. The first major case concerning the lake to reach the Supreme Court level was Rutten v State in 1958. In that case, the historical record of the lake's behavior was closely examined, the lake was deemed to be navigable, and the Court ruled that the dramatic reliction that had taken place during the late 1800s and early 1900s could not be identified or treated as a permanent change. Therefore, the Court held, North Dakota had the right to take certain actions that would operate to raise the water level in the lake, without providing any compensation to the many parties who had been cultivating large portions of the relicted lake bed for decades, or using the relicted areas in other ways, as the water had steadily

receded. Thirty years later, subsequent changes to the lake made it necessary to address riparian rights relating to the lake once again, so the nature of the lake was again very closely scrutinized by the Court in 1988, in Ownership of the Bed of Devils Lake. In that case, the lake's status as navigable was confirmed, the Court found that submergence and reliction were applicable to the lake, and rights to the bed and former bed, as the lake stood at that time, must be adjudicated accordingly. Also during the 1980s, the lake was the subject of a long running federal case, 101 Ranch v US, which was fought in the federal court system because North Dakota had conveyed it's rights to the bed of the lake to the United States. Ultimately in 1990, the Eighth Circuit Court of Appeals ruled that the lakefront boundaries of all the riparian owners around the lake are permanently ambulatory, agreeing with the Supreme Court of North Dakota in principle, and finally putting that matter to rest. Of course, all these cases were focused on the boundaries of the lake itself, and did not involve disputes between adjoining riparian owners over their mutual boundaries extending to the lake. In this final riparian case, we observe how the Court deals with a situation where alternative solutions for division of accretion and reliction are proposed, and learn, not surprisingly, that the Court is not inclined to favor a rigid application of land division principles, when it would have a fundamentally unjust result, such as the result initially accepted by the trial court here. Instead, we see that the Court is open to adaptations of the general rule that lake frontage must be divided proportionally, when circumstances require crafting an untypical solution, as long as the proposed solution honors and protects the rights of all the interested parties, damages no rights of others, and accomplishes the overall goal of doing equity. This case is also an excellent example of the value that the input of expert professional land surveyors can have, assisting the Court by presenting boundary resolution proposals.

> 1982 - Shelver owned a tract of land on the northeast side of Devils Lake. How or when Shelver had acquired the tract is unknown, and how it was described in Shelver's deed is also unknown. Shelver conveyed the southerly portion of the tract to Nord, describing that portion as two acres bounded by the meander line. The north and south boundary lines of Nord's parcel both ran due east and west. Since the lakeshore ran in a northwesterly direction, the sidelines of

Nord's parcel would therefore strike the shoreline at approximately a 45 degree angle, if extended west to the water.

1983 - Shelver platted a subdivision covering the remainder of his tract, lying directly north of the Nord parcel. This subdivision contained seven lakefront lots, and like the description of the Nord parcel, all of the lots were platted and described as being bounded by the meander line. The sidelines of the lots however, unlike the sidelines of the Nord parcel, ran more or less perpendicular to the shoreline, with the exception of the south line of the southernmost lot of course, which adjoined the Nord parcel, and ran due west toward the lake, as noted above.

1987 - The lot adjoining the Nord parcel was acquired by Herrman and the next lot to the north of it was acquired by Peterson. In 1883, when the first patents in this area were issued, the meander line was already some distance above the actual lakeshore, and at the time these parties arrived on the scene, the lake's surface was considerably lower than it had been 100 years earlier, so the shoreline had moved to a location that was quite some distance, perhaps hundreds of feet, west of the meander line.

1988 - Nord ignored the fact that his description called for the meander line as his west boundary and had been using the land between the meander line and the lake, which was a substantial area. Shelver evidently had no problem with this, indicating that he had intended to convey all of his land and had simply not been aware that the original meander line was not located at or near the current lakeshore. By this time Nord had improved the area beyond the meander line, maintaining it as a part of his yard, and at this time he erected a fence along his north boundary, extending west to the water.

1989 - Herrman and Peterson began using the area west of the meander line as well. Because they believed that they had the right to use the whole area lying within a southwesterly extention of their lot lines to the water, they essentially took over the area by force, preventing Nord from using it. They cut down Nord's trees, tore out his fence, and dumped boulders in his yard to block him from using the area.

1992 - Nord filed an action against Herrman, claiming that Nord owned all the land lying south of the south boundary of the subdivision, which was his north boundary, including the area south of that line projected west to the lakeshore. Peterson joined the action on Herrman's side.

Nord argued that he was entitled to extend his north boundary line due west to the water, as he had done in building his fence, despite the fact that in so doing he was intruding upon a portion of the relicted area lying directly between Herrman's lot and the water. Hermann argued that he and the owners of the other six platted lakefront lots, were each entitled to the entire relicted area lying directly in front of each lot, even though in his case, since he owned the southerly lot, this southwesterly extention of his lot would have the effect of extending his area of ownership south of the subdivision boundary, into the area claimed by Nord, cutting Nord off from the water. The trial court ruled in favor of Nord, based primarily on the fact that he had acquired his parcel prior to the existence of the subdivision.

After agreeing that the meander line was not the west boundary of any of the properties involved, despite the language used by Shelver in the descriptions of all of the properties, the Court closely examined the division of the area west of the meander line that had been sanctioned by the trial court. Although the trial court was very cognizant of the relevant previous rulings of the Court, particularly the ruling in the 1995 North Shore case, which we have reviewed, since it provided the most recent guidance on this subject, and the trial court attempted to follow that guidance, by applying the same type of solution, the Court found that there was reason for concern regarding the trial court's solution. This case, the Court noted, was in fact quite different from the North Shore case, because in the situation presented by this case, extending the sidelines of the properties beyond the meander line resulted in a patent conflict, due to the fact that the sidelines of the Herrman lot converged as they approached the lake. If all of the sidelines were simply projected toward the water, as proposed by the trial court, Herrman could be completely cut off from the water, because his converging sidelines would come to a point before reaching the lakeshore, where the shoreline stood at the time the controversy had begun. Herrman had the benefit of an astute land surveyor, who testified on his behalf and

pointed out the inadequacy of the trial court's solution. Although the trial court had been unreceptive to the argument put forth by Herrman and Peterson, and essentially granted Nord the full area that he had requested, the Court found that the trial court's solution was not suitable to the circumstances, since it violated the most fundamental rule of apportionment, which is that the division process, regardless of what specific method might be employed, must always be just and equitable. Herrman, the Court decided, could not be punished merely because he happened to own the lot with converging sidelines. His proportional share of the frontage, as measured along the meander line, must be preserved, when the lines were extended to the 1883 lakeshore, and also when the lines were extended to the current shoreline, however near or far the distance to the water might prove to be. Therefore, the Court remanded the matter to the lower court, with directions to forge a more equitable solution.

When the second solution adopted by the trial court reached the Court, nearly three years later in 2001, the Court observed that the resolution of the controversy had come down to a debate between the expert witnesses testifying on behalf of the two sides. Two highly competent land surveyors presented contrasting views, with respect to the best manner in which to divide the area between the meander line and the water. Each surveyor made a viable case for a method that would result in the maximum amount of frontage on the lakeshore for the side that he was representing. The trial court chose to employ the method proposed by Nord's surveyor. Under this method, all of the boundary lines were extended due west from the meander line, to the 1883 lakeshore, maintaining the relative width of each of the properties. At the 1883 lakeshore line, each boundary line then turned about 45 degrees and ran in a southwesterly direction, radially toward the center of the lake, preserving the proportional relationship established at the 1883 line. The trial court described the solution as an:

> “...extension of government lot lines to the 1883 survey water's edge with parallel boundary lines for each property owner to the 1883 water's edge and then providing a proportional amount of 1992 shoreline based on the amount of 1883 shoreline..."

The Court elected to embrace this resolution of the matter, since it fully satisfied the mandate of the Court to find and enforce a legitimately equitable outcome, although the Court determined that in reality either of the two proposals presented by the two land surveyors would in fact have been acceptable. This outcome was generally more favorable to Nord than to Herrman and Peterson, since Nord was allowed to control part of the area directly between Herrman's lot and the center of the lake, meaning that Herrman's line of sight, in gazing out over the lake, could be at least partially obstructed by Nord, while Herrman and Peterson had no such opportunity to block the view of Nord across the lake. In addition, the Court made it very clear that this solution could not be allowed to stand if it were to be protested by any adjoining property owners who had not been participants in the present action. The owners of properties lying along the lake to the north of the subdivision might have good reason to take issue with this outcome, the Court realized, since by bending each of the property lines in a northerly direction at the meander line, this method intruded upon the area that those owners could legitimately attempt to claim as theirs, by virtue of a projection of their property lines. Nevertheless, the Court ruled that justice had been done, at least to the extent possible under the circumstances, and fully upheld this ruling of the lower court. Herrman and Peterson had retained access to the lake, but they did not escape the damage award granted to Nord, once again showing that when it comes to disputes over land rights, destructive behavior virtually always leads only to regret.

STATE BANK & TRUST OF KENMARE v BREKKE (1999)

Here we have a case in which adverse possession was a factor, but which was ultimately decided instead on the basis of the language used in a deed by a grantor. Although this case involves the implications and consequences of adverse possession, and a building encroachment sets the stage for the controversy, the lesson presented by the Court's resolution of the matter concerns the significance of specific words placed in a deed, and shows us how the Court analyzes deeds, when it becomes necessary to do so. We learn from this case that the Court is far more concerned with the

true nature of the intentions of the parties to a conveyance, than it is with formalities, such as the type of deed used in the conveyance. We see here that the Court will drill down into the detailed language of a document, when the ends of justice are served by doing so, particularly when the good faith of one of the parties is in question. When the specific rights of the parties emanating from a deed are at issue, the Court is not inclined to draw a bright line distinction between quitclaims and warranties, based solely on the title or form of the document at issue. While the document's title or general form is certainly of significance, it is not always conclusive as to the true nature and effect of the deed. In this case, the Court finds that the elements of quitclaim and warranty are both present, and pursuant to the rule that the language used in a deed will be construed against the party who prepared the document, which is presumed to be the grantor, the warranty must be given it's intended legal effect, binding the grantor and protecting the grantee. With the help of guidance such as that provided here by the Court, surveyors can learn to recognize the key words and phrases that control the meaning of deeds and the rights of the parties. In another noteworthy case, also focused on the intent and effect of a deed, the 1988 case of Brend v Dome Development, the Court ruled that a deed issued by a corporation, or any of it's officers acting on behalf of the corporation, after it has been dissolved, is void, unless it can be shown to have been intended merely as confirmation of a conveyance actually made by the corporation prior to it's dissolution. In that case, which highlights the importance of understanding corporate law when acquiring land from a corporation, the Court also again upheld the long standing principle that recordation adds no legal force or effect to a document, holding that the corporate deed in question, although recorded, was nonetheless inferior to an earlier unrecorded contract for deed, so the holder of the corporate deed had acquired nothing.

> 1981 - Brekke, who was a businessman, acquired a tract from Northern States Power by warranty deed, which had formerly been used as an NSP utility site. The size and shape of the tract are unknown, but are not relevant to the issues involved.
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> 1984 - Brekke acquired a platted lot adjoining the NSP tract, under a contract for deed. The size and shape of this lot, who Brekke acquired it from, and how long they owned it, are all unknown details as well.

Shortly after acquiring this lot, Brekke formed the Brekke Limited Partnership and assigned the contract for deed to BLP. There was a warehouse on the lot, which extended over the property line, onto the NSP tract, and Brekke was aware of this. How long the building had existed is unknown, and how Brekke ascertained the location of the platted lot line is also unknown. There is no evidence that any survey was done or any monuments were found at this time.

1986 - BLP completed the payments on the lot and obtained a warranty deed for it. Brekke then created a document entitled "Memorandum of Purchase", by which he conveyed the portion of the NSP tract occupied by the warehouse to BLP. Brekke did not record this document however, and no survey was performed, so the new boundary line was completely invisible and it's existence was known only to Brekke. Where this new boundary was located, in relation to the original platted lot line, and how it was described in this document, if it was described at all, is unknown.

1989 - Brekke conveyed the NSP tract to the Bank. The tract was described in this conveyance in the same manner as it was described when Brekke had acquired it in 1981. Brekke did not inform the Bank that the warehouse was occupying a portion of the tract, or that he had created a new boundary between the two parcels, so that the burdened portion of the tract was no longer part of the tract, and was now legally attached to the adjoining lot instead.

1994 - The Bank decided to sell the NSP tract and ordered a survey of it. The survey showed that the warehouse was encroaching on the NSP tract.

1995 - The Bank filed an action to quiet it's title to the entire original NSP tract, against both Brekke and BLP.

The Bank argued that Brekke was in breach of his conveyance to the Bank, even though the conveyance was not made in the form of a statutory warranty deed. Brekke argued that he had not breached his conveyance and the portion of the NSP tract that was occupied by the warehouse had become attached to the warehouse lot by means of adverse possession. The trial court agreed with Brekke on both of these points, ruling that the Bank had only acquired the remainder of the NSP tract, and not the portion

burdened with the warehouse. However, the trial court required Brekke to pay the Bank damages for his failure to convey the entire NSP tract, despite the fact that the conveyance had not been made by means of a warranty deed, because he was aware that the entire tract could not be conveyed as described, due to adverse possession, and he had failed to inform the Bank that he had no intention of conveying the entire tract to the Bank.

The Court first addressed the portion of the controversy involving adverse possession. Although the trial court had ruled that adverse possession had taken place, barring the Bank from making any successful claim to the entire NSP tract, the Bank did not appeal that decision and simply conceded that the portion of the NSP tract covered by the warehouse had in fact become attached to the warehouse lot, essentially ratifying the new boundary line that Brekke had documented in 1986, as noted above. The Bank was willing to make this concession, because the Bank did not want the portion of the lot that was under the building anyway, it was satisfied with the remainder of the lot, supplemented by the damage award provided by the trial court. Since neither party had challenged the decision of the trial court on the adverse possession issue, it stood as conclusive, and the Court therefore had no need to review that decision for correctness. The Court went so far in fact, as to suggest that the adverse possession ruling could have been struck down, had it been challenged, since there was no evidence that acquiescence for the full twenty year period had been shown, and possession under color of title may have been incorrectly applied by the trial court. Since the Court does not review matters not specifically appealed by any of the litigants however, the boundary had become permanent, in the location documented by Brekke in 1986, and the lot line of record was therefore no longer controlling.

Nonetheless, adverse possession was still highly relevant to the final outcome, because the trial court had awarded the Bank damages based on the fact that part of the property conveyed to the Bank had been lost to adverse possession. The Court declared that this was a clear error on the part of the trial court, because Brekke's knowledge and conduct, regarding the warehouse and the boundary, had no impact whatsoever on the question of whether or not adverse possession had occurred. Brekke was not responsible for the construction of the warehouse over the lot line, so he was not the

adverse possessor, he was the record owner of the NSP tract, which was the tract that was reduced by the successful completion of the adverse possession. It has long been well established, as the Court indicated, that the conduct or knowledge of the record owner is irrelevant to adverse possession, only the conduct or knowledge of the adverse possessor is relevant. Furthermore, the Court noted, no precedent existed for providing damages to a party who had lost a portion of a tract of land to an adverse possessor, and the Court was not willing to sanction any grant of damages on that basis, so the reason cited by the trial court for granting damages to the Bank, and against Brekke, was an invalid one. At this point, one might think Brekke had successfully accomplished his goal of keeping the expanded warehouse lot, and unloading the diminished NSP tract, without having to suffer any consequences, in terms of damages, since the Court appeared to be about to strike down the damage award against him, but that was not the case. The Court could clearly see the deception that Brekke had attempted to pull off, and it was merely preparing to fashion a more supportable penalty, one with a legitimate legal basis, unlike the one imposed by the trial court.

As we have previously observed, the Court does not alter correct rulings made by lower courts, merely because the lower court arrived at the correct result through erroneous reasoning. In this case, although the trial court produced a correct and equitable result, in awarding the Bank damages, the trial court had left the correct legal basis for doing so unstated, so the Court undertook to spell out exactly why the damages against Brekke were truly justified. The basis for damages that the Court found convincing resided in the language of the 1989 deed from Brekke to the Bank. Although that deed was fundamentally a quitclaim, since it did not expressly convey a fee simple interest, and only purported to convey whatever interest the grantor may have in the subject property, the Court determined that it contained additional language that made it more than a simple quitclaim. Since the deed contained the phrase "warrant and defend", the Court decided that it was in fact a special warranty deed. Noting that it had previously held that a quitclaim deed can also contain a warranty, the Court adopted the position that:

> “A deed in which covenants are limited to defects which arise

> by, through, or under the actions of the grantor is known as a special warranty deed. Under this limited form of warranty, recovery is available only if the defect arises because of the acts of the grantor .... under a special warranty deed a grantor is liable if the grantee's ownership is disturbed by some claim arising through an act of the grantor."

Since the 1986 document of conveyance, by means of which Brekke had sought to transfer the portion of the NSP tract covered by the building to BLP, constituted an act taken by him, in derogation of his own title to the NSP tract, it fell within the range of actions for which a grantor can be held liable, under a special warranty deed. Because Brekke had neglected to eliminate the phrase "warrant and defend" from his quitclaim deed to the Bank, or perhaps because the Bank had very wisely insisted that it be included, Brekke had not accomplished his objective. The Court upheld the ruling of the trial court, as to the amount of damages due to the Bank from Brekke, not because adverse possession had deprived the Bank of a portion of the tract, but because Brekke himself had endeavored to convey away a portion of the tract to the adverse possessor, BLP, enabling BLP to successfully claim adverse possession under color of title. This case once again very clearly illustrates that the Court simply will not tolerate any form of deception introduced into a conveyance by the artifice of a clever grantor, particularly where it appears that it may have been intended to entrap an innocent grantee.

WEBSTER v REGAN (2000)

If the importance of creating clear and complete descriptions for easements, as well as for boundaries, has not already been communicated, this case will serve to again demonstrate the consequences of the use of a description that fails to fully capture and embody the real or full intent of it's author. Surveyors know that descriptions are meant to last, and can therefore have far reaching effects in the future, if conditions and land values in the area being described change significantly over time, as very often happens.

Many people fail to realize this however, so many descriptions have been created and remain on the record that were reasonably effective and understandable at the time they were created, but have become difficult or impossible to conclusively retrace, due to changing conditions on the ground. In addition to this failure to foresee future changes in physical conditions, descriptions are also often rendered ambiguous by the use of terms that may seem to be legally appropriate, but which actually carry a legal meaning that is different in some important way from the meaning intended by the author of the description. In this case, we will see an example of a very short and simplistic description that includes errors of both of these kinds, leaving the true intent of the description's author very much in doubt. Once again here, a determination that the description is genuinely ambiguous allows extrinsic evidence to be introduced to support it's intended location, although in this instance the extrinsic evidence is found by the Court to be just as uncertain as the description itself. Evidence that the author of the description actually staked the easement on the ground himself, which might otherwise be considered controlling evidence of the true intended location of the easement, is valued at naught here by the Court because no trace of it remains physically in place, emphasizing the importance of durable monumentation. The lack of physical evidence of the easement's location is further compounded by uncertainty over the author's real intent in using the phrase "meander line", raising the question of whether he made the common assumption that the water line and the meander line are always coincident, or he actually intended the original meander line, even though that location was unknown to him. Still further complicating the resolution, no evidence of the record meander line location is presented by any of the parties, so the result, which is ultimately based on the true location of the original meander line, remains a hypothetical location, unknown until such time as it is retraced on the ground by means of a survey. As can readily be seen, the lesson of this case lies in the fact that all of this confusion and contradiction, resulting in expensive litigation, could very easily have been completely avoided, with better forethought at the time the easement was created, a few additional words of clarification, or proper monumentation on the ground.

1976 - Webster and his wife owned an unspecified quantity of land bounded on one side by Morrison Lake. As part of a divorce

settlement, dividing their lakefront property, Webster conveyed to his former wife an access easement over a portion of the land bounded by the lake that he retained in the settlement, described as "a strip of land 200 feet wide along the southwesterly shore of Morrison Lake from the meander line running to Gordon's Pass". Webster set stakes along the easement area, by measuring 200 feet from the water, based on the assumption that the meander line was located at the edge of the lake as it stood at that moment. How long these stakes survived is unknown, evidently none of them were left at the time of the trial. The location of this easement would become the focus of the controversy.

1979 - Webster's former wife conveyed the easement in question to Regan by assignment. Whether she also conveyed any or all of her land to Regan, or she conveyed only the right to use the easement, is unknown. Whether or not Regan actually used the easement for any certain purpose, or for what purpose he intended to use it, is also unknown.

1980 to 1995 - At an unspecified time during this period Webster died, and his land, including the land over which Regan's easement ran, passed into the ownership of several of Webster's adult children.

1996 - A disagreement developed between Regan and the heirs of Webster, concerning Regan's rights relating to the easement, which lead to a dispute over the limits and length of the easement. The parties could not agree on where the lateral boundaries of the easement were located, nor could they agree on exactly where the easement ended at Gordon's Pass.

1997 - Webster's heirs filed an action against Regan, seeking to limit Regan's use of the area, in terms of both the location and the range of acceptable activities. There is no indication that any surveys were performed to show either the easement's location on the ground or the record location of the meander line. A survey was performed however, to locate and clarify the point where the easement terminated at Gordon's Pass, which was at a section line evidently marking the extent of the portion of the Webster tract lying along the lakeshore. No evidence was presented to indicate whether the water

level of the lake had risen, fallen, or remained the same, since the time of the creation of the meander line.

The heirs of Webster argued that it was his intent, in creating the easement, that it would cover the 200 feet of dry land lying closest to the water, and he had staked it in that location for all to see. In other words, they argued that it was intended to be above the meander line, rather than below the meander line, but only if the meander line was actually located at the water's edge, as their father had believed. Regan argued that the easement was located further upland, completely above the meander line, which he believed was located at some unknown or unspecified distance above the water level, and was not at the edge of the lake. The trial court initially ruled that the easement was located between the meander line and the lake. On appeal however, the Court immediately rejected this ruling as being intolerably ambiguous, and remanded the case back to the lower court for clarification. On remand, the trial court changed it's original position that the easement was located entirely below the meander line, and ruled instead that the easement description was ambiguous and must therefore be construed in favor of Regan, deciding that Regan was not limited to the 200 feet closest to the water, and was entitled to use 200 feet of Webster's land lying above the original meander line, wherever the original meander line was actually located.

By the time this case arrived upon the Court's doorstep for the second time, the original ruling of the lower court had not only been clarified with regard to the location of the easement, as the Court had directed, the trial court had also materially shifted the easement to the location contended for by Regan, leaving the heirs of Webster highly unsatisfied with the situation. Evidently, the heirs of Webster wanted the easement to be located as close as possible to the water, so it would have only a minimally disruptive effect on the remaining unburdened upland portion of their late father's estate, and they would be left with the maximum possible amount of unencumbered upland. Regan, on the other hand, evidently was not concerned with access to the lake itself, so he did not want the easement to be located along the water's edge, he wanted it to be located as far away from the water as possible. There is no indication of why the easement width was originally set at 200 feet, which would obviously appear to be a very extravagant and

excessive amount of land to commit for purposes of an access easement, but this was clearly the width that was originally intended by Webster, and his heirs did not attempt to assert that 200 feet was unnecessary, or that the width should be reduced to some lesser amount. The failure to clearly define the location of the easement, at the time when it's language was composed, was clearly the root cause of the controversy, since it provided both sides with the opportunity to maintain that the easement was actually intended to be in the location of their own preference, and to present any evidence they might have to support their competing interpretations of the description. No evidence was ever discussed presenting any further details about the easement's original purpose or scope, beyond the fact that it was intended for general access, so there was no written indication of whether or not access to the lake itself was intended, which could have served to support the idea that the easement location was intended to be governed by the water's edge.

The principal source of conflict over the description in question was the failure to indicate the meaning of the phrase "from the meander line". By employing this phrase, without giving any indication of which side of the meander line the easement was intended to be on, the description left it possible for the various parties to assert that it was actually intended to be either above or below the meander line, in accordance with their own personal preferences. In view of this fundamental description failure, the Court decided that the description was certainly ambiguous, which enabled both sides to present evidence relating to facts, conditions, circumstances, events and other matters, known as extrinsic evidence, reaching beyond the plain language of the deed, which they would not otherwise have been able to legitimately put before the Court for consideration, had the deed language been completely clear and complete. Extrinsic evidence pertaining to location is legally acceptable whenever ambiguity is discovered in a description, because the Court is always open to assistance in forming a complete and appropriate view of the situation that existed at the time any given description was created, since this evidence allows the Court to experience the perspective of the relevant parties at that time. Although extrinsic evidence can never directly contradict the specific terms of a description, it can significantly modify the way in which the meaning of the language is read and understood, by showing what the parties really

believed the words to mean. In this particular case however, the Court noted that the description in question was stipulated to have been specifically created for inclusion in a settlement agreement, so the intentions of the original parties, Webster and his wife, had been effectively superseded by the intentions of the court that had adjudicated the settlement, and incorporated this easement description into the final legal judgment, which was issued in 1976, as noted above. Yet even at this juncture, the Court found itself confronted with additional uncertainty, because the intent of the 1976 court ruling itself was unclear, with respect to the nature and extent of this easement.

Webster had exercised poor judgment in basing his description of the easement on a line that he was not sure about the location of, and in the end, his descendants were destined to suffer the consequences of his failure. It's very likely that at that time, in 1976, he saw no possibility of any problem resulting from his description, especially since he had staked off the area that he intended to be used himself. But he did not think far enough ahead, to the day when both his stakes and his personal presence and testimony would be gone and unavailable, so he failed to go to the trouble to properly document his intentions, which he could have done by having the upland boundary of the easement surveyed and properly monumented. If he had not used the phrase "meander line" and had simply made reference instead to the existing edge of the lake, his intentions could have been deemed sufficiently clear, since there was no evidence that the water level had ever materially changed, but his choice of words proved to be quite problematic for his successors. Given the fact that Webster had believed the meander line to be at the water line, the Court determined, it was impossible to seriously argue that he had intended the easement to be below the meander line, because that would put practically the entire easement underwater, a clearly absurd result. Therefore, the Court ruled, it was possible that he truly intended the meander line, rather than the water line, to control the easement's location, and the language of the description that he had created served to support that idea, so on that basis the Court upheld the decision of the lower court that the easement location was governed by the meander line, and was located completely above the meander line, wherever that line might be. Although agreeing with the lower court on the general principle that a document must always be construed against the party who prepared

the document, as the party responsible for the selection of the language used, the Court held that rule inapplicable to this case, finding instead that the actions of Webster made it unnecessary to deviate from the known meaning of the phrase "meander line", or to apply any presumption in favor of the grantee, in order to reach the result that the lower court had reached in Regan's favor. On the related question of the purpose of the easement, the Court also ruled favorably to Regan, stating in conclusion that the easement could be used by Regan for any and all lawful purposes relating to access, due to Webster's failure to limit it's use in any way. Since the easement had been created at a width easily sufficient to accommodate a highway, consistent with that evident intent, Regan was free to use it to provide primary access to any adjoining land that he might choose to acquire and wish to develop.

JAMES v GRIFFIN (2001)

Although the Court had unhesitatingly invoked the doctrine of acquiescence in the Haas case in 1991, as we have seen, by 2001 ten years had passed without another successful acquiescence case at the Supreme Court level, indicating that the Court had become more focused on limiting that doctrine of it's own creation than on expanding it. In this case, we see the Court asked to extend acquiescence to operate with reference to a tree line, which obviously meets the basic visibility requirement, but which cannot be shown to have been the result of improvement of the land in question, and may have been natural in it's origin, or may have been intentionally offset, if planted by human hands. While the Court has always respected efforts to develop and make productive use of land, it has also sternly upheld the concept of physical notice as a requirement supporting land rights claims. In the absence of a line that is sufficient to give distinct notice to the world of a land claim, by virtue of it's own presence, denial of the claim should not come as a great surprise. In this case, the Court finds that separate objects, not forming a clear line themselves, do not represent a basis for a successful acquiescence claim and are mere encroachments, due in part to the fact that they do not provide notice of the existence of a

distinct and unique line. Most notably however, the Court here also finds itself conflicted over the larger issue of how to best support certainty and security of land ownership. Under the unique circumstances of this case at least, in which an adverse claim was fatally interrupted by a condemnation action, the majority of the Court expresses the sentiment that evidence of record provides a higher degree of certainty than does physical evidence, in the process of declaring that the improvements in question represent encroachments. The dissenting Justices adhere instead to the traditional view that respect for fully observable physically established boundaries represents the most certain means of insuring stability of land rights and preserving harmony among land owners, by preventing existing conditions from being overturned by stale claims. Which of these diverging lines of judicial thought will prevail going forward remains to be seen.

> 1945 - James acquired Lot 4, which contained an old house. This lot was one of several lots located in a certain block in a typical residential subdivision in Wahpeton. The James family lived on the lot henceforward, with one very critical exception, which would prove to be key to the outcome of the case.
>
> 1956 - Lambert acquired Lots 5 & 6 in the same block, adjoining Lot 4. No evidence was presented regarding the use that was made of these lots by Lambert.
>
> 1979 - The house on Lot 4 was condemned by Wahpeton and the James family was compelled to convey the lot to Wahpeton and vacate the lot for about two months, so the public nuisance created by the house could be eliminated. Once the old building was demolished, Wahpeton conveyed the lot back to James, another house was moved onto the lot, and the James family took up residence on the lot once again.
>
> 1995 - Griffin acquired Lots 5 & 6 from Lambert. No evidence was presented regarding the use that was made of these lots by Griffin.
>
> 1997 - James died, his widow continued to live on the lot.
>
> 1998 - Griffin ordered a survey, which indicated that a driveway, a garage and a brick fireplace, all owned by James, were actually located partly on Lot 5. Who had built these things and how long they

had been there is unknown, but they had all been built prior to the demolition of the old house in 1979. How far over the line these items were is also unknown, evidently it was about three feet or less, because the survey also indicated that there was a line of trees on Lot 5, four feet from the lot line, which ran parallel with the lot line. When the trees were planted, or who planted them, is unknown. How the lot line was located during this survey is also unknown, there is no indication that any monuments were found, but the survey was undisputed, so it was accepted as accurately depicting the original lot line location. Griffin built a fence on a portion of the line indicated by the survey.

1999 - The heirs of James filed an action against Griffin to quiet title to the four foot strip, claiming that the trees marked the lot line.

The heirs of James argued that the tree line had become a permanent and binding boundary by means of acquiescence, because it had always been treated as the boundary between the lots by all parties, both before and after the 1979 condemnation. They made no assertion that the tree line might actually represent either evidence of the true original lot line location, or evidence of a boundary agreement, and implicitly conceded that the tree line was not on the original lot line, relying instead upon the tree line solely as the basis for their adverse use of the strip in question. Griffin argued simply that acquiescence was inapplicable, being unsupported by the evidence. The trial court dismissed the case, because at the time Griffin built the fence in 1998, staking his claim to the original lot line, the requisite statutory period of twenty years had not passed since 1979, when James regained ownership of the lot from Wahpeton, and James heirs had made no effort to present any evidence to attempt to prove that there had been any acquiescence in the tree line as a boundary during the 34 years that James had occupied Lot 4 prior to the condemnation proceedings.

The Court had quite a struggle with this case, emerging only with a strongly dissented result, indicating a deep division in the judicial philosophy of the members of the Court at the time, on the fundamentals of land rights. As we have seen, acquiescence had developed in a unique way in North Dakota, over many decades, into a doctrine that provides a means of resolving boundary disputes, in situations where adverse possession is

inapplicable, either because only a portion of the record title in question is challenged, or because the mandatory hostile intent, on the part of the adverse possessor, was absent, due to the origin of the dispute being rooted in some kind of innocent or unknown mistake. The Court had become quite comfortable applying this doctrine of it's own fashioning, although it was defined by the Court in a manner that was distinctly different from most other western states, where acquiescence is seen as a form of practical location, providing evidence of a lost or undocumented tacit agreement between adjoining land owners, and is entirely separate from adverse possession, which is based on rights that develop through a process that is adverse in nature, and therefore obviously represents the polar opposite of agreement. In this case, the linkage of acquiescence to the twenty year statutory period for adverse possession, which the Court had formally ratified and put into effect in the Terra Vallee case twenty years earlier, not surprisingly became a source of internal controversy for the Court.

It was undisputed that the condemnation action in 1979 had broken the continuity of the ownership and control of James over any or all of Lot 4, regardless of where it's boundaries were located. Condemnation, being a rigidly defined process, implemented by a governmental entity under strict legal guidelines, is antithetical to adverse possession, the Court determined, and therefore could not operate to support an adverse claim of any kind. So nothing that had happened since that time could be relevant evidence of acquiescence, because even complete and perfect acquiescence for 19 years accomplishes nothing, under the North Dakota doctrine of acquiescence, as it has been consistently administered by the Court. In 1979, Wahpeton had conveyed only Lot 4 to James, according to the original plat, so any improvements that were outside the original boundaries of the lot at that time served only to commence the running of the twenty year clock, and Griffin had asserted his claim to the boundary of record before the time allowed to him under the law to do so expired. In addition, no evidence was presented by the James heirs to show that neither Griffin nor Lambert had ever used the four foot strip at any time since 1979, nor did they present any evidence showing that either Lambert or Griffin had ever relied on the tree line as a boundary or acted with reference to it as a boundary. So even if Griffin had waited a few more years before asserting his claim to all of Lot 5, allowing the twenty year period to expire, he may still have prevailed,

since although James and his family had certainly treated the tree line as the boundary themselves, there was no clear evidence that the tree line had constituted a definite boundary that was mutually recognized as such by all parties.

Having decided that the condemnation formed an absolute obstacle to the claim of recent acquiescence made by the James heirs, the Court cast it's gaze upon the earlier 34 year period, during which James had full and undisputed ownership of Lot 4, that had ended 19 years before the dispute erupted. It was quite possible, the Court acknowledged, that a state of genuine acquiescence may have existed, for well over twenty years, between 1945 and 1979. If the heirs of James could have proven acquiescence in the tree line during that time period, they might have had a legitimately convincing case. Griffin had wisely waited for James to die however, before making his claim, so that James could no longer testify about the origin of the tree line or any other important facts that only he might recall from that remote time period. With no first hand testimony available, regarding how the tree line had been treated by Lambert, or Lambert's predecessor, the heirs of James were unable to convince the Court that the line of trees was ever considered to be a boundary by Lambert, or even by James himself. The tree line may have been known by James and Griffin to be on Lot 5, and not on the lot line, and in the absence of credible testimony to the contrary, the Court was unwilling to presume that it was ever honored as a boundary. Moreover, unless the tree line had been openly acknowledged as a boundary, it would have been insufficient to provide a valid basis upon which to charge a grantee, such as Griffin, with notice of an existing visible boundary, since a line of trees can be natural, unlike a fence or wall, which provides clear notice of a line set in place by the hand of man. Although it was certainly very possible that the tree line was generally regarded and used as a boundary, and it may have even been evidence of the true original lot line location, the Court could not reach that conclusion without evidence to that effect. In the end however, even this made no difference to the outcome, as the divided Court adopted a new philosophical position on the subject of acquiescence:

> “A rule allowing record title of property to be lost by a 20-year period of unadjudicated acquiescence occurring in the distant

past does not foster predictability and certainty of property rights."

As previously noted, this was the view of only a narrow majority however, since this was a 3 to 2 split decision of the Court. The two dissenting Justices presented perhaps the strongest dissent the Court had seen over such a fundamental land rights issue since the Stoll case of 1920, which he have previously reviewed. The dissenting Justices quite rightly maintained that the Court had never before established a requirement that acquiescence must take place in the specific twenty year window coming immediately prior to the outbreak and trial of the dispute, and pointed out that in fact the Court had repeatedly stated the contrary, as we have seen. The Court had always held that acquiescence, as it functions in North Dakota, creates a transfer of land, and a new boundary, immediately upon completion of the twenty year period, without the necessity of adjudication. But the majority was no longer comfortable with that point of view, and although they declined to overturn any previous cases that had been decided by the Court, or even to address any language previously used by the Court that was contrary to their new position, they served notice that going forward, the Court might choose to reserve unto itself the opportunity to scrutinize marginal acquiescence claims more deeply, and might be less inclined to accept evidence attempting to show what may or may not have happened at some earlier time.

TIBERT v CITY OF MINTO (2004)

Our last case on the topic of dedication, is in fact just one in a series of seven rulings handed down by the Court, in the process of resolving a controversy centered around the operation of a certain grain elevator, which dragged on for nearly ten years, making it arguably the most fascinating land rights saga in modern North Dakota history. The case we are about to review represents the second of those seven rulings, and it was selected for inclusion here because it contains a full discussion of the circumstances and explains the legal principles, employed by the Court to dispose of the claims

made by the plaintiffs as private parties, relating to the use and alleged dedication of the road serving the grain elevator. This controversy evidently began to brew in the late 1990s, culminating in the first ruling of the Court in this series, Nowling v BNSF Railway in 2002. All of the parties involved in the case we are about to review were also involved in this first legal battle, in which a number of private parties were aligned against Burlington, Minto and the operator of the grain elevator. The private land owners lead by Nowling initially experienced success at the trial court level, prevailing on their claim of adverse possession of a portion of a railroad right-of-way, which adjoined the portion of the right-of-way upon which the grain elevator stood. That success was immediately undone by the Court however, as the Court took the position, after consulting the North Dakota Constitution, that railroad right-of-way is essentially equivalent to any other type of highway right-of-way, and is therefore immune to adverse possession, due to being fundamentally public in character. Consistent with it's many previous decisions strongly upholding public rights, the Court decided in that first case in this series that neither adverse possession nor acquiescence could ever operate to reduce the width of any functioning railroad right-of-way, regardless of the type of use made of any portion of the right-of-way by any parties, and regardless of how long the use had continued. Further, the Court also found in that first case that the concept of abandonment, which was also alleged by the land owners, was not applicable to the situation, again due to the public nature of a railroad right-of-way, consistent with it's treatment of the public right-of-way in the Jamestown case of 1959, which we have previously reviewed, regardless of the manner in which the land owners had used part of the railroad right-of-way, and regardless of how long they had used it without any objection from the railroad or anyone else. Unfortunately, some of the private parties found this stern stance taken by the Court against them to be extremely difficult to accept, and rather than acquiescing to it, they elected to extend the fight, precipitating the long running litigation that would return them to the Court six more times, only to be ultimately vanquished in all respects, at an enormous cost, as we shall see. So it was against this backdrop that the second and most detailed case in this series played out.

> Prior to 1980 - A Burlington Northern (BN) railroad right-of-way, 400 feet in width, 200 feet on each side of a railroad track, acquired in

fee in 1881 and in continuous operation since that time, ran through Minto. A grain elevator, which had been in operation for over a century, was located within the BN right-of-way, inside the city limits. A road, known locally as Elevator Road, ran for an unspecified distance through the BN right-of-way, providing access to the grain elevator from a nearby city street. The origin of Elevator Road was unknown, presumably it had been built at the same time as the grain elevator itself, by the builders of the grain elevator, to serve that facility as a driveway for employees, customers and others. BN also used Elevator Road itself, to access portions of the railroad track when necessary.

1980 - Minto passed a city ordinance, declaring that Elevator Road was to be adopted as a city street, to be known as Kilowatt Drive. No further legally mandated action was ever taken however, so since the statutory requirements for creation of a city street were not met, the road remained legally private in character and never officially became a city street, by means of any formal dedication. In one particular location within the BN right-of-way, a small bridge on this road crossed over a drainage ditch maintained by Walsh County. Walsh County agreed to also take responsibility for maintaining the bridge, so BN conveyed a small isolated parcel containing the bridge to Walsh County for that purpose. Aside from this one isolated location, the rest of this road remained under the full legal control of BN, being within the BN right-of-way.

1981 to 1999 - Minto placed some traffic signs along the road, installed water and sewer lines through a portion of the road, and generally treated and maintained Kilowatt Drive as a typical city street. An unspecified number of homes and businesses were built near the grain elevator, bordering the BN right-of-way, and some of these were connected to Kilowatt Drive by means of private driveways. There was no evidence that BN ever attempted to prevent anyone from using Kilowatt Drive, or ever objected to any of this use of it's right-of-way.

2000 - The grain elevator was acquired by Slominski, who began operating it as a business, known as Minto Grain.

2001 - BN quitclaimed the portion of the BN right-of-way occupied by the grain elevator and the related facilities to Minto Grain, reserving an access easement over the road in question and some other existing roads around the facility that were also located on the land being conveyed to Minto Grain. Tibert, who owned one of the nearby buildings, that was located on a tract adjoining the grain elevator tract, and was connected to Kilowatt Drive by a private driveway, filed an action against both Minto and Minto Grain, claiming that Kilowatt Drive had been dedicated to public use by BN. When Tibert had acquired his property is unknown, and who built the driveway connecting Tibert's building to Kilowatt Drive is unknown, it may have been built by Tibert or by a previous owner of his building. There was no dispute concerning the record location of the right-of-way boundary, which was conceded by all parties to be 200 feet from the centerline of the railroad track, so it was undisputed that all of the parties had always known that Kilowatt Drive and the driveways connected to it were located with the BN right-of-way.

2002 - In an attempt to respond to the concerns of Tibert and the many other land owners in the vicinity, who had been using Kilowatt Drive in a similar manner, and to resolve the situation without becoming entangled in litigation with all of those parties, Minto Grain granted an access easement over Kilowatt Drive to Minto. The purpose of the easement was expressly described as being to "...limit the non-commercial use of the roadway by the public, and provide general access to residences...". Tibert was unsatisfied with this easement however, and chose to press on with the litigation that he had initiated. Tibert had supported Nowling in Nowling's failed effort to claim a portion of the BN right-of-way in this same area, by means of adverse possession and acquiescence, as described above.

Tibert argued that the access easement created by Minto Grain, and accepted by Minto, was not equivalent to dedication of Kilowatt Drive as a city street or public road of any kind. Tibert further argued that Kilowatt Drive had become a public road by means of implied dedication, as a result of the fact that BN had never objected to any of the public use that had been made of the road over the previous two decades. Minto Grain argued that Kilowatt Drive had never been dedicated in any manner, so Minto Grain had

the right to control the use of the road as Minto Grain saw fit. The trial court ruled that since the easement created by Minto Grain provided sufficient access to Tibert, and in fact to all of the other comparably situated parties as well, Tibert had no legitimate basis upon which to make his claim, dismissing the argument presented by Tibert without consideration.

As we have seen in a number of earlier cases, dating back to the Cole case of 1908, nearly a full century before this controversy arose, the Court has always strongly protected public access rights, and has been generally receptive to claims of dedication by implication, so it's not surprising that Tibert might have felt quite confident in making his assertion that a common law dedication of Kilowatt Drive had taken place. Clearly, the evidence indicated that there had been a great deal of use of Kilowatt Drive by the public, on a regular basis, for a number of legitimate purposes, all of which were beneficial to the public and were of the same nature as the uses that had been held by the Court to support the creation of public rights in past cases. In addition, all parties had believed for several years that the 1980 ordinance had been sufficient to convert Kilowatt Drive into a city street, and the behavior and conduct of the city officials had also evidenced their own apparent recognition that the former Elevator Road had become a city street in 1980. But two important differences distinguished the circumstances present in this case from those of the earlier successful dedication cases. First, the earlier successful dedication cases had all involved dedications made by plat, and secondly, none of them had involved land lying within a railroad right-of-way. As has already been discussed in earlier cases, a complete dedication requires both an offer of dedication and an acceptance of that offer. Both the offer of dedication and the acceptance of it can be proven by acts or conduct supplying the requisite evidence of intent. Since the evidence of acceptance of the roadway in question by the public was abundant in this case, the most critical question was not the acceptance, but whether or not a valid offer of dedication had ever been made. Dedications made by means of a plat are very difficult for a subdivider to escape or deny, because the plat provides powerful graphic evidence, upon which innocent grantees are legally entitled to rely, as we have seen repeatedly demonstrated. But since the road in question in this case was never platted, and was within a railroad right-of-way, Tibert was starting from a far less advantageous legal position than had the earlier

dedication claimants, such as Cole in 1908.

The Court began by agreeing with Tibert, that the access easement created by Minto Grain was not equivalent to a dedicated public right-of-way, in principle, but this would prove to be the only point on which he was able to prevail, and it proved to be insufficient to obtain the result that he was seeking. Although the trial court had erred in finding that Tibert's claim was rendered moot by the access easement created in 2002, since that easement reserved unto Minto Grain the right to control the use of the road to a large extent, which Minto Grain obviously could not have done if the road had been dedicated to public use, the Court decided that this error was not fatal, and the lower court had in fact reached the correct overall conclusion, despite it's erroneous perception of the potential validity of Tibert's argument. Noting that dedication creates only an easement interest, as opposed to a fee interest in the area in question, the Court stated that the conduct of a property owner alone, even in the absence of any conscious intention on the part of the land owner to make a dedication, can be sufficient to support an implied or common law dedication. This is the case, because implied dedication is founded primarily on the principle of estoppel, denying the land owner the right to deprive the public of the use of the dedicated area, after having made the area available to the public and created a state of legitimate public reliance upon the use of the area in question. In this particular case however, the involvement of the railroad was pivotal, because the Court determined that the use of Kilowatt Drive which BN had allowed was actually beneficial to BN, and did not amount to a burden in any sense. In addition, the Court reiterated it's position, previously set forth in the Nowling case mentioned above, that the uses allowed within the railroad right-of-way by BN did not amount to an abandonment of any portion of the 400 foot right-of-way, which BN had always maintained the right to claim and use itself at any time. Since BN was the party in control of the railroad right-of-way, and BN had not participated in any way in the attempted dedication in 1980, the Court observed, the city ordinance had no power to impact or diminish BN's rights in any respect. In conclusion, the Court ruled that since the railroad right-of-way was already a form of public right-of-way, and was to be treated in the same manner as a public highway in that regard, under the North Dakota Constitution, the use of the railroad right-of-way allowed by BN, and made

by Tibert any many others, could create no additional public rights to the area in question. Therefore, the court upheld the ruling of the lower court that no valid offer of dedication of any kind had ever been made with respect to Kilowatt Drive, BN having been the only party with the authority to make such a dedication offer, so Minto Grain had acquired the right to take and maintain complete control over the area quitclaimed by BN, and the access easement granted by Minto Grain was entirely adequate to serve the needs of Tibert and all of the other parties who had been using Kilowatt Drive.

Although the Court had made it quite clear in it's first two rulings on this matter that it intended to apply the law in protection of the rights originally held by BN and subsequently acquired by Minto Grain, Tibert opted to forge ahead with further charges and allegations, in an apparent attempt to limit, restrict or prevent the ongoing use and development of the grain elevator, which he and his neighbors evidently found to be highly objectionable or intolerable. Later in 2004, just a month after this second case in the series ended, Tibert lost the third case in this series, as the Court denied that an assault by Tibert on Minto Grain's title had any validity, and declined to declare the quitclaim deed to Minto Grain void. Just a month after that, Tibert lost the fourth case in the series, as the Court rejected Tibert's assertion that the quitclaim to Minto Grain amounted to a statutory violation, indicating that the statute relied upon by Tibert could apply only to abandoned railroad right-of-way, and not active right-of-way. Tibert next lost the fifth case in the series in 2005, which involved no additional land rights principles, and in which Tibert claimed that construction and demolition work associated with the operation and expansion of the grain elevator and the widening of Kilowatt Drive amounted to a nuisance to him and a trespass upon his property. Tibert then lost the sixth case in the series in 2006, in which Tibert challenged the city's decision to allow the expansion of the grain elevator, when the Court upheld the validity of a building permit issued by Minto to Minto Grain, which had enabled the construction and demolition work that Tibert found objectionable to proceed. In that case, the Court once again upheld the general principle that a servient owner has the right to make any use of an access easement that respects, and does not unreasonably impede, the use of the easement for access by the easement holder, supporting the right of Minto Grain to

perform construction activities along Kilowatt Drive, near the properties of Tibert and others, as long as the access of Tibert and the others to Kilowatt Drive was preserved in some location and was not completely cut off by those activities. Sadly, the saga was not destined to end just yet. Tibert, apparently completely exasperated with his inability to prevail in any litigation, evidently felt compelled to take the law into his own hands. In 2009, in Minto Grain v Tibert, the seventh and final case in the series, the Court found that numerous actions that had been taken by various members of the Tibert family, intended to hinder or prevent the expansion and operation of the grain elevator, had resulted in $6.8 million in damages to Minto Grain. The Court therefore upheld a jury imposed damage award against the Tiberts of $455,000. Ironically, one of the items on the long list of violations committed by the Tiberts was threatening the surveyors who were working for Minto Grain. The awful saga, that had begun ten years before as a basic dispute over a driveway and some trees, had proven to be the most economically devastating event in the entire lives of all of the unfortunate participants, making this series of cases the most tragic in the history of North Dakota land rights, and conclusively emphasizing the importance of understanding and respecting land rights.

FISCHER v BERGER (2006)

Our final case dealing with prescriptive easements finds the Court taking a position that limits the range of situations in which a private prescriptive easement can be successfully claimed, and also putting in place a bar limiting the application of a related legal concept. Whenever a prescriptive easement claim is made, the determination of the origin of the use, and the conditions in existence at that time, becomes critical. In many cases, the exact origin of the use is uncertain or unknown, due to the passage of time, and in such situations a legal presumption about how and why the use began must be applied by the Court. Generally, if the use began with permission, it remains permissive and is not adverse in nature, but if it began without permission, it can represent an adverse use, resulting in a prescriptive easement. Obviously, proving whether or not permission was actually granted, sometimes after several decades have passed, can be

difficult or impossible, bringing the legal presumption into play. In this case, the Court adopts the position that when no conclusive evidence that permission was ever granted exists, the use will be presumed to represent friendly behavior by the owner of the land being used, widely known as neighborly accommodation. Under this view, the owner of the land being used need not show that permission was ever expressly granted, in order to retain the right to stop or prevent the use from continuing at any time. The legal burden of proof resides with the easement claimant, to prove that the use was not made pursuant to any form of permission, such as unspoken neighborly accommodation, forcing the easement claimant to prove that the use was adverse in some other way, in order to prevail. In this case, unable to prove that the use did not begin with permission from the neighboring land owner, the easement claimant turns to the acquiescence of his neighbor, and asserts that acquiescence should be seen and accepted by the Court as a legal factor equivalent to adverse use, in determining the true nature of the use. The Court concludes here however, that the presence of acquiescence is essentially equivalent to, and indicative of, permission through tacit neighborly accommodation, and therefore holds that acquiescence cannot support a prescriptive easement claim. In so doing, the Court again demonstrates that it views acquiescence as a highly specific legal tool, which it has elected to reserve solely for the resolution of boundary issues, when the Court is required to uphold and enforce a boundary location that differs from the record location of the boundary in question, due to the presence of equitable factors or considerations. In addition, although not in such dramatic fashion as in the Tibert case, just reviewed, here again we see the negative consequences that descend upon a party who chooses to take matters into his own hands, committing a violation of the law that robs him of the mantle of good faith, which is essential to one coming before the Court in search of rights of a fundamentally equitable nature.

> 1947 - Berger owned the north half of the north half of a certain section. Fischer owned two separate tracts, one lying to the north of Berger's land and one lying to the south of Berger's land. How or when these parties acquired their land is unknown. Fischer was unable to take advantage of the section line right-of-way that connected his two tracts, which ran along the west edge of Berger's land, because the terrain along that portion of the section line made

that area impassable. Therefore, Fischer began using an existing trail running through Berger's land to travel between his two tracts. How far east of the west section line right-of-way this trail was located is unknown, but Fischer evidently viewed it as a substitute for the section line right-of-way and believed that he had the right to use it on that basis. Berger was aware of the use of this trail by Fischer and made no objection to that use, but he evidently did not consider the trail to be a surrogate or alternate section line right-of-way and he never recognized or acknowledged it as such. The origin of this trail, and what use had been made of it prior to this time, is unknown. With what frequency Fischer used this route over Berger's land is unknown, and whether or not Fischer had other ways of accessing each of these two tracts is also unknown.

1948 to 1959 - At some time during this period, Fischer and Berger discovered that they disagreed over the location of their mutual boundaries, so a survey was done, and both parties honored the boundaries resulting from the survey. Following the survey, Berger fenced his land, building gates in the fence at the points where the trail being used by Fischer crossed his north and south property lines. No details regarding this survey were discussed, since no boundaries were in dispute.

1960 - Relations between the parties soured and Berger told Fischer that he could no longer use the trail.

1961 to 1974 - Fischer continued to use the trail, despite Berger's wishes. Whether he used it when Berger was present, or only when Berger was not around, is unknown.

1975 - Fischer failed to close the gate at the south end of the trail, when using the road, so Berger locked that gate.

1976 - Fischer informed Morton County that his access had been cut off by Berger, and the county responded by having the trail surveyed and having cattle guards built next to each of Berger's gates, so Fischer could use the trail unobstructed. Morton County also prepared an easement document, which evidently described the surveyed location of the trail, but for unknown reasons, this document was never signed by anyone or used at all.

1977 to 1999 - Fischer used the trail running through the cattle guards without objection from Berger.

2000 - Fischer needed to move livestock, so he put plywood over the cattle guards. Whether he removed the plywood or left it covering the cattle guards is unknown, but Berger became upset when he discovered what Fischer had done, so Berger removed the gates and cattle guards and fenced off the portion of the trail on his property.

2001 - Fischer informed Morton County that Berger had cut off his access again, but since Fischer had violated the law by covering up the cattle guards, the county declined to come to his assistance this time. The State Representative for the area in question was then informed of the controversy and the Attorney General of North Dakota was asked for his advice on the matter. The Attorney General stated that the county could be held legally responsible for providing Fischer with access to all of his land, depending on the specific details of the situation, but also stated that Fischer could be entitled to a private access easement or right-of-way over the portion of the trail in question by virtue of adverse possession, again depending upon the specific evidence and conditions.

2003 - Deciding to pursue the private prescriptive easement option pointed out by the Attorney General, rather than continuing to deal with the county, Fischer filed an action against Berger, claiming that a prescriptive access easement or right-of-way in his favor existed across Berger's land.

Fischer argued that his use of the trail for more than twenty years had created an access easement or right-of-way over Berger's land, in the location of the trail, by means of prescription, so Berger had no right to block or prevent his use of the trail. Berger argued that he had always maintained complete control over all of his land, and the use of the trail by Fischer did not constitute adverse use, so no easement or right-of-way had been created anywhere on his land by means of prescription. The trial court found that Fischer's use of the trail had been permissive in nature, and was therefore never adverse to Berger, so no prescriptive easement had been created and Berger was free to terminate Fischer's use of the trail as he had done.

As we have learned from the several decisions of the Court discussing the section line right-of-way concept that we have reviewed, every section line right-of-way is fundamentally public in nature, so the counties and townships bear the legal responsibility to make and keep it available for use, whenever it may be necessary to do so. The law recognizes however, that not all section lines are subject to use for purposes of travel, due to terrain and topography among other reasons, and therefore the law provides the appropriate officials at the county and township level with the authority to deliberately deviate from the actual section lines when justifiable or necessary, essentially replacing any unusable portion of a section line right-of-way with an equivalent right-of-way in a legitimately useful nearby location. In such instances, the roadway that is actually used, in place of the legally contemplated roadway along the section line, has the same general legal characteristics that it would have otherwise, had it not been moved away from the impassable section line, and the rights associated with the relocated right-of-way likewise remain public in nature. In other words, the alteration of the location does not operate to change the purpose for which the right-of-way exists, therefore the responsibilities of the various parties relating to the alternative right-of-way are essentially equivalent to those relating to any typical section line right-of-way containing a roadway. In this case, the action taken by Morton County in 1976 clearly demonstrates that the trail in question was accepted by the county as a legitimate substitute for the useless portion of the section line right-of-way at the west end of Berger's land. Had the trail not been deemed legally acceptable as a surrogate section line roadway, the county would have had no authority to install cattle guards on Berger's land and require him to tolerate Fischer's use of his land for access purposes against his wishes, so the fact that the trail qualified as a legitimate replacement for the useless section line right-of-way, in the eyes of the officials having jurisdiction over the section line right-of-way, was legally established at that time. Since the documentation of the right-of-way along the existing trail was never completed however, the matter was left in a state of legal limbo. Had Fischer not made the unfortunate decision to illegally cover the cattle guards, he would have been well positioned to maintain his right to require the county to complete the unfinished business of legally documenting the relocated right-of-way, and to compel Berger to keep the trail clear, on the basis that it was an established public right-of-way. But since Fischer had taken the law into his

own hands, he had forsaken his position as a party acting in good faith, and we have already seen a myriad of cases illustrating how the Court views those who have taken any actions demonstrating a lack of good faith, so Fischer had essentially painted himself into a corner.

Having abandoned the effort to enlist the support of the county, and assert that the trail was in fact the legal equivalent of a section line roadway, Fischer was left with only the alternative to claim that he had obtained the right to use the trail by adverse or prescriptive means, as a result of his long ongoing use of it. He may have made the same mistake made by many others before him, of assuming that long use alone is sufficient to clinch an adverse claim, and that no further evidence would be needed to prevail on that claim, because his argument for adverse use was not a strong one. The Court has always consistently maintained the position that the presence of fences, either with or without gates, creates a strong legal presumption that the record owner of the fenced area has asserted and retained full physical and legal control over the entire fenced area. Since Berger had fenced his land shortly after Fischer began using the trail across his land, no use of the trail by Fischer before Berger built his fence could have resulted in a prescriptive easement, because the period of time that passed before Berger began regulating Fischer's use of the trail, by means of the gates that Berger built, was insufficient, being well short of the required twenty years. Once the fence and gates were in place, the Court determined, no adverse rights could accrue, since Berger had provided physical notice to Fischer that he reserved the right to terminate Fischer's use of the trail at any time, by virtue of the presence of the gates. Fischer's use of the gated trail against Berger's wishes could have been considered truly adverse, but again the period of time that this condition existed, being less than 15 years during the 60s and 70s, before Berger interrupted Fischer's use in 1975, was clearly insufficient to result in the creation of any adverse rights. Once the cattle guards were put in place, the Court decided, the use of the road by Fischer was once again with the consent of Berger, and was not adverse, since Berger had voluntarily accepted the solution provided by the county's installation of the cattle guards, even though he was under no obligation to do so, since no easement had been legally created over his land, due to the failure of the county to legally finalize the proposed relocation of the section line right-of-way onto Berger's land. So even though Fischer had used the trail between

the cattle guards continuously for over twenty years during the 80s and 90s, that time period was of no benefit to his prescriptive claim, since that period of use was not adverse, having resulted only from Berger's voluntary acquiescence to the functioning cattle guards, representing a state of affairs that was satisfactory to Berger. In addition, the fact that Berger had terminated Fischer's use, when the cattle guards were covered up by Fischer, showed that Berger had retained the right of control over the trail all along, and he had promptly exercised that right when conditions became unsatisfactory to him, as a consequence of Fischer's illegal action.

At this point, essentially as a last ditch effort, Fischer and his legal team elected to present a suggestion that was novel in North Dakota, asserting that the trail had been legally established as a prescriptive access easement by virtue of the acquiescence of Berger. The doctrine of acquiescence has in fact quite frequently been applied to resolve conflicts and disputes over easement and right-of-way locations in most other states, as a form of practical location by agreement, but as will be recalled from our review of the many previous cases concerning acquiescence discussed herein, the development and application of acquiescence in North Dakota has been distinct and independent of it's legal meaning and effect elsewhere, so here acquiescence has no basis in, or relation to, practical location or agreement. Because acquiescence is fundamentally linked to adverse possession in North Dakota, the suggestion made by Fischer that it could or should be considered applicable to prescriptive easements was logical and reasonable, because prescriptive rights are legally established by means of adverse use, so his suggestion regarding acquiescence was not a new and different argument in that sense, it was simply a variation on the larger theme of acquisition of rights under adverse conditions. The Court however, has always made it clear that it views acquiescence solely as a means of overcoming the absence of adverse intent, when justice commands and requires that a party who acted in good faith, with respect to a mistaken boundary, must prevail and be deemed to have acquired a portion of an adjoining estate. Since the purpose and use of acquiescence by the Court has been thus very narrowly defined and limited, Fischer was essentially seeking an expansion of the concept into a wider arena of the law relating to land rights, and in view of the perception of an absence of good faith on his part, created by his abuse of the cattle guards, the Court proved to be

entirely disinclined to oblige him in this regard. Instead, the Court chose to take the position that Berger's acquiescence amounted only to neighborly accommodation of Fischer's apparent need to use a portion of his land, which resulted in no sacrifice of any rights by Berger, and no acquisition of any rights by Fischer. Having disposed of all of the legal options available to Fischer, the Court upheld the ruling of the lower court that no access easement over the trail in question existed. Fischer's case had been a futile one, doomed to failure by his own illegal act, but the critical decision made by the Court in this case, to decline to extend the concept of acquiescence beyond the narrow field of boundary law, may well prove to have a dramatic impact on cases involving easement and right-of-way controversies in the future. The Court concluded by expressly eliminating the possibility that acquiescence could ever be thus extended in North Dakota, stating that:

> "Our cases recognize the doctrine of acquiescence applies to the location of a boundary between adjacent property .... acquiescence allows a person to acquire property when occupying part of a neighbor's land due to an honest mistake .... acquiescence does not apply to servitudes created by prescription .... the doctrine of acquiescence is not applicable to a claim for an easement by prescription..."

BURLINGTON NORTHERN v FAIL (2008)

This case, which involves a dispute over the legal requirements applicable to an easement description, provides a classic example of the fact that legal principles, rather than specific details, form the basis of the Court's decisions and govern the results of the cases upon which the Court passes judgment. Since surveyors are intimately involved with descriptions in every aspect of their work, the subject matter of this case makes it an especially appropriate one with which to demonstrate the way the Court follows and applies legal principles in the context of land rights, as it provides important clarification regarding what does, and does not, represent a legitimate and legally valid easement description. Here again,

just as in the 1931 McHugh easement case that we have also reviewed, the right to use railroad tracks serving private properties is the focus of the controversy, but the principles applied in these cases by the Court are not unique to railroad tracks, and are in fact no different than those that the Court applies to all situations in which prominent physical evidence provides notice of the existence and location of an object representing a beneficial use of land. Practically any ostensibly permanent object that serves a purpose can potentially form the basis of an easement, from a fire hydrant to a water tower, or from a transformer to a microwave tower. The key aspect of the legal equation for surveyors to recognize and understand is that every easement exists for a purpose, and the purpose is the real matter of prime importance, as opposed to the detailed technical language of a description, so the purpose is necessarily relevant to the location of the easement, and can control it's location. As we will see here, in the very basic and logical view of the legal function of descriptions taken by the Court, a description that places an easement anywhere other than the one physically useful location adds no value and creates uncertainty, while a very minimal description that clearly points to the truly intended location is completely sufficient and legally supportable, although devoid of technical detail. A great lesson can be learned, by those who are technically inclined, from the wisdom demonstrated by the Court in decisions such as this, which honor the elegance of simplicity. It's important for surveyors to realize that the Court approaches issues relating to surveys and descriptions from a very different perspective than that of the surveyor, the Court being concerned with location issues only to the extent that the location must ultimately serve and accomplish the intended purpose. As we shall see here, the Court is entirely unreceptive to the suggestion that the mere absence of technical data renders a description incapable of serving it's intended purpose, based on an attempt to interpret the language of a statute in a manner that serves only the personal agenda of the party making the suggestion, who put himself in the position that he finds himself in, by failing to carry his burden of notice as a grantee.

> 1989 - Burlington Northern (BN) owned a tract of unspecified size in Grand Forks. A double railroad spur track, which served a nearby potato warehouse, crossed the tract owned by BN. BN quitclaimed this tract to a company known as Glacier Park, reserving an easement

to insure BN's right to make ongoing use of the tracks, describing the location and extent of the easement only by means of an exhibit drawing, that was referenced in the description in the quitclaim deed and attached to the deed when it was recorded.

1992 - After having been conveyed an unspecified number of times to various parties, the tract in question was conveyed to Fail, who operated an automotive business and intended to use the land for business purposes. Upon acquiring the tract, Fail promptly informed BN that in his opinion no railroad easement existed on his property, and he intended to begin charging BN for it's use of the tracks crossing his property.

1993 - BN evidently chose to ignore Fail's opinion regarding the easement in question and went on using the tracks just as it always had. Fail then barricaded the tracks, making it impossible for BN to safely use them. BN filed an action against Fail and the trial court ordered the barricade removed, but also declared that the nature of BN's easement was unclear and would therefore need to be legally determined through additional litigation.

1994 to 2008 - Fail's business failed and he went into bankruptcy, so any further litigation concerning the BN easement was put on hold for most of this period and the controversy remained unresolved. At some point in time, when Fail emerged from bankruptcy, he decided to resume his efforts to prevent BN from using the tracks across his property. He posted signs on his property notifying BN that he considered any use of the tracks to be a criminal trespass, subject to criminal prosecution, so BN was compelled to take up the matter again, returning the case to the trial court for resolution of the issues relating to the easement that had not yet been argued and ruled upon.

BN argued that the railroad easement in question had been properly legally created, and had never been abandoned or lost by any other means, and it was therefore a fully valid easement that was still in effect, so Fail had no right to obstruct it and was legally required to honor it. Fail argued that the easement had never been adequately described, and that this failure by BN was fatal to the existence of the easement, so in fact it had never been legally created. The trial court decided that the easement had been

adequately described and was legally valid and fully effective, so Fail had no right to prevent BN from freely using it.

It should be well noted and understood at the outset that although this case involved a railroad track, the general principles of easement law that were in play here are completely analogous and equally applicable to most other types of easements as well, including access and utility easements in general, so this is not a case in which principles that are applicable only to railroads were being argued. The fact that the land upon which the 2004 Tibert case took place was within a BN right-of-way was indeed crucial and pivotal to the outcome of that particular case, as discussed in our review of that case, but the fact that the easement in controversy in this case happened to be for the purpose of the use of a railroad track does not make this case equivalent or directly comparable to the situation in the Tibert case. The dispute over the easement owned by BN in this case would have been decided on the same basis and the same principles discussed here, even if the easement in question had been for some other type of use or purpose, such as a driveway, a power line or a pipeline, and even if it had taken place on land that was never owned by any railroad. In fact, with respect to the exceedingly powerful concept of physical notice, this case is actually most comparable to the McHugh case of 1931 and the Roll case of 1983, in both of which the Court emphasized the importance of the burden upon all parties dealing with land rights to take notice of the existing conditions, and particularly any existing uses, taking place upon the land in question, as we have seen. In this case, the easement at issue was created by means of reservation, so the fundamental question was how thoroughly and precisely an easement that is being reserved by a grantor must be described, in order to be legally valid. The fact that BN happened to be the dominant party in this case is relevant only to the extent that BN chose to use a form of easement description that is not typically used by private parties when creating or acquiring easements, aside from that, the outcome of this case would have been no different if the holder of the easement in question had been a corporation of another type or an individual.

The theory implicitly put forth by Fail in his argument was that no easement lacking a precise and exact description of it's location can have any validity. Although this is certainly contrary to the typical treatment of

easements, which have been historically treated as legitimate and legal, even when described in a variety of nebulous ways, whenever intent to create an easement is evident, it's not difficult to see how Fail may have arrived at his mistaken conclusion. The language of statute 47-05-02.1, which requires easement descriptions to properly define the exact area to be covered by the easement being created, very likely lead him to believe that only a description containing precise details, such as bearings and distances, is acceptable for the purpose of creating an easement in North Dakota. But if that was the basis of his opinion, he had overlooked, or failed to understand, the fact that such statutes are viewed by the Court only as augmenting the accepted principles of the common law, rather than as eliminating or destroying those principles. Therefore, the Court analyzed the meaning of this statute with a view toward merging and blending it harmoniously with the long accepted principles applicable to easement descriptions, rather than treating the statute as an attempt to arbitrarily negate those long standing principles. To that end, the Court observed the context in which the statutory language was created, and found that the spirit of the law was merely to preclude the creation of overly burdensome blanket easements, which can operate to prevent development or improvement of otherwise valuable land. The legislative intent, the Court concluded, was never to require the presence of minute and unnecessary detail in an easement description, in order to create a legally valid easement, it was simply to prevent the use of careless and negligent language, creating abusive and detrimental burdens on land. Fail had unjustifiably relied on an improper interpretation of the statute in question, the Court determined, and to that extent his argument was groundless and his position on the validity of the easement was without merit. In effect, he had attempted to usurp the role of the Court itself, as the interpreter of the law, and had erred in so doing, as a result of his failure to take the original legislative intent behind the statute into account, and to properly note and respect the true spirit of the law, which was a constructive and affirmative spirit, rather than a destructive and negative one.

The easement exhibit created in 1989 by BN, for the purpose of reserving the easement in question, as described by the Court, was evidently quite simplistic, showing only two parallel lines, representing the tracks, with a shaded area amounting to a strip across the subject property, labeled

with the dimension "32". In addition, the exhibit was entitled "Track Easement Reserved", which evidently appeared very prominently in large bold letters. Fail's assertion was that this exhibit, lacking any supporting text description of the easement's location, was legally insufficient to define the location and extent of the easement. In view of the fact that the Court has always strongly maintained that all intended easements must be clearly indicated and properly defined, and must not be hidden or deceptive, when being created by means of a reservation being made by a grantor in a deed, it's not surprising that Fail felt confident that the Court would agree that the exhibit was legally deficient. The Court however, citing the Royse and North Shore cases that we have also reviewed, held that the exhibit met all the legal requirements set forth in those cases for a valid reservation description, since the intentions of BN were fully expressed with complete certainty and were very prominently stated on the face of the exhibit. In the eyes of the court, the exhibit, although extremely basic from a technical perspective, was a good and full description of BN's intent, which is exactly what every grantor is bound to reveal in the documents of conveyance created by the grantor. Moreover, this decision of the Court was in full accord with it's long standing position that form does not control over substance, so the presence of any additional text, such as measurements indicating the exact location of the tracks, either on the exhibit or on a separate page in typical text description form, would have amounted to surplusage, since the substance was already present. Since the tracks were in existence when the reservation was made, the intent of BN to reserve an easement over a 32 foot strip, in the location physically occupied by the tracks, wherever they might cross the subject property, was quite fully and clearly expressed on the exhibit, without any need for any further words or numbers to express that intent. With regard to the use of metes and bounds in a right-of-way reservation description, the Court upheld the concept that:

> “...an instrument of conveyance containing a reservation for the future construction of any railroad or highway must specifically locate or describe by metes and bounds such right-of-way."

This language, the Court noted however, could have no application when the object upon which the easement location is based is already in existence at the time the reservation is made, as in the present case, because

the location is already established on the ground, making any further attempts to describe it superfluous. In other words, since the intent of the easement is clear, even if a numerically detailed description were to be created and recorded, it would add nothing more than supplemental information, since the location of the easement, being defined by the purpose for which it was intended, was already controlled by the actual physical location of the object which the easement was created to protect, wherever that object might turn out to be on the subject property. The essential message of this case is not that easements can be poorly described, a good and full description is always best of course, being most useful, provided that it is accurate. The important point for surveyors to appreciate is that the absence of measurements and similar details does not destroy land rights, the existence and location of which are controlled by legal principles, rather than by mere numbers. When evidence indicating the intent to create an easement is present, and physical notice of it's location is clearly provided by a visible object or objects of any kind, the measured location of the easement is a secondary concern, which cannot operate to void the intent to create an easement. In this case, the definition of the location of the easement required the use of only one number, 32, to provide the width, in all other respects the graphic exhibit fully expressed the location of the easement with legal certainty, so it was a legitimate description fulfilling the statutory requirements. Having ruled that the graphic exhibit form of description is fully valid and legal, for purposes of the creation of an easement by reservation, the Court upheld the ruling of the lower court that BN had the right to use a 32 foot strip across Fail's land as a railroad easement, and Fail had no legal basis upon which to block it or deny it's legal existence, since he was charged with physical notice of it's presence when he acquired his land. Fail had learned the same lesson that had been learned the hard way by so many before him, who acted impetuously, based on their own speculative ideas about the law, or on their own misconception about the true meaning of one statute or another, without sufficient research. Yet again, it bears reiteration that in matters involving land rights, destructive acts and aggressive behavior are always inadvisable, as they inevitably pave the pathway to defeat, when brought to the attention of the Court.

BROWN v BRODELL (2008)

This most recent decision of the Court dealing with adverse possession and acquiescence emphasizes the importance of investigating and understanding the history behind the existing conditions, whenever the objective is to determine whether or not there is any real chance that the circumstances observed during a survey may prove to be sufficient to overcome the record location of the boundary in question and control the boundary location over a survey reflecting the location of record. We have seen in several previous cases how the Court views lines marked by physical objects of various kinds, but the physical form in which the allegedly acquiesced boundary manifests itself is only one element bearing upon it's validity, the manner in which the parties themselves, and in some instances their predecessors as well, have historically perceived the line in question is equally important. The physical form the alleged boundary line takes is important, because this determines whether or not the line itself provides notice of it's meaning and significance, as a boundary. However, the knowledge that the parties carry in their minds about the origin and history of the line in question can render the element of physical notice effectively inoperative. In the 2002 case of Gruebele v Geringer, for example, a garage straddled a property line for nearly 40 years before a dispute broke out, concerning the ownership of the land that it sat on. The fact that the building had provided visible evidence of it's presence, extending beyond the record boundary, for decades was not enough to support adverse possession however, because the Court found that the use of the building had historically been shared by the owners of both properties involved, so the owner whose predecessor had built the garage could not successfully argue that it represented an adverse claim, since it's presence had always been beneficial both parties and adverse to no one. The case we are about to review again clearly illustrates that no useful judgment can be made, regarding the true nature of the use, and the resulting rights of the parties, based solely on the present physical circumstances, without examining and learning the origin and history of the current existing conditions, to ascertain how the intentions of the parties and their predecessors brought about the conditions that appear to the present day

surveyor. Likewise, we observe here once again that whether or not the line of record, as indicated by any given survey prevails, is not a function of how the survey was performed. Unless the survey itself is specifically attacked and found to be incorrect, which is rarely the case, the decision as to whether or not the record line location controls is based entirely on the behavior, conduct and knowledge of the parties themselves, which are the factors that form the real basis for the Court's determination of the outcome.

> 1951 - Brodell acquired the southwest quarter of a certain Section 19. Brodell generally used the land for farming and ranching operations. There is no indication that he ever made any effort to locate the east boundary of his quarter, since it was located in an area that was comprised primarily of steep and rugged terrain, making most of the easterly portion of the quarter practically useless to him, so the terrain itself essentially formed the greater part of his east boundary, for all practical purposes. Who owned the southeast quarter of the section at this time is unknown.
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> 1976 - Olson, who had acquired the southeast quarter at an unspecified time, ordered a survey of her quarter. Olson then hired Gleason to build a fence either on or near the west boundary of the southeast quarter, following a line that had been staked during the survey, and Gleason built the fence along the surveyed line, as instructed by Olson.
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> 1978 to 1987 - Gleason occupied Olson's land, as a tenant farmer, and used all the land east of the fence. The fence ran more or less along the edge of the steep and rugged area previously mentioned for most of it's length, so Gleason would not have been able to cultivate most of the land lying west of the fence, even if the fence had never been built.
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> 1992 - Olson conveyed the southeast quarter to Brown. Brown continued using the land in the same manner as Olson and Gleason had used it, farming the area east of the fence. Brown and Brodell both placed signs, saying "No Hunting", along the fence. In certain areas, where the terrain west of the fence was not too rugged to be useful, Brodell extended his farming operations all the way up to the fence, under the assumption that it had been built on the quarter line.

Brodell never asked Olson, Gleason or Brown what the intended purpose of the fence was, or whether it was intended to mark their boundary.

2005 - Uncertain about whether or not the fence had been built on the quarter section line in 1976, Brown ordered another survey of the southeast quarter. This survey was in agreement with the 1976 survey about the location of the center of the section, and confirmed that the north end of the fence was located at the center of the section, but this survey located the south quarter corner of the section over 100 feet west of the south end of the fence. None of the details relating to either of the two surveys are known, so there is no way of telling what was the cause of the apparent disagreement between the surveys, if in fact there was any disagreement, over the quarter corner location. The 2005 survey was not challenged in any respect by anyone, so it was simply accepted without question as being correct. Brown relocated the fence to the line indicated by the new survey, but Brodell tore the relocated fence down. Brown filed an action to quiet title to the entire southeast quarter, as defined by the 2005 survey.

Brown argued that he had always suspected that the 1976 fence was not on the quarter section line and he had never considered it to be his west boundary or treated it as his west boundary, so he was entitled to claim all of the land east of the quarter line indicated by the 2005 survey. Brodell argued that Olson, Gleason and Brown had all treated the fence as their western boundary, for a total of nearly 30 years, so it had become the boundary by acquiescence, and he was entitled to all of the land west of the 1976 fence line. The trial court ruled that no boundary had been created by acquiescence and quieted title in Brown, based on the 2005 survey.

We have seen that the Court has generally been willing to support boundaries that were created with reference to a fence, or were subsequently marked by the construction of a fence, when it can be shown that the fence has been in place so long that no one can recall when it was built or who built it, and also in situations where the fence was built in a clear attempt to follow a line that had been surveyed, either as an existing boundary or as a new line of division, in a faithful attempt to rely on the survey, regardless of whether or not the line in question is later found to have been surveyed in

error in some way. We have also seen that fences and other such clearly visible and substantial improvements have been upheld by the Court, as being sufficient to provide notice of the existence of a boundary claim, even when put in place by a party acting out of ignorance, and even when placed as an outright mistake, provided that enough time has passed to merit invoking the doctrine of acquiescence, as the appropriate means of putting the rights of the parties in repose. Given these observations, one might suppose that Brodell had a fairly strong case and a good chance of convincing the Court that the ruling of the lower court should be reversed. But since reaching it's zenith in the Haas case of 1991, by 2008 there had been no successful acquiescence cases in nearly twenty years, and in the James case of 2001 the Court had signaled that it was not inclined to extend the doctrine of acquiescence any further that it already had, declining to apply it to a tree line. In this case, as it turned out, the Court once again found an opportunity to hone the doctrine of acquiescence to an even finer point, by more strictly defining it's limitations.

Testimony, as is so often the case, again proved to be key to the outcome of this case. Brodell and his son testified to the facts, as they saw them, and to what they had gathered from the actions of the adjoining parties, with respect to the quarter line, and the Court fully accepted the testimony of the Brodells as genuine and legitimate. However, the Court emphasized that acquiescence requires mutual actions and intentions, so the testimony of Brown and those on his side, as to their intentions, was of at least equal value as evidence to the Court. This provided the opportunity for Brown to take advantage of the critical fact that in this case, the origin of the fence was known, rather than unknown, and the man who had actually built the fence was available to testify about exactly what it's purpose was. Olson was evidently either no longer alive, or no longer able to testify, but Gleason testified that it had been Olson's intention, and her specific instructions to him, to keep the fence on her quarter. She wanted the fence, he testified, to bypass the area of steep and rugged terrain along portions of the quarter line and remain on the more level terrain to the east, on her side of the line, presumably because it would be more useful and easier to maintain in that location. From this, the Court deduced that it was not necessarily Olson's intention to run the fence down the quarter line. Furthermore, the Court implied from this evidence that there was not necessarily any conflict

between the two surveys over the south quarter corner location, because it was entirely possible that the line staked on the ground in 1976 was never intended to represent the quarter section line at all. It was equally possible, the Court stated, that Olson had told the surveyor to locate the quarter line, but then also told the surveyor to stake a line from her northwest corner that would keep the entire fence on her quarter and bypass the steep and rugged area, obviously causing the staked line, when extended southerly, to hit the south section line east of the quarter corner. This, the Court decided, was what had presumably happened, based on the testimony of Gleason. In addition, Gleason testified that the reason Olson wanted the fence built in the first place was merely to contain her livestock, further indicating that she may very well have had no intention of fencing her entire quarter. Therefore, the fact that neither Olson nor Gleason nor Brown ever used any of the land west of the fence, for nearly 30 years, was of no significance, because they were all aware that the fence did not represent a boundary. On that basis, the Court upheld the decision of the lower court, that acquiescence was inapplicable in this particular case.

Brodell either made no effort to show that there was any conflict between the 1976 and 2005 surveys, and prove that the 1976 line of stakes really was intended to mark the quarter section line, or else he was simply unable to do so. If he had been able to show that the 1976 line was intended to represent the true boundary, the 1981 Terra Vallee case, the foremost North Dakota acquiescence case, would have provided strong support for his claim, as we have already discussed, and he could very well have prevailed. But evidently he did not even attempt to compare the two surveys, since the Court noted that the 1976 survey was not even among the evidence presented, so we have no indication from the record as to whether or not there was really any difference in the 1976 and 2005 quarter corner locations. Brodell made the mistake of relying on his own assumption that the fence represented the quarter line, and although he was not obligated to confirm that assumption by means of a survey, he evidently never even attempted to confirm it with any of the adjoining parties. Moreover, the use Brodell made of the land between the true quarter line and the fence was minimal, he had never used some of it, or perhaps even most of it, since it was not susceptible to cultivation. If Brodell had built any substantial improvements in the disputed area, the outcome could have been entirely

different, because Brown could have been vulnerable to estoppel. Brown, on the other hand, did not bear the burden of taking notice of the fence location at the time he acquired his quarter, as a grantee typically would if the origin and purpose of the fence were unknown, because he knew that the fence had been built by his grantor, so he had no reason to question whether or not it was really located on the boundary. Since no land owner is required to fence every bit of their land, as the Court recognized, Brown had the right to presume, at the time he acquired his quarter, that the fence was located either on the boundary, or on his side of it, and that it did not represent a potential claim of ownership by Brodell. Finally, the Court also noted that Brown had been paying taxes on the entire quarter all along, so he was presumed to be thereby actively maintaining his claim to all of it, whether he knew where the boundary really was or not. This concludes our pursuit and examination of the topic of acquiescence in North Dakota, it will be interesting to see what course the Court follows in adjudicating future cases on this topic.

FARMERS UNION OIL COMPANY OF GARRISON v SMETANA (2009)

In this case, which marks our final opportunity to examine a conflict resulting from problematic conveyances, and which is replete with negligent conduct by all of the parties involved, we again encounter and revisit several issues with which we have become acquainted in earlier cases. The primary issue in play here is description reformation, but extrinsic evidence and subsequent survey evidence also represent potentially significant factors, and of course the important and powerful principles of good faith and notice stand prepared, as always, to play a major role in the outcome. We are given enough detailed information in this case to clearly see that the origin of the controversy is rooted in the failure of the parties to appreciate the value of a survey for conveyance purposes. As is so often the case, and as surveyors know only too well, if any of the parties had ordered a survey before completing the conveyances that took place, this dispute would never have developed, but instead, false assumptions were made and problems resulted.

Its important to note that although the Court does not expressly state that a survey should have been done prior to the conveyances, the failure to order a survey can bear upon the crucial element of notice and the equally critical perception of good faith. While the Court cannot void a conveyance merely due to the absence of a survey, it can consider a failure to order a survey as an indication of contributory negligence, or as a failure to carry the burden of diligence on a grantor, or the burden of inquiry notice on a grantee, or even as an indication of bad faith, where the circumstances clearly show that having a survey done would have been prudent and beneficial. Also relevant to this case, the Court has reiterated, as recently as the 2005 case of Anderson v Selby, that extrinsic evidence of the true intentions of the parties can control land rights, where it can be shown that the parties had a definite agreement and the documents of conveyance failed to properly express their agreed intentions or failed to put their actual agreement into effect, due to mistaken language or numbers used in descriptions, as the previous description reformation cases have illustrated. This case may or may not represent the final word from the Court on the matter in question here, since it was remanded to the lower court for proper resolution of the issues, only time will tell if it proves to be yet another case that eventually returns to the Supreme Court on appeal of a subsequent lower court ruling.

> 1992 - Bauer owned the north 196 feet of Lots 13 & 14 in an old platted residential subdivision in Garrison and he lived in a house on this northerly portion of those two lots. The platted dimensions of the two lots are unknown, and how or when the Bauer parcel was created is also unknown, but these lots were apparently rectangular in shape, and the southerly portion of both lots was owned by Cenex. This southerly portion of the two lots was occupied by a Farmers Union Oil gas station. Cenex wanted to expand the gas station parcel, so they contacted Bauer about acquiring part of his portion of the two lots. The parties met on the ground and decided that a certain tree, which was in Bauer's backyard, south of his house, would mark the new boundary. The parties then made some measurements, and without the benefit of a survey, they somehow determined that Cenex needed the southerly 116 feet of the Bauer parcel. Bauer evidently had made no improvements in the area that Cenex wanted, and he decided that he did not need that area, so he agreed to this proposal

and deeded the southerly 116 feet of the northerly 196 feet of Lots 13 & 14 to Cenex. Bauer was therefore still the owner of the north 80 feet of the two lots. Bauer then erected a fence running from the tree across the full width of his backyard, marking the agreed boundary location, which the representatives of Cenex observed and accepted as being the same boundary location that was described in the deed. What use Cenex actually made of the area they acquired from Bauer is unknown.

1996 - Bauer conveyed the north 80 feet of Lots 13 & 14 to Scheel and Narad. How Scheel and Narad used their parcel is unknown, but there is no indication that they ever used the area beyond the fence.

2000 - Scheel and Narad conveyed the north 80 feet of Lots 13 & 14 to Smetana, who occupied the house. There is no indication that Smetana ever used the area beyond the fence.

2005 - Smetana had the north 80 feet of the two lots surveyed. The survey indicated that only a portion of the house was on the two lots. Most of the house was actually located north of the northerly lot line and extended into a 50 foot wide platted public right-of-way that had been vacated many years earlier. Upon being notified of this discovery, Garrison quitclaimed the 50 foot right-of-way to Smetana and the house was allowed to remain where it had always been. However, the survey also indicated that the southerly boundary of the north 80 feet of the lots was actually 42 feet south of the fence that Bauer had built. There is no indication of what evidence the survey was based on, and no evidence that any monuments were found, but no one disputed the validity of the survey, so it was accepted as correctly indicating the location of the original lot lines. From the survey, it was evident that the measurements of the Bauer parcel, made 13 years earlier by the representatives of Cenex, had been inaccurate, as a result of their failure to recognize and account for the vacated right-of-way. When Cenex was informed of the situation, Cenex filed an action against Smetana, Bauer, Scheel and Narad, claiming that Cenex owned the 42 feet lying south of the fence.

Cenex argued that the 116 foot distance used in the deed from Bauer to Cenex was the result of a measurement error, and that both Cenex and

Bauer had intended and understood that the fence was the new boundary, and that all of the parties had consistently treated the fence as the boundary, so Cenex should be allowed to correct that distance to include the entire area south of the fence, and title to that area should be quieted in Cenex. Smetana argued that he was an innocent purchaser in good faith, and that he had no reason to suspect that any problem or discrepancy existed with regard to the 80 feet described in his deed, so title to the entire 80 feet should be quieted in him. The trial court summarily dismissed Smetana's argument and agreed that Cenex was entitled to reform the deed to conform to the intentions of Cenex and Bauer in 1992, quieting title in Cenex up to the fence.

We have reviewed several cases that clearly explain and demonstrate the conditions under which a description in a conveyance can be reformed, but in this last case on the topic of conveyances, we have a set of conditions under which the Court was not comfortable applying the judicial remedy of description reformation, and chose instead to take this opportunity to more clearly define the limitations of the reformation remedy, and to issue a stern warning to those who take on the task of creating descriptions to be used in conveyances of land rights. The Court began by pointing out that reformation in North Dakota is controlled by statute 32-04-17, which expressly provides for the protection of innocent third parties who act in good faith. Smetana claimed to be such a party, but was not given an opportunity by the trial court to present his case to that effect. This was an error, the Court found, on the part of the trial court. If Bauer had never sold his parcel, and only Cenex and Bauer were involved in the controversy, this factor would not have arisen, because no one other than those two original parties to the agreement would have been impacted by any alteration of the document that described their agreement, but since other parties had acquired rights to the parcel, the original intent of Cenex and Bauer was no longer the only important factor to be considered. This alone might have been enough to cause the Court to return the case to the lower court for further evidence and reconsideration of it's conclusions, but in fact an even more fundamental and serious issue was called into question by the involvement of subsequent parties, who were not present at the time of the agreement between Cenex and Bauer, and that was the issue of notice, which as we have seen repeatedly demonstrated over many decades, is a matter of unsurpassed gravity.

The Court next indicated that the language of statute 1-01-21, defining good faith as innocent ignorance, with respect to transactions, was also relevant, as were statutes 1-01-23 through 1-01-25, which define the crucial concept of notice and outline the serious burden that rests upon a grantee who can be charged with notice. While the trial court had presumed that Smetana was subject to the heavy burden of inquiry notice, since the fence that Bauer had put up across his backyard was still present and clearly visible at the time Smetana acquired his parcel, Smetana had not been given an opportunity to present evidence that he was genuinely ignorant of the significance of the fence. Since the fence was known to have been built by Smetana's predecessor, Smetana was essentially in the same position occupied by Brown, less than a year earlier, which we have just discussed. Brown could not be charged with notice that the fence, in that case, was a boundary, because he had never been told by any of his predecessors, who he knew had built the fence, that it represented a boundary, so he was entitled to assume that it was inside his boundary. As noted in that case, if the fence had not been built by Brown's predecessor, he could have been charged with notice of it's significance. So Smetana, being a successor of the fence builder, like Brown, could not be charged with notice regarding the fence in this case, unless it could be shown that Smetana had some good reason to suspect that the fence might represent a boundary. Of course, in this case, the fence very clearly was intended to form a new boundary, but the question was whether or not Smetana had any way of knowing that, and the Court decided that the trial court had failed to properly address that question, so the ruling of the trial court, being based on the assumption that Smetana was either notified that the fence was his boundary, or that he was required to inquire about the meaning of the fence, was unsupportable.

The Court decided that the determination of whether or not Smetana was an innocent party must be made on the basis of the evidence, so further adjudication by the trial court was necessary and the case must therefore be remanded to the lower court for a full trial. On remand, the Court indicated, the decisive question would be whether or not the evidence reveals that Smetana had any reason to suspect that a boundary issue might exist. Obviously, a surveyor would typically be inclined to suggest that a survey should have been performed prior to the transaction by which Smetana acquired the property, since this would have exposed all of the issues in play

and could thereby have prevented this controversy. Its important to note however, that here once again, although there can be no doubt that a survey would have been beneficial, the Court gave no indication that any of the subsequent grantees of Bauer were obligated to obtain a survey, or that their failure to obtain a survey diminished or reduced their rights in any way. A grantee does not lose his status as an innocent participant in a transaction involving a conveyance of land rights merely because he failed to order a survey. As we observed in the 1988 Deichert case, the grantee loses his innocent status only if the circumstances provide notice to him that some uncertainty exists with respect to the boundaries being conveyed to him. As the cases we have reviewed consistently indicate, the grantor typically bears the primary responsibility for doing whatever is necessary to enact a complete and proper conveyance, which includes providing a reliable description, so if any burden to order a survey did exist, it would logically rest upon the grantor, rather than the grantee. The grantee is generally entitled to rely upon the documentation pertaining to the transaction provided by the grantor, as a true and complete portrayal of the grantor's intent, which is exactly what Smetana did, and the grantee is charged only with observing the existing conditions, to insure that they are reasonably consistent with the information relating to the land that is provided by the grantor. In this case, the Court felt there was no clear evidence that Smetana failed to carry that burden, since there was no evidence that Smetana had any reason to suspect that the fence had not been built some distance inside the rear boundary of the parcel. Of course, if it were to be shown on remand that Smetana had some reason to believe the boundary was erroneously described, then his failure to pursue the matter prior to acquiring the parcel would operate to his detriment, and he could lose his innocent status. If it were to be shown that Cenex was openly using all the land south of the fence at the time Smetana first viewed the property, then inquiry notice would be applicable against Smetana.

In conclusion, its always very important to understand any case such as this for what it really is, it is not a contest between a grantor and a grantee, it is a contest between two grantees, Cenex and Smetana, from the same root grantor, Bauer. When viewed from that perspective, which is how the Court viewed the controversy, it becomes easy to see that the conveyance from Bauer to Smetana is not the decisive factor. In a contest

between grantees, the most important factor, as we have seen the Court repeatedly emphasize, is which party operated in good faith and which party failed in that regard. In this case, Smetana holds a major advantage over Cenex in that comparison, because Cenex is a corporate entity, with substantial professional resources and knowledge concerning how to properly conduct a land transaction. In the eyes of the Court, Cenex created the problem by negligently conducting it's transaction with Bauer. Although Cenex was the grantee and Bauer was the grantor in that transaction, the rule placing the responsibility on the grantor is effectively reversed with respect to that transaction, because Cenex was the motivating party, who instigated, conducted and controlled the manner in which the conveyance was made, including the critical fact that Cenex generated the erroneous description of the land being conveyed. Bauer was the innocent party in that transaction, although he was the grantor, since Cenex had full control over all the decisions that were made relating to that conveyance. Once again, as we have seen and noted, as early as the Mitchell case of 1910, a full century before this case, when one party with professional knowledge participates in a land rights conveyance, that party will be held to an elevated burden of professional diligence and responsibility. So even if Smetana was guilty of failing to have his parcel surveyed before buying it, an even greater share of the culpability for the existence of the conflict could still fall upon Cenex, due to it's failure to properly survey and describe the original conveyance. In the opinion of the Court, the Cenex representatives were trying to wash their hands of the consequences of their own carelessness, and since the statutory period had not yet put their mistake in repose, that was something the Court was not inclined to condone. The Court made it very clear that it is the party who prepares the description, whether grantor or grantee, who must bear the consequences of any errors in the description. While being a professional has its benefits, it must always be remembered that any violation of the fundamental burden of professional diligence can have most unfortunate consequences.

HAGER v CITY OF DEVILS LAKE (2009)

In our concluding case, we find the Court again applying it's most powerful tools of equity, to uphold the validity of rights that benefit both the public and private parties, against an assault launched by a group attempting to develop land, comprised of parties who had previously developed adjoining land, and had therefore been present and aware of the circumstances surrounding the use and condition of the land in controversy here, for a protracted period of time. The principles of notice, laches and estoppel are all on display in this case, which serves very well to illustrate the potential impact of delays and procrastination, especially when combined with false assumptions, on the rights of private land owners. As we have learned from many previous cases, the concept of notice requires all parties holding or dealing with land rights to observe the existing conditions on the land at issue and understand the legal implications of any visible use or occupation of the land, rather than choosing to simply close their eyes to reality and rely on documentary evidence alone. Notice has formed perhaps the most consistent land rights theme throughout the history of the Court, it was decisive in our first case in 1895 and it is again well demonstrated in this case, as we see the obligation that all private land owners bear, to know how their land is being used, again confirmed here. While notice can provide a foundation for the creation, alteration or termination of land rights, the passage of time, in conjunction with either action or inaction, as we have frequently seen in previous cases, can bring down the legal bar upon claims of private rights, and this is once again the scenario here. The concept of laches is embodied in the statutes of limitations on actions, essentially barring a land owner who has neglectfully delayed in asserting his rights, while allowing rights of others to develop, from putting asunder the rights of others that he has silently watched develop on his land. This concept is among those intended to prevent entrapment, and deception in general, which can become especially threatening or damaging to the fabric of society, by creating uncertainty concerning land rights, making it necessary to place those rights in repose after the passage of a significant length of time, for the larger benefit of society. Lastly, and perhaps most powerfully of all, estoppel ultimately represents the embodiment of the fundamental judicial requirement of good faith, in speech, in writing and in all actions. Here, an easement is imposed

by virtue of estoppel, because no land owner can successfully claim to have been damaged by a use of his land that was originally created to bestow a benefit upon his land, at his request and with his tacit acceptance. To that end, the Court here brings the plaintiffs to the realization that all benefits entail corresponding burdens, in land rights matters, just as in all other human affairs.

1980 - A development group, lead by Hager, owned a large tract near Devils Lake which they intended to subdivide into residential lots. The details relating to the acquisition, history, size, shape and boundaries of the tract are unknown, but are not relevant to the issues presented. A subdivision plan was prepared, which proposed to create an unspecified number of lots on the westerly portion of the tract, leaving the easterly 170 acres vacant for future development. A storm sewer system was required to serve this proposed subdivision, which was named Northdale, and which was to become part of the city. Devils Lake agreed to construct the storm sewer facilities needed to serve Northdale, and did so, the cost of the project being shared by Hager's development group and the city. As a result of the construction of the storm sewer system, as it had been designed, an unspecified portion of the easterly 170 acres owned by Hager was effectively converted into a drainage basin, onto which the storm sewer pipes draining Northdale discharged storm water.

1981 to 1990 - The Northdale subdivision was completed as planned, the lots were sold and occupied, and the storm sewer system was put into use.

1991 - Devils Lake performed some additional construction of storm sewer facilities, which resulted in an increase in the amount of storm water being discharged onto the 170 acres owned by the developers.

1998 - Devils Lake installed certain unspecified utilities in the vicinity of the drainage basin, on the 170 acres owned by the developers, and also graded a utility service road that was located on a portion of the 170 acre parcel.

2001 - The developers filed an action against Devils Lake, claiming that the city had damaged or removed some unspecified items or objects located on the land belonging to Hager and the others, and

Devils Lake contended in response that a prescriptive drainage easement had been created over a portion of the 170 acres. The case was tried and decided in favor of the developers. Devils Lake did not appeal the result of the case, so it was legally established, and conceded by Devils Lake at this time, that no prescriptive easement existed on the 170 acre parcel.

2005 - The developers filed another action against Devils Lake, seeking damages for the drainage of storm water onto the 170 acre parcel, which effectively prevented them from developing all or part of that parcel into another subdivision, as they had originally intended and now desired to do.

The development group lead by Hager argued that they had never approved or consented to the construction of the storm sewer system and related facilities on their land, and that it amounted to a legal nuisance, negligently constructed by Devils Lake, which was now preventing them from making full use of their land, so they were entitled to compensation from Devils Lake for the loss of the opportunity to develop the remainder of their land. Devils Lake argued that the drainage facilities had been constructed under a license agreement between the developers and Devils Lake, which had been put into effect in 1980, and which had become irrevocable due to the passage of 25 years, so Devils Lake was entitled to a drainage easement on that basis, and the developers were entitled to no compensation. The trial court agreed with Devils Lake and created the easement requested by Devils Lake, employing a metes and bounds description, covering that portion of the 170 acres that had been used by Devils Lake for utility purposes. In addition, the trial court awarded no compensation to the developers and required them to pay the costs incurred by Devils Lake associated with the litigation.

As a threshold matter, the Court was first required, before proceeding to decide the merits of the easement claim made by Devils Lake in 2005, to address the issues arising from the outcome of the previous case, concluded in 2001. That outcome had never been appealed, so the Court had no need and no reason to decide whether or not that case was properly decided, but the fact that the land in question had been the subject of previous litigation, involving the same parties and the same source of controversy, made it

necessary for the Court to determine the legal consequences of that earlier case. Hager asserted that no easement claim could be legitimately made by Devils Lake after 2001, because Devils Lake had claimed that an easement existed in the 2001 case and lost that argument, so the claim made by Devils Lake in 2005 was legally invalid, being a mere repetition of a claim that had already been legally ruled to be without merit. Two legal doctrines were in play in this regard, known as res judicata and collateral estoppel. The Court explained that res judicata applies when a valid final judgment has been made on a given matter and has become binding, meaning in effect that the matter has judicially been put to rest, and therefore cannot be legally brought up and argued all over again. Collateral estoppel, the Court also explained, forecloses relitigation of any ancillary issues that were covered by logical implication in an earlier case, based on a different claim. The general effect and purpose of both of these principles is to prevent time from being wasted fighting the same legal battles over and over, which would obviously prevent the judicial system from moving on to other pressing matters. Although Devils Lake had claimed an easement in the 2001 case and lost, and that decision was legally binding upon the parties, the Court pointed out that the argument adjudicated in 2001 had been limited to an easement that was allegedly created on the subject property by means of prescription. Therefore, while Devils Lake could no longer legally claim that a prescriptive easement had been created in the location in question, it was entirely possible that an easement could have come into existence in that same location by some other means, so Devils Lake was free to argue that an easement had been created on the 170 acre parcel in another manner. This decision very clearly indicates the great significance of understanding the various ways in which easements can come into existence, and appreciating the fact that easements can and do legally arise under a wide variety of different circumstances, and for a wide variety of different reasons, each having it's own particular legal basis, and the Court is open to considering all of them.

The Court next dealt with the suggestion by Hager that Devils Lake could not legitimately raise the statute of limitations as a defense, as it had done, because storm water was flowing onto the 170 acre parcel on a regular basis, if not continuously, and each time the water flowed through the storm system onto Hager's property new and additional damage was being done to

the subject property. The Court observed however, that the developers had made no claim that the storm system was not intended to be permanent, and in fact it was perfectly clear that it was necessarily permanent, so physical notice had been effectively served upon Hager and his group in 1980, that the system was going to be put into operation as constructed, and the obvious result would be continual and perpetual drainage of storm water onto the 170 acre parcel. Therefore, under the view of the situation taken by the Court, a new injury to the subject property was not being suffered each time water flowed through the system, each instance was merely a repetition of the burden originally placed upon the 170 acre parcel in 1980. Since the source of that burden, which had reduced the value of the subject property, was rooted many years in the past, the Court found that the statute of limitations was entirely applicable to the situation. In addition, also with regard to the interpretation and application of the various relevant statutes of limitations, the Court took the opportunity presented by this case to effectively tighten the time period during which certain claims for compensation, resulting from a taking of land for purposes beneficial to the public at some point in the past, could be made. Holding that the twenty year time period was excessive under certain circumstances, such as those present here, the Court determined that the six year statute of limitations specified in 28-01-16 was the appropriate one to apply in cases involving an injury or damage to land that occurs as a consequence of a contractual relationship concerning the use of the land. In so doing, the Court took the rare step of expressly overruling an earlier case that had applied the twenty year statute, in a situation involving a prescriptive public road right-of-way, awarding a land owner whose property bore a portion of the road damages, several years after the road had been built across his land. Since all of the construction done by Devils Lake on the subject property had been done in or before 1998, and the claim for compensation was not made by the developers until 2005, under the six year statute of limitations, the claim made by the developers was legally barred. Stating that the basic purpose of all statutes of limitations is to discourage land owners from sleeping on their rights and clogging the judicial system with stale claims, the resolution of which is necessarily problematic, due to the vintage of such claims, the Court thus disposed of the compensation claim made by the developers.

All that remained for the Court was to rule upon the validity of the

easement in favor of Devils Lake, that had been declared to exist by the trial court. Here, one last time, we will see the Court apply the immensely powerful principle of estoppel, as a tool of justice. Citing the Johnson case of 1912, which we have previously reviewed, and also the 1977 case of Lee v North Dakota Park Service, which contains an unusually thorough review of the law applicable to licenses, the Court agreed with Hager that the lower court had erred in finding that the 1980 license agreement, which resulted in the construction of the storm system, had become irrevocable and resulted in the creation of a drainage easement. This was however, a classic Pyrrhic victory for Hager and his group, since the Court was not about to allow them to escape the consequences of the burden that had been created on their land as a direct result of their own request. Just as the Court had recognized that Cenex bore the primary responsibility for the origin of the controversy in the case just previously reviewed, the Court once again focused the legal burden here on the parties responsible for the current dispute. Since the evidence clearly indicated that it was the developers who had been the motivating parties behind the construction of the storm system, and that it had been built in order to enable them to profit from the sale of the lots that they were proposing to create in 1980, and they had subsequently carried out their subdivision plan, selling the lots and thereby sharing in the benefits resulting from the construction of the storm system, the Court decided that the evidence was sufficient to establish an estoppel against the developers. Although Hager and his partners may very well have intended in 1980 to reserve the right to subdivide the 170 acre parcel at some time in the future, they had failed to do so, and in addition, they had knowingly allowed Devils Lake to expend public funds on construction of the storm system. Therefore, the Court ruled, they had legally forsaken their right to later change their minds about the location of the drainage basin and declare that they had decided to create additional lots in that same area. Both the buyers of the existing lots and the public in general had the right to rely on the existing storm system and Hager no longer had the authority to deny that it was necessary, or suggest that it had been improperly located and must be moved, in order to unburden his land. Because the land in question had been legitimately devoted to a specific beneficial use, which was never envisioned as being anything other than permanent, the Court ruled that the easement adopted and approved by the lower court was appropriate and legally valid, not as an irrevocable license, but as an

easement by estoppel, modifying the lower court's ruling only to that extent. Citing the Hille case of 1929, as an example of a comparable estoppel imposed upon a subdivider, the Court made it quite clear that estoppel can and does frequently arise in cases involving land rights, and the Court will continue to employ it as a means by which to vigilantly protect both public and private rights, acquired in good faith by implication:

> “A court can imply an easement created by estoppel when .... injustice can be avoided only by establishment of a servitude .... an easement by estoppel is created when a landlord voluntarily imposes an apparent servitude on his or her property, and another person, acting reasonably, believes that the servitude is permanent and in reliance upon that belief does something that he or she would not have done otherwise or refrains from doing something that he or she would have done otherwise."

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