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Boundary Litigation and Legislation in North Dakota

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BOUNDARY LITIGATION AND LEGISLATION IN NORTH DAKOTA

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Boundary litigation and legislation date back to territorial days for North Dakota. The legislation has changed little over the years, and the litigation has not become voluminous. It is the purpose of this article to analyze what laws and decisions there are in North Dakota, to set forth the principles of law that can be evolved therefrom, and to indicate some of the problems that they raise but do not settle.[1]

The land in North Dakota was surveyed under the United States Public Survey.[2] Much of this land is still conveyed by descriptions based on that survey. Some well established principles concerning that survey have been applied in North Dakota cases. These shall be considered first.

I. THE U. S. SURVEY

The discussion of problems arising under the U. S. Survey descriptions can be divided into two parts: (1) section and quarter section monuments as termini of boundary lines, and (2) meander lines as boundary lines

Section and Quarter Section Monuments

Original government section and quarter section monuments as located *on the ground* by the surveyor will control over any inconsistent calls in a description.[3] Should the location of the original

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1. This article does not deal with the location of boundaries above and below the surface, with the question of lateral support, or with the question of trees on boundary lines. On these subjects see generally N.D. CENT. CODE §§ 47-01-12; 47-01-17; 47-01-18 (1960); Duggan v. Davey, 4 Dak. 110 (1886), dealing with mining claims. Nor does this article deal with the county boundary problem recently discussed by the North Dakota Supreme Court in Higgins v. Hawks, 126 N.W.2d 791 (N.D. 1964), and the question of party walls recently discussed in Brandhagen v. Burt, 117 N.W.2d 696 (N.D. 1962).

2. Act May 18, 1796, c 29, 1 Stat. 464, provides in part: That a Surveyor General shall be appointed, whose duty it shall be to engage a sufficient number of skillful surveyors, as his deputies; whom he shall cause, without delay, to survey and mark the unascertained outlines of the lands lying northwest of the river Ohio. . . . [T]he said deputies shall carefully note, in their respective field-books. . . . These field-books shall be returned to the Surveyor General, who shall therefrom cause a description . . . to be made out. . . . He shall also cause a fair plat to be made of the townships. . . ." This legislation is the foundation for 43 U.S.C. § 751 (1958).

For a brief historical introduction to surveying in North Dakota see Ruemmele, *Origin of Surveys in North Dakota*, 24 N.D. BAR BRIEFS 102 (1948). On surveying in general see CLARK, SURVEYING AND BOUNDARIES (1959); STEWART, PUBLIC LAND SURVEYS (1935); 1 PATTON, TITLES § 116 (2d ed. 1957); Fegtly, *Historical Development of Land Surveys*, 38 ILL L. REV. 270 (1944).

3. This is simply an application of the general rule that where there are ambiguities in a deed and no other evidence of the intent of the parties "the court will sustain those provisions or parts of the description about which the parties would be least likely to have been mistaken." BURBY, REAL PROPERTY 461 (1953). And the primary rule is that a call for a monument will prevail over any other inconsistent call. This principle has been

monument be disputed its location will be an evidentiary problem and a question of fact for the jury.[4] The dispute may involve a triangular plot as in the early North Dakota case of *Black v. Walker*.[5] In *Black* one party contended that the original section monument was at point B (see the following diagram) so that line AB constituted the boundary line between Sections 35 and 36, and the other party contended that the original section corner monu-

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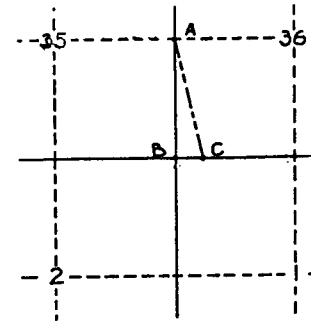
recognized in numerous decisions by the United States Supreme Court dating back to Newsom v. Pryor's Lessee, 7 Wheat. 7, 9 (1822). See, *e.g.*, Higueras v. United States, 5 Wall 827, 835 (1864); Security Land & Exploration Co. v. Burns, 193 U.S. 167, 179 (1904), Silver King Co. v. Conkling Co., 255 U.S. 151, 161 (1921); United States v. State Investment Co., 264 U.S. 206, 211-12 (1924); New Mexico v. Colorado, 267 U.S. 30, 41 (1925). Patton discusses the subject in part as follows: "The monuments on the ground are considered to constitute the facts of the survey; the field notes, showing the courses, distances and quantities, form a description of the survey in words; and the plat made from these is a map portraying the same facts. In case, therefore, of a discrepancy between the survey, as shown by the monuments thereof, and the field notes and plat, the survey controls. . . . It is only when the monuments marking the original lines cannot be found, or established, that the field notes and plat are resorted to as secondary evidence of location." 1 Patton, Titles § 149 (2d ed. 1957).

The general rule has been stated in various North Dakota cases with approval. See Hanson v. Grubb, 94 N.W. 2d 504 (N.D. 1959); Propper v. Wohlwend, 16 N.D. 110, 112 N.W. 967 (1907); Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933); Gardner v. Green, 67 N.D. 268, 271 N.W. 775 (1937). The specific application of it here dealt with has been repeated and applied many times in North Dakota cases. For example, in Propper v. Wohlwend, 16 N.D. 110, 115, 112 N.W. 967, 969, (1907), the North Dakota Supreme Court said: "The authorities seem to be unanimous in holding to the doctrine adhered to by this court in *Radford*. . . . Where . . . original monuments can be located definitely, they control absolutely over all other evidence, including plats and field notes." (In *Propper* plaintiff had argued that the plat should control with respect to fractional sections, but the court rejected any notion of different rules for fractional and whole sections.) See also, Black v. Walker, 7 N.D. 414, 75 N.W. 787 (1898); Radford v. Johnson, 8 N.D. 182, 77 N.W. 601 (1898); Nystrom v. Lee, 16 N.D. 561, 114 N.W. 478, (1907); Jamtgaard v. Greendale Township, 29 N.D. 611, 151 N.W. 771 (1915); Emmil v. Smith, 62 N.D. 174, 242 N.W. 407 (1932); Oster v. Muhlhauser, 63 N.D. 671, 249 N.W. 777 (1933) (*Oster* is difficult to follow. In its opinion, the court drew from Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933), rather than any of the preceding North Dakota authority to make and support the statement, "It is elementary that in determining boundaries 'Points marked by the original stakes and monuments placed by the government surveyors, if they can be found, or the place where they can be identified, govern. . . .' 4 Thomp., Real Prop., § 3138." *Oster* involved the location of the boundary line between 2 lots platted in Homesite Plat, Mercer County, which in turn, hinged on the location of the center of Section 25 as the starting point for measuring the lots, according to the plat.); Hanson v. Grubb, 94 N.W.2d 504 (N.D. 1959) ("[I]f a line is described to run on a certain course for a certain distance to a fixed governmental description point it will be extended to that point even if it has to run on a different course and for a different distance from those which the description designates in the absence of a different intent being shown." The question in *Hanson* was whether or not a notice of special school district reorganization election was invalid due to an improper description of boundaries. Query whether the sometimes technical and often times not well known rules of property law should be used in construing whether or not a notice has served its purpose, that of giving notice? In *Hanson* the courses and distances given did not take the line to the "Northeast corner of the Northwest Quarter of Section 6, Township 157 North, Range 92 West" which had been described. The court held that the corner was "a fixed governmental description point" and the inconsistent course and distance gave way. The court pointed out, further, that the irregularity dealt with mere surplusage in the description). In 1805 Congress enacted a statute which has been on the books ever since without material alteration and which contained in part the following language: "1st. All the corners marked in the surveys, returned by the surveyor-general . . . shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate. . . . 2d. The boundary lines, actually run and marked in the surveys returned by the surveyor-general . . . shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned by either of the surveyors aforesaid, shall be held and considered as the true length thereof. . . . 3d. Each section, or subdivision of section, the contents whereof shall have been, or by virtue of the first section of this act, shall be returned by the surveyor-general . . . shall be held and considered as containing the exact quantity, expressed in such return or returns. . . ." Act. Feb. 11, 1805, c. 14 § 2, 2 Stat. 313-14. The current version can be found in 43 U.S.C. § 752 (1958). The holdings previously discussed would appear to be consistent with the second subdivision, *supra*. The section is specifically discussed in Propper v. Wohlwend, 16 N.D. 110, 112 N.W. 967 (1907), and Heald v. Yumisko, 7 N.D. 422, 75 N.W. 807 (1898).

4. Of the seven North Dakota cases dealing with disputed monument locations three were reversed because the jury was not allowed to perform its function of evaluating the evidence and rending a verdict (*Radford, Propper,* and *Jamtgaard*); one was reversed for trial of damages only, the Supreme Court finding for the plaintiff after a directed verdict for the defendant below (*Nystrom*); three were affirmed, the evidence held to sustain the jury's verdict (*Black, Emmil, Oster*).

5. 7 N.D. 414, 75 N.W. 787 (1898).

ment was at point C so that line AC was the boundary line. The distance from point B to point C was 7¾ rods (127⅞ feet), indicating that a fairly substantial area was in dispute.



What evidence is admissible to establish either point B or point C as the location of the original corner monument? In *Nystrom v. Lee*,[6] the Court said that, "any evidence may be used which tends to establish the location of such monuments." The testimony of witnesses who had seen the monuments and remembered their location was permitted.[7] In *Jamtgaard v. Greendale*,[8] the North Dakota Supreme Court held that it was error for the trial court to have rejected the testimony of one Burbank. Burbank claimed to be the original surveyor, although one Blanding had certified to the field notes.[9] The Court said that this discrepancy might have been a valid objection if the proof was being offered to vary the field notes, but here it was offered, not to vary, but to amplify or spell out a point not covered in the notes. The Court thought that if a bystander was permitted to testify, certainly Burbank should be permitted to. Of course, as time has marched on, original surveyors and original witnesses have died and memories have dimmed, so that that avenue of evidence has been appreciably cut off.[10] The North Dakota Supreme Court recognized this as early as 1915: "that testimony was, like the testimony as to all

6. 16 N.D. 561, 114 N.W. 478 (1907).

7. In Black v. Walker, *supra* note 3, witnesses were permitted to testify as to the location of a corner stake, although, as the court pointed out, "the survey was made more than 10 years before either witness claimed to have seen the stake." Because of this time lapse the jury could have found that the stake was moved in the interim or "that the witnesses mistook something else for the original stake and mound." 7 N.D. at 417, 75 N.W. at 789.

8. 29 N.D. 611, 151 N.W. 771 (1915).

9. The court pointed out that it was a common practice in the midwest for someone who knew nothing about surveying to take a surveying contract and then hire someone else to do the actual surveying. *Id.* at 619, 151 N.W. at 773.

10. The federal government has for a long time been resurveying public lands for the purpose of locating the original monuments. Further, the Department of the Interior's Bureau of Land Management publishes a current pamphlet, RESTORATION OF LOST OR OBLITERATED CORNERS AND SUBDIVISION OF SECTIONS (1963). This pamphlet is designed especially for the information and guidance of county and local surveyors. The pamphlet properly points out: "After title to a piece of land is granted by the United States, jurisdiction over the property passes to the State; the Federal Government retains its authority only with respect to the public land in Federal ownership. Where the lands are in private ownership it is a function of the county or local surveyor to restore lost corners and to subdivide the sections." *Id.* at 1. North Dakota legislation providing for a county surveyor may be found in N.D. CENT. CODE ch. 11-20 (1960). Chapter 47-20 deals specifically with "landmarks." Section 47-20-01 provides: "If there is good reason to believe that any monument erected to mark any section corner, quarter corner, meander corner, or any boundary fixed by the United States survey, is lost, or in danger of being lost, a permanent monument may be erected and established by the governing body of any political subdivision or municipality in which such section corner, quarter corner, or meander corner is located. Any such governing body may employ the county surveyor or other competent surveyor or civil engineer to erect, maintain, and perpetuate such landmarks."

As to the scope of a resurvey, the following language from Radford v. Johnson is pertinent: " 'in a resurvey of the land which originally belonged to the United States, and which it has caused to be surveyed under its authority, such resurvey must con-

monuments and boundaries which have long since departed, and which is based upon remembrances alone of a long past fact and upon conclusions merely, by no means conclusive."[11]

The question of the weight to be accorded the testimony of a county surveyor arose in *Radford v. Johnson.*[12] There the trial court had instructed the jury in part that " '[t]he question of fact then . . . to be submitted to you is as to where the line between these two contending parties rest (sic), *bearing in mind that the line as fixed by the surveyor at this time* [that is the Cass County surveyor in an attempted re-survey][13] is *presumptively correct,* and the burden of proof falls on the defendant to show that it is incorrect, and not according to the government survey.' "[14] The North Dakota Supreme Court, in reversing, said: "The real issue was the existence or nonexistence of the original quarter section corner. This was a pure question of fact for the jury . . . . By the instruction given, the jury were directed, in effect, not to weigh his evidence for what it was worth to aid them in determining the point in issue . . . but to take his determination on that point as presumptively correct. This was wrong."[15] The Revised Statutes of North Dakota then provided, in part: "The county surveyor shall make in a good and professional manner all surveys of land within his county which he may be called upon . . . to make . . . *and his surveys shall be held as presumptively correct.*"[16] The Court ruled the statutory language inapplicable to the problem in *Radford,* giving as one of three reasons that the statutory language referred to courses, distances, variations, mathematical computations and other determinations either made pursuant to exact scientific methods or provided for in the statute, including field notes

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form to the survey made under the authority of the government, if the mounds and corners of the original government survey can be identified. If the stakes and monuments placed by the government in making the survey to indicate the section corners and quarter section posts can be found, or the places where they were originally placed can be identified, they are to control in all cases. Further, 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.' " 8 N.D. at 183-84, 77 N.W. at 601.

See N.D. CENT. CODE § 11-20-07 (1960) on guides a county surveyor must follow. A predecessor, N.D. REV. CODES § 2540 (1905) is discussed in Nystrom v. Lee, 16 N.D. 561, 114 N.W. 478 (1907). The legislators took to heart the charge of Moses: "Cursed be he that removeth his neighbour's landmark. And all the people shall say, Amen." *Deuteronomy* 27:17. For in N.D. CENT. CODE § 47-20-10 (1960) they provided: "Every person who: 1. Maliciously removes any monuments of stone, wood, or other material, erected for the purpose of designating any point in the boundary of any lot or tract of land; 2. Maliciously defaces or alters the marks upon any tree, post, or other monument made for the purpose of designating any point, course, or line in any such boundary; or 3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks, is guilty of a misdemeanor." See 18 U.S.C. § 1858 (1958), 62 Stat. 683, 789, for federal legislation. N.D. CENT. CODE § 47-01-19 (1960) deals with the civil side of the question and provides that: "Coterminous owners are mutually bound to maintain equally the boundaries and monuments between them." And the subject of partition fences is treated extensively in N.D. CENT. CODE ch. 47-26 (1960).

11. Jamtgaard v. Greendale Township, 29 N.D. at 619, 151 N.W. at 773.
12. 8 N.D. 182, 77 N.W. 601 (1898).
13. See footnote 10, *supra,* on resurveys.
14. 8 N.D. at 184, 77 N.W. at 602. (Emphasis added).
15. *Ibid.*
16. N.D. REV. CODES § 2028 (1899). (Emphasis added). N.D. CENT. CODE § 11-20-01 (1960) is substantially the same.

and plats, but did not include a determination of disputed boundaries and corners. In other words, a layman can determine as well as a surveyor, based on the evidence, whether a certain monument was ever located at point B or point C.

Further, the location of old mounds, pits and stakes, even though indistinct, may be considered.[17] If they are found at points where they should have been located they will probably furnish more valuable evidence than if they are found some distance from where they should have been located.

And finally, the field notes are permissible evidence since they are, in effect, the surveyor's testimony as to where he placed the monuments. In *Black v. Walker*,[18] the Court held that the field notes were sufficient "circumstantial" evidence to sustain a jury verdict in the face of otherwise uncontradicted testimony of witnesses to the contrary.

Suppose, however, that there is no outside evidence to support the view that the monuments were located where they should have been located. What happens? The Court's discussion in *Nystrom* is relevant. The Court cited from REV. STAT. U.S., § 2395, on instructions to surveyors, concluding: "It will be seen from this that the interior sections are required to be one mile square, and we think the court is justified in *presuming, in the absence of evidence to the contrary*, that they are so established."[19] The Court then goes on:

> Rule No. 147 of the Manual of Surveying Instructions, issued by the United States General Land Office, requires that in making surveys of public lands quarter section corners, both upon the meridional and latitudinal sections lines, be established at p o i n t s equidistant from the corresponding section corners. . . . The instructions issued by the General Land Office March 14, 1901, regarding the re-establishment of interior quarter section corners, say: 'The missing quarter section corner must be re-established equidistant between the section corners marking the line according to the field notes of the original survey.' We take take this to mean that, when the section corners on any side of the section are found or located, the quarter corner must be placed midway between them. Conversely, it must be true that, when the northwest corner of an interior sec-

17. Nystrom v. Lee, 16 N.D. 561, 567, 114 N.W. 478, 481 (1907).

18. 7 N.D. 414, 75 N.W. 787 (1898). In Nystrom v. Lee, 16 N.D. 561, 565, 114 N.W. 478, 480 (1907), the Court said that field notes when used in evidence "have the force of a deposition made by the surveyor." See also Propper v. Wohlwend, 16 N.D. 110, 112 N.W. 967 (1907), which quotes *Black* with approval, and the other cases cited in note 21, *infra*.

19. The validity of a presumption that section corners were located where they were supposed to be located is questionable since it is well known that there are many errors in our public land survey, that there really could not help but be and that "rarely does a section actually contain 640 acres." See generally STEWART, PUBLIC LAND SURVEYS (1935).

> tion and the quarter corner on the north line are found or located, and they are found to be one-half mile apart, the northeast corner of the section must *at least* be *presumed* to be one-half mile east of the quarter corner, and the same rule must apply to the southwest corner of the Section, when, as in this case, the northwest corner and the west corner are one-half mile apart. If this rule is correct, as we think it must be, then, when the surveyor ran the east line one-half miles (sic) south from the northeast corner which he had established, and a line between that point and the quarter monument on the west line was found to be one mile in length, it must *at least* furnish *prima facie evidence* of the location of the original corners and boundaries. We think the evidence on this point was competent, and that the plaintiff did not have to resort to every known test to ascertain the correctness of the survey. It is held in several states that lost quarter posts should be relocated at equal distances between the section corners.[20]

The significance of the statement that "the plaintiff does not have to resort to every known test to ascertain the correctness of the survey" is in the fact that the plaintiff had not introduced or relied on the field notes. Earlier in its opinion the Court had said that even though the field notes would have been competent evidence, they were not necessary evidence. Looked at from the viewpoint of evidence, it appears that if the field notes were in defendant's favor he would have to introduce them. Doing so should overcome the bare presumption or *prima facie* case just referred to, since the question to be decided is not where should the monuments have been placed, but where, in fact, were they placed. However, the Court has not ruled clearly on what will overcome the presumption.

And further, although the North Dakota cases indicate that copies of the field notes and plats are permitted as evidence,[21] they are not clear as to which should prevail if there is a discrepancy between the two. It is important not to confuse the question here under discussion—where was the original monument actually located on the ground—with the question as to which should control, plat or field notes, when *no original monument was ever located on the ground.* Clearly, if the question is where was the monument originally located on the ground, the field notes ought to prevail as the "best" evidence; for the field notes are the notes of the surveyor as to where the monuments were originally placed by him, whereas the plats were made from the field notes. Some of the cases reported to be contrary to this view are not so; the reporters

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20. 16 N.D. at 565, 114 N.W. at 480.
21. Black v. Walker, 7 N.D. 414, 75 N.W. 787 (1898) (field notes); Emmil v. Smith, 62 N.D. 174, 242 N.W. 407 (1932) (field notes); Jamtgaard v. Greendale Township, 29 N.D. 611, 151 N.W. 771 (1915) (field notes); Propper v. Wohlwend, 16 N.D. 110, 112 N.W. 967 (1907) (plat and field notes); Nystrom v. Lee, 16 N.D. 561, 114 N.W. 478 (1907) (field notes).

have failed to see that they were dealing with the second question referred to—namely, where there has never been an actual placing of a monument on the ground which should prevail, plat or field notes?[22] Clearly the plat should, and the cases saying so are correct, for as a matter of construing the intent of the parties it is more probable that they dealt in terms of the plat, a map which many would see, rather than the field notes, which not as many would see or understand. However, some of the cases reported to prefer the plat on the first question clearly do so, and then they are the ones that have confused the two questions rather than the reporters.

In *Propper v. Wohlwend*,[23] an argument had been made that the plat should control in determining the location of fractional section and quarter section monuments on the basis that it was referred to in, and made a part of, the government grant. The Court said: "We think counsel have fallen into error in assuming that these lands are granted by the government with reference to the plat." The patent read in part: " 'Containing 160 acres according to the official plat of the survey of said lands, returned to the general land office by the surveyor general,' " about which the Court said: "This recital is no part of the granting clause of the instrument, nor does it constitute a warranty that the quarter sold contains 160 acres. It is a mere recital that, according to the plat as returned by the surveyor general, this quarter section of land contains that many acres." Contrast the foregoing view of the North Dakota Supreme Court with that of the United States Supreme Court as expressed in *Cragin v. Powell*,[24] where the grant had contained the language: " 'containing 635 58/100 acres tidal overflow according to the official plat of the survey of said lands in the state land office.' " There the court said, "It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat, itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written upon the face of the deed or the grant itself." This case had been cited to the North Dakota court in *Propper*, along with five others. These five others the court distinguished in text, but it ignored *Cragin*.[25] It is true that in *Cragin* the Court was talking about a grant from the state of Louisiana; however, this is basically the same kind of language that is employed in United States' patents,

22. See 1 PATTON, TITLES § 404 (2d ed. 1957), and the cases cited at footnote 60 therein. See also 1 PATTON, TITLES § 152 (2d ed. 1957).
23. 16 N.D. 110, 112 N.W. 967 (1907). *Cf.* Gardner v. Green, 67 N.D. 268, 275-76, 279-80, 271 N.W. 775, 779, 781 (1937).
24. 128 U.S. 691, 696 (1888).
25. See 16 N.D. at 114, 112 N.W. at 969.

and it seems clear from the opinion that the court had no intention of excepting United States' patents from its statement. One of the other five cases, *Beatty v. Robertson*,[26] that the North Dakota court does distinguish, it distinguishes on the basis that it "simply holds that, where there is a difference between the field notes of the original survey of public lands and the plat, the latter must control, since it represents the lines and corners as fixed by the surveyor general *and by which the land was sold.* There was no attempt to prove the actual location. . . ."[27] Based on the earlier analysis, this distinction is clearly correct. But unfortunately the Court indicates neither approval nor disapproval of the *Beatty* decision as to when no one is attempting to prove an on the ground location of an original monument, and seems to rule out *Beatty's* rationale on this point by its statement that the reference to the plat "is no part of the granting clause." This statement was, of course, unnecessary to the decision in *Propper* and, hopefully, should the Court ever be faced with the *Beatty* question, it would adopt the *Beatty* approach.[28]

The most recent evidentiary problem considered by the North Dakota Supreme Court on the question of locating an original monument arose in *Emmil v. Smith*.[29] There the plaintiff offered into evidence a judgment in an earlier case between himself and another defendant. The Court rejected the offer. This was sustained on appeal. The result was that the monument on the south line dividing the east and west halves of Section 21 will be at the midpoint on the south line, but the monument on the north line dividing the east and west halves of Section 28 (which is immediately south of section 21, so that the north line of Section 28 is the south line of Section 21) will be 154.6 feet west of the midpoint. The location of this monument as to Section 28 had been determined in the earlier action. Thus plaintiff won one of his cases and lost the other.

The preceding discussion has avoided use of the terms "lost" and "obliterated" monuments in discussing the question of a dispute

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26. 130 Ind. 589, 30 N.E. 706 (1892).

27. 16 N.D. at 114, 112 N.W. at 969. (Emphasis added).

28. Perhaps the North Dakota Court has recognized the error of its earlier statement when in Gardner v. Green, 67 N.D. 268, 279-80, 271 N.W. 775, 781 (1937) it said: "In government surveys of public lands, at least in this and other western states, fractional divisions made so by water are designated and sold by the numbers attached thereto, and reference is always had to the notes and maps of the survey. Thus in accordance with the official regulations of the general land office the patents conveying lots 5 and 7 described the lands respectively as lots 5 and 7 'according to the official plat of the survey of said land, returned to the general land office by the surveyor general.' In the absence of showing to the contrary it will, of course, be presumed that the meander line is also the shoreline; and a person who claims that at the time of the survey there were lands between the meander line and the shore line has the burden of establishing that fact." The difficulty with the language in this excerpt is that the Court appears to draw a distinction as to the significance of the plat as between fractional lots bounded by water and sectional divisions not bounded by water. For this I can see no justification. Furthermore, it would give the ridiculous result in a description such as the one in *Heald*, quoted in the text at note 31 *infra*, that the plat would be relevant to the reference to "lots five and six" but not relevant to the reference to the "southeast quarter."

29. 62 N.D. 174, 242 N.W. 407 (1932).

as to where an original monument was located. This has been done purposely to avoid adding to the confusion in their use. Probably the most progress in clarification could be made by adopting uniformly the three-part categorization made by the Department of Interior's Bureau of Land Management:

> 1. An existent corner is one whose position can be identified by verifying the evidence of the monument, or its accessories, by reference to the description that is contained in the field notes, or where the point can be located by an acceptable supplemental survey record, some physical evidence, or testimony.
> 2. An obliterated corner is one at whose point there are no remaining traces of the monument, or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt, by the acts and testimony of the interested landowners, competent surveyors, or other qualified local authorities, or witnesses, or by some acceptable record evidence.
> 3. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners.[30]

This brief excerpt also serves as a good summary of the types of evidence discussed previously.

Meander Line or Water Boundary?

Rather than measure the sinuosities of the shore line of a lake or river, it was customary for surveyors to establish imaginary lines near the actual shore line, but straighter. These lines were known as meander lines.[31] A typical description giving rise to the problem is found in *Heald v. Yumisko*:[32] " 'Lots five and six and the southeast quarter of the southwest quarter of section twenty-six, township one hundred and twenty-nine north, of range sixty west of the fifth principal meridian in North Dakota, containing eighty-six and forty-hundredths acres, according to the official plat of said land, returned to the general land office by the surveyor general.' " The plat of lots number five and six shows a meander line run some distance from the James River. Clearly the 86.40 acres refers to the area as bounded, in part, by the meander line. But should that make the meander line the boundary line?

In 1805 Congress had legislated that "each section, or subdivision . . . the contents whereof shall have been . . . returned by the

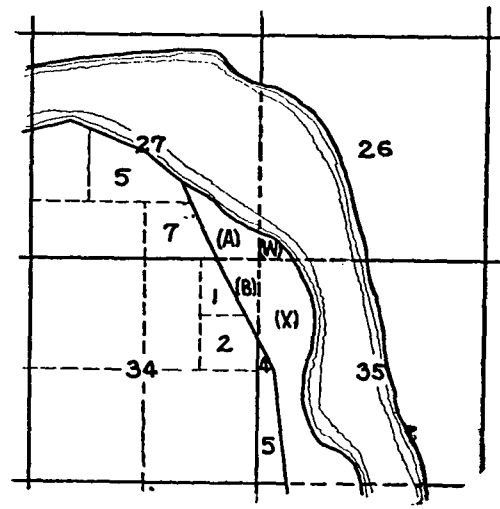
30. RESTORATION OF LOST OR OBLITERATED CORNERS AND SUBDIVISIONS OF SECTIONS, *supra* note 10, at pages 9 & 10.
31. "The meander lines established by the government survey are usually a short distance back from the water's edge. They disregard the minor sinuosities of the shore, and merely mark its general contour." 1 PATTON, TITLES § 117 (2d ed. 1957).
32. 7 N.D. 422, 75 N.W. 807 (1898).

surveyor-general . . . shall be held and considered as containing the exact quantity, expressed in such return or returns . . . ,"[33] but various courts early held that this legislation was not for the purpose of establishing boundaries, but for the purpose of determining the quantity of land for which the federal government would charge.[34] The United States Supreme Court in affirming a decision of the Minnesota Supreme Court that the Mississippi River and not the meander line was the boundary to a certain tract, said: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary."[35] Was the court suggesting that if the meander line is not represented on the plat as the border-line of the stream, it is intended to be a separate boundary? In *Producers Oil Co. v. Hanzen*,[36] that Court pointed out: "But they [earlier cases] no less certainly establish the principle that facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights." In *Jeems Bayou Club v. United States*,[37] the Supreme Court said: "It [the rule that where lands are patented according to an official plat or survey, showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance and the water itself constitutes the boundary] will not be applied where, as here, the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat or where, as here, there never was, in fact, an attempt to survey the land in controversy." In *Heald*, The North Dakota Supreme Court concluded that the shoreline of the river and not the meander line was to be treated as the boundary, citing language from four cases which makes it seem apparent that the North Dakota Court recognized that there might be factors in a certain case under which the meander line would be treated as the boundary line.[38]

33. Act. Feb. 11, 1805, c. 14, § 2, 2 Stat. 313-14. For other language in the same section see, *supra*, note 3.
34. See Heald v. Yumisko, 7 N.D. 422, 75 N.W. 807 (1898), and cases cited therein.
35. Railroad Co. v. Schurmeir, 7 Wall 272, 286-87 (1868).
36. 238 U.S. 325, 339 (1915).
37. 260 U.S. 561, 564 (1923).
38. 7 N.D. at 428, 75 N.W. at 808.

However, the North Dakota Supreme Court did not then, and has not since, found such factors to exist. Uniformly it has held that the meander line in the specific case has not been the boundary line.[39] But the Court's statement in these subsequent cases that "meander lines are not per se boundary lines,"[40] suggests that they might be boundary lines if properly evidenced.

Perhaps the court's conclusion in *Heald* that the meander line was not the boundary is questionable since it recognized: "True it is that the finding shows the tract to be much larger if bounded by the shore line than if bounded by the meander line. But what causes this difference, we are left to conjecture. Whether it arises from accretion proper, or from the failure of the surveyor to accurately follow all the horseshoe bends and windings of an exceedingly tortuous stream, we cannot say. If these lots are bounded by the meander line, they contain only 46 acres and a fraction; but, if they extend to the shore line of the river, they contain about 100 acres."[41] Just how much land should there be between the location of the meander line and the nearest shore line before the *Jeems Bayou* approach should be applied? The same question arises with respect to *Gardner v. Green*.[42] The following is a fairly accurate drawing of the relevant parts of Sections 26, 27, 34 & 35 as shown on the original United States Survey. The original government plat clearly shows that in Section 27 a meander line was run with respect to the south bank of the Missouri River. For close to half of the length of the south shore line of the River in Section 27 the meander line is shown as following the shore line exactly, but for the other approximate half of the shore line it is shown as being a substantially increasing distance away from the shore line. Tract A, the land in question, is substantial in area. Was it intended to be conveyed?



39. Brignall v. Hannah, 34 N.D. 174, 157 N.W. 1042 (1916); Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921); Gardner v. Green, 67 N.D. 268, 271 N.W. 755 (1937); Oberly v. Carpenter, 67 N.D. 495, 274 N.W. 509 (1937); State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949); Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949).

40. See, *e.g.*, Ozark-Mahoning Co. v. State, *supra* note 39; State v. Brace, *supra* note 39.

41. 7 N.D. at 427, 75 N.W. at 808. See Horne v. Smith, 159 U.S. 40 (1895), where the court held that the meander line was the boundary line. This resulted in a conveyance of 170 acres whereas extending the boundary to the water would have resulted in a conveyance of over 700 acres.

42. *Supra* note 39.

In *Gardner*, the Court did place a qualification on the general approach that either the meander line or the shore line is the boundary line. It held that the easterly boundary line of Lots 5 and 7 in Section 27 would not be the meander line, but would be the west shore of the river "unless before reaching the river it [the subdivision line between lots 5 and 7] intersected the section line running north and south between sections 26 and 27, in which case the section line formed the eastern boundary of lots 5 and 7 at the point of such intersection."[43] If the plat is an accurate reflection of where the section line ran in relation to the river, it would appear that the line between lots 5 and 7 will go all the way to the river. But in section 34 it is clear that the subdivision line between lots 1 and 2 will hit the section line between sections 34 and 35 before it hits the river. This would mean that their eastern boundary would not be the river and that the land tract labeled "X" would go in its entirety to the owners of lots 4 and 5 in Section 35, or else still belong to the federal government. Apparently the owner of lot 7 in Section 27 would not get the tract marked "W" either, since it is beyond the section line. As a matter of fact it is beyond the section line for any lot on the western side of the river so it must still belong to the federal government. What reasonable basis is there for this distinction? The Wisconsin case which the North Dakota court purports to rely on did not set forth an absolute rule that the boundary must stop at the section line. Even the part which the North Dakota court quotes says: " 'an intercepting governmental subdivision line' is not, 'in and of itself, a complete bar to further search for an actual water boundary' in all cases; 'that such an intercepting governmental subdivision line is not to be deemed an absolute and controlling feature, but one only of the many that may be properly considered' in determining the boundary; that 'the primary consideration is to ascertain as far as . . . possible, what should be deemed was the intention or purpose in the original government survey and chamber platting of the property bordering on any particular body of water.' "[44] Would the government have intended to give up tracts "A" and "B" but not tracts "X" and "W"?

Generally, then, meander lines have not been treated as boundary lines when a conveyance is made in terms of the U.S. Survey. The land owner will take to the shore line, either high or low water mark, or to the thread or center of the stream or lake. How will the exact water boundary be determined?

II. WATER BOUNDARIES

It should be obvious immediately that many water lines will

43. *Id.* at 285, 271 N.W. at 784.
44. *Id.* at 281, 271 N.W. at 782. The Wisconsin case is *Blatchford v. Voss*, 197 Wis. 468, 222 N.W. 804 (1929).

fluctuate which, in turn, raises the question whether the boundary lines based thereon will fluctuate also. However, there are certain basic principles applicable to the establishing of water boundaries that are not related to the shifting of water lines. These shall be discussed first. Therefore, this section will be divided into two parts: (1) Basic Principles re Water Boundaries and (2) The Affect of Shifts in the Water Lines.

Basic Principles

When a state was carved out of the public domain and became a state, it acceded to fee ownership of all beds underlying navigable waters.[45] This ownership extended to the high water mark.[46] This was true of North Dakota when it became a state in 1889, and it still owns all such lands unless it has conveyed them.[47] However, title to nonnavigable water beds remained in the federal government for it to dispose of as it saw fit.[48]

A patent from the federal government conveying land abutting on a navigable waterway cannot convey any part of the bed, since that is owned by the state.[49] But a state is free to give up its title to

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45. See Scott v. Lattig, 227 U.S. 229, 242 (1913): "It was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones." See also United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926).

46. See Shively v. Bowlby, 152 U.S. 1, 26, 40 (1894), where the court examined the approach of the original states to the question of ownership of land under navigable waters and concluded: "[E]ach State had dealt with the lands under the tide waters [the only waters that are navigable within the common law definition] within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. . . .

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, *and in the lands below the high water mark,* within their respective jurisdictions.

"The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil *below high water mark of navigable waters* are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution." (Emphasis added).

47. "When North Dakota became a state it acquired title to lands under all navigable waters within its borders, subject to the limitation of the commerce clause of the federal constitution." State v. Brace, 76 N.D. 314, 317, 36 N.W.2d 330, 332 (1949).

In Roberts v. Taylor, 47 N.D. 146, 155, 181 N.W. 622, 626 (1921), we find: "When this state was admitted into the Union, the title and ownership to all of section 36, both that of the island and of the bed of the lake, passed to the state, both as school land *and by reason of state sovereignty.* Enabling Act, § 10. . . . The Plaintiff's rights as riparian owner are based upon his title received from the state to lots 1 and 2 in section 36. The defendant's rights are likewise so based. concerning lots 3 and 4 in block (sic) 36. . . . The grant made by the state to the parties did not convey to them the island nor any part of the bed of the lake. The state expressly reserved its rights under the Constitutional law of this state."

48. Hardin v. Shedd, 190 U.S. 508, 519 (1903): "When land is conveyed by the United States bounded on a nonnavigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the affect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies." State v. Brace, 76 N.D. 314, 317, 36 N.W.2d 330, 332 (1949): "Admission to statehood vests no title in the state to lands underlying non-navigable bodies of water. Title to such lands remained in the federal government or in persons to whom it had transferred title."

49. In State v. Loy, 74 N.D. 182, 20 N.W.2d 668 (1945), a riparian owner had acquired his riparian land abutting the Missouri River by patent before North Dakota

private owners, and many states have done so, some allowing private ownership to the low water mark, others allowing it all the way to the center of a lake or stream.[50] North Dakota has specifically provided:

> Except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream *at low watermark.* All navigable rivers shall remain and be deemed public highways. . . .[51]

Where is the low watermark as contrasted with the high watermark? "In nontidal waters, high-water mark is the point to which the water rises at its average highest stage, and low-water mark is the point to which it recedes at its lowest ordinary stage, and not the line of recession in an unusually dry season."[52] Obviously this would be a question of fact. *Rutten v. State*[53] is the only North Dakota case discussing determination of high and low water mark.

But title to beds underlying nonnavigable waters could be conveyed by the federal government. Did a particular conveyance do so? The United States Supreme Court early said that the question of whether or not a particular federal patent conveying title to land abutting a nonnavigable body of water included any part of the bed

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became a state, and, therefore, while title to the river bed was still in the federal government. He contended that the patent to him should be treated as conveying ownership of the bed to the thread of the stream. The Court cited several United States Supreme Court decisions in rejecting his contention. The language from one, United States v. Holt State Bank, 270 U.S. 49 (1926), was: "the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." The grants from the United States to the riparian owners were not in evidence. "We assume therefore that the granted land was described as the fractional lots shown by the official survey of 1881." 74 N.D. at 189, 20 N.W.2d at 670. And the court's conclusion was: "It is thus clear that defendant's grants from the United States to riparian land along the Missouri River did not include any part of the bed of the stream." *Id.* at 190, 20 N.W.2d at 671.

The argument was also made and rejected in *Loy* that by virtue of Section 4 of the Enabling Act, North Dakota had disclaimed any title to the beds under navigable waters and therefore the title remained in the United States. Section 4 reads as follows: "That the people inhabiting said proposed states . . . do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof." The court cited a number of United States Supreme Court opinions, but did not cite Mann v. Tacoma Land Co., 153 U.S. 273 (1894), in which that Court was very specific: "Further, in the act of February 22, 1889, c. 180, providing for the admission of Washington, Montana, and the two Dakotas, into the Union. . . , among the conditions imposed was this: 'That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof.' No one can for a moment suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the tide waters and those of navigable streams." *Id.* at 284.

50. This can best be illustrated by using the Mississippi River, a navigable stream passing through several jurisdictions. Thus four of the jurisdictions extend riparian ownership to the center of the stream (Illinois, Kentucky, Mississippi, and Wisconsin); three extend it to low-water mark (Minnesota, Missouri and Tennessee); and two stop it at high-water mark (Iowa and Arkansas). See 1 PATTON, TITLES § 138, at 361 (2d ed. 1957), and cases cited therein. Query if North Dakota can give away any land it owns. See discussion in note 164, *infra.*

51. N.D. CENT. CODE § 47-01-15 (1960). This section dates back to the territorial civil code without change. Civ. Code 1877, § 266.

52. 1 PATTON, TITLES § 140 (2d ed. 1957). *Cf.* the definition of "ordinary high-water mark" in N.D. CENT. CODE § 61-15-01 (1960).

53. 93 N.W.2d 796 (N.D. 1958). See textual discussion at notes 130-32, *infra.*

under the water was to be decided by local law.[54] Most jurisdictions have held that such a federal patent passed title to the nonnavigable water bed to the riparian owner.[55] The North Dakota Supreme Court has held with respect to nonnavigable lakes and ponds that the federal patent has conveyed bed ownership and that the riparian owners have taken to the "center."[56] "Boundary lines of these lands are fixed by extending from each end of their respective meander lines, lines converging to a point in the center of the waters."[57] This is fairly easy to apply when the lake is round; it becomes

54. Hardin v. Jordan, 140 U.S. 371, 384 (1891): "In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

55. "As to non-navigable rivers and streams, all of the states follow the English rule. Conveyances, therefore, of lands bounded by such waters carry the title of the bed of the water course to the center thereof, unless a contrary intention is manifest." 1 PATTON, TITLES § 132 (2d ed. 1957). "In some states it is held that the state's ownership of water beds includes those of non-navigable lake and ponds, and that the littoral owner takes titles to the shore line only. In other states, however, the beds of such waters are considered private property, and, unless the contrary appears by the terms of a conveyance, the tract embraced is held to extend to the center of the lake." 1 PATTON, TITLES § 133 (2d ed. 1957).

56. The first case dealing with this problem was Brignall v. Hannah, 34 N.D. 174, 184-86, 157 N.W. 1042, 1045 (1916), in which the court said: " '[W]hether the patentee of the United States to land bounded on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies.' . . . What title, if any, does a patentee or grantee of realty abutting upon a non-navigable lake acquire to the bed of the lake, under the law of this State? There is no express constitutional or statutory declaration upon the subject, hence, we are required to ascertain and apply the rules of the common law. . . . The common-law rules as approved by the United States Supreme Court in Hardin v. Jordan, *supra*, are stated in Cyc. . . . as follows: 'Land underlying the water of an inland non-navigable lake is the subject of private ownership, and title thereto may be acquired by adverse possession. Where several owners front on the lake, they own the bed of the lake in severalty, their title extending to the center; and the boundary lines of each abutting tract are to be fixed by extending, from the meander line on each side of the tract, lines converging to a point in the center of the lake. But the owner of lands bounding on large navigable lakes and 'great ponds' takes title only to low-water mark.' . . . The rules announced in Cyc. are in harmony with our statutory enactments regarding the ownership of the bed of non-navigable streams . . . and have the support of the overwhelming weight of authority." But see the text discussion at notes 60-68, *infra*.

See also State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949); Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949).

The North Dakota Court has had to deal with Section 210 of the State Constitution which provides: "All flowing streams and natural water courses shall forever remain property of the state for mining, irrigation and manufacturing purposes." The court early said: "At common law, the owner of land through which a non-navigable stream flowed was possessed of the title to the bed of the stream, as well as the right to a reasonable use of the water. The land under the water was his. The right to a reasonable use of the stream was as much his property as the land itself. The course of the stream could not be so diverted as to cause it to cease to flow in its accustomed channel upon his property. (citations) These doctrines of the law were in force in the Territory of Dakota at the time of the adoption of the constitution of this state. By virtue of them, the riparian owners in the territory were vested with the specified property rights in the bed of all natural water courses, and in the water itself. Such rights were under the protection of the fourteenth amendment to the federal constitution, which protects property against all state action that does not constitute due process of law. It follows that § 210 of the state constitution would itself be unconstitutional insofar as it attemped to destroy those vested rights of property, if it should by construction be given a scope sufficiently wide to embrace such matters. For this reason, we feel constrained to hold, despite its broad language, that § 210 was not framed to divest the rights of riparian owners in the waters and bed of all natural water courses in the state.

"On the other hand, we do not wish to be understood as expressing such a view as to its proper interpretation as would utterly emasculate it. So far as it can have constitutional effect, it should be construed as placing the integrity of our water courses beyond the control of individual owners. Should all the riparian proprietors along the course of a stream so join in the sale of their riparian rights as to work an utter destruction of the stream so far as its channel was within the bounds of this state, it might be that the sovereignty of the state could invoke this provision of the constitution against such attempted annihilation of the water course. But no such case is before us." Bigelow v. Draper, 6 N.D. 152, 163, 69 N.W. 570, 573 (1896). Both State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949), and Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949), quote extensively and with approval from the foregoing language in *Bigelow*.

57. Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949). See also Brignall v. Hannah, 34 N.D. 174, 157 N.W. 1042 (1916).

progressively more difficult as lakes have less and less of a round shape.[58] But the Court has not decided any case involving the bed under a nonnavigable stream.[59] The North Dakota Legislature has declared such beds to be in private ownership. But a difficulty arises in the language of the statute: "In all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become *common* to both."[60] Does the use of the word "common" mean that two opposite shore owners will own the bed as tenants in common, or simply that each shall own a part of the bed? Although this section is referred to in our Code as being derived from the California Civil Code, the California Civil Code does not now, and apparently never has, contained the "common" language.[61] In 1796 Congress had enacted the following statute which has been on the books ever since without material alteration:

> Sec. 9. And be it further enacted, That all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways: *And that in all cases, where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both.*[62]

Apparently this federal statute is the source for the North Dakota law rather than the California Civil Code. In *Railroad Co. v. Schurmeir*,[63] the United States Supreme Court in interpreting the foregoing legislation said:

> Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream. . . . Decided cases of the highest authority, affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the

58. "[O]wing to the fact that the center *or centers* of the lake had not been determined, the court did not fix the exact amount, or define the boundaries of the particular tracts belonging to each owner, but left this question open for future determination." Brignall v. Hannah, 34 N.D. 174, 186, 157 N.W. 1042, 1046 (1916). (Emphasis added).

59. In Bigelow v. Draper, 6 N.D. 152, 162-63, 69 N.W. 570, 573 (1896), the court recognizes private ownership of stream beds for in the course of its opinion it makes these statements: "At common law the owner of land through which a non-navigable stream flowed was possessed of the title to the bed of the stream. . . . These doctrines of the common law were in force in the Territory of Dakota at the time of the adoption of the constitution of this state. . . ." But the case gives no indication as to how ownership of the bed would be split up amongst different riparian owners.

60. N.D. CENT. CODE § 47-01-15 (1960).

61. Currently CALIF. CIVIL CODE § 830 (West 1954) reads as follows: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The notes appended thereto indicate that the original section read as follows: "When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." See also Kirby v. Potter, 138 Cal. 686, 72 Pac. 338 (1903), where the California Court adopts the *Schurmeir* view, relying on the *Schurmeir* case without mentioning any statute. (See text at note 63, *infra*).

62. *Act* May 18, 1796, ch. 29, § 9, 1 Stat. 468.

63. 7 Wall. 272, 287-89 (1868).

> common law prevail, as understood in the parent country. Except in one or two States, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land. . . . Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways.

One federal court in commenting on this interpretation by the Supreme Court observed that "this section was interpreted to mean that instead of the owners of opposite banks of a nonnavigable stream being tenants in common of the bed, each held in severalty to the centre of the stream. The liberty that was exercised in this case of construing the statute according to its spirit and purpose, rather than by its words, would, it is contended, authorize an interpretation of the words 'a stream not navigable,' as intended to include lakes not navigable."[64] Note that the North Dakota statute refers only to a "stream and the bed thereof" also. Apparently the *Schurmeir* interpretation has been followed consistently by the federal courts.[65] In *Brignall v. Hannah*,[66] the North Dakota Supreme Court used language which indicates that it would make the same interpretation of the North Dakota statute that the United States Supreme Court made of the federal statute, saying: "The rules announced in Cyc. are in harmony with our statutory enactments regarding the ownership of the bed of *nonnavigable streams*. . . , and have the support of the overwhelming weight of authority." The rule expressly quoted from Cyc. that the Court referred to dealt with lakes and included the following statement: " 'Where several owners front on the lake, they own the bed of the lake *in severalty*, their title extending to the *center*.' "[67] However, the Court did not refer to the specific North Dakota statute cited above, and the statutes cited by the Court dealt with the question only indirectly.[68] It is probable that placing any other interpretation on the North Dakota legislation than the one placed on the federal statute by the federal courts would be unconstitutional in the sense that if federal law says that a grantee from the federal government gets title to the center of the stream, it would be depri-

64. State v. Milk, 11 Fed. 389 (1882).

65. See Gable v. Angle, 7 F. Supp. 967 (W.D. Okla. 1933); United States v. Elliott, 131 F.2d 720, 723 (10th Cir. 1942).

66. 34 N.D. 174, 157 N.W. 1042 (1916).

67. *Id.* at 185, 157 N.W. at 1045.

68. N.D. COMP. LAWS § 5476 (1913), now N.D. CENT. CODE § 47-06-09 (1960); N.D. COMP. LAWS § 5473 (1913), now N.D. CENT. CODE § 47-06-05 (1960); N.D. CENT. CODE § 47-01-15 (1960) then appeared as N.D. COMP. LAWS § 5352 (1913).

vation of property without due process of law for the state to change that into a title as tenant in common with the opposite shore owner.

If the North Dakota Court eventually holds that each riparian owner owns to the center of a nonnavigable stream, should that be to the center of the stream, equidistant between the two banks, or the center of the main channel? There is authority from other jurisdictions to support each view.[69]

Thus it can be seen that often the location of the boundary line will depend on whether or not the body of water involved is navigable or nonnavigable. How is navigability determined? Four North Dakota cases discuss this issue.[70] Tests are set forth and facts considered. It would be impractical to set forth and evaluate the minutia of evidence considered in these cases; that will be left for the reader to do when faced in practice with the question as to whether or not a particular body of water is navigable. However, the following general conclusions can be drawn from these cases.

North Dakota has rejected the "tidal test" of the common law which was that only those waters which are affected by the ebb and flow of the tide are navigable and has adopted, instead, "a test of navigability in fact borrowed from both civil law and common law principles."[71]

Despite the observation of the Court in *Bissel v. Olson*,[72] that

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69. See 1 PATTON, TITLES § 132, at 345-47 (2d ed. 1957). Apparently "center" is synonymous with thread. "The thread of a stream is the line midway between the opposite shore lines when the water is at its ordinary stage and neither swollen by freshets nor shrunken by droughts, no account being taken of main channel, current, or of line of greatest depth." 1 PATTON, TITLES § 140, at 363 (2d ed. 1957).

70. Bissell v. Olson, 26 N.D. 60, 143 N.W. 340 (1913) (Mouse River); Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921) (Sweetwater Lake): State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949) (Fuller's Lake); Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949) (Grenora Lake No. 2). Except for *Roberts*, the Court found the bodies involved to be nonnavigable. In Heald v. Yumisko, 7 N.D. 422, 428, 75 N.W. 806, 809 (1898), the court did not discuss whether or not the James River there involved was navigable or nonnavigable, saying simply: "Under these decisions, as the evidence stands in this case, it is too clear for question that defendants took *to the shore line*, under their deed." (Emphasis added). In Brignall v. Hannah, 34 N.D. 174, 179, 157 N.W. 1042, 1043 (1916), the court did not discuss the navigability or nonnavigability of Rush Lake, saying simply: "This is an action to quiet title to certain lands in Cavalier county which constituted a portion of the bed of a *non-navigable body of water* known as Rush lake." (Emphasis added.) In Gardner v. Green, 67 N.D. 268, 271 N.W. 775 (1937), and Oberly v. Carpenter, 67 N.D. 495, 274 N.W. 509 (1937), the court dealt with portions of the Missouri River, and simply, and quite properly it would seem, assumed that it was navigable. In State v. Loy, 74 N.D. 182, 185, 20 N.W.2d 668, 669 (1945), the court did manage to say: "It is conceded by all parties that the Missouri River is a navigable stream." And in Hogue v. Bourgois, 71 N.W.2d 47, 52 (N.D. 1955), the court noted: "As a preliminary statement, it is clear from the undisputed testimony in this case and from prior holdings of this court that the Missouri River is a navigable stream in this state," citing *Gardner* and *Loy*. Although there was no issue before the court concerning the Knife River in *Loy*, the court referred to the "Knife River, an *unnavigable* tributary of the Missouri. . . ." 74 N.D. at 186, 20 N.W.2d at 669. (Emphasis added).

71. Roberts v. Taylor, *supra* note 70. It should be kept in mind that one "body" of water may be both navigable and unnavigable. In Bissel v. Olson, 26 N.D. 60, 70, 143 N.W. 340, 343 (1913), the Court rejected some evidence on this basis: "For the purposes of this case we may eliminate all reference to the condition of the river at points a considerable distance below Minot. It must be, by the river channel, 100 or 150 miles to Russell, probably more than that by reason of the tortuous course of the river; hence it may be easily navigable at that point, and totally incapable of navigation at Minot and above."

72. 26 N.D. 60, 143 N.W. 340 (1913). The Court in *Bissel* said that where the body of water was neither meandered nor declared navigable by the legislature it was presumed nonnavigable "and the burden is upon the party claiming it to be navigable to show it is so in fact." *Id.* at 66, 143 N.W. at 341. Perhaps the Court is suggesting that the presumption is the other way when there is a legislative declaration or a meandered body of water. In the other three cases discussing navigability the bodies of water

a stream which is neither meandered nor declared navigable by the legislature is presumed to be nonnavigable, it is clear that the absence or existence of meander lines is not conclusive on the question of navigability.[73]

A declaration by the legislature that certain waters are to be deemed navigable is not conclusive. In 1935 the North Dakota legislature enacted a statute on "Water Conservation," including this definition: " 'A navigable lake' shall include any lake which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands."[74] In *State v. Brace*,[75] the North Dakota Supreme Court, quite properly, found that "a legislative declaration that all meandered lakes are navigable will not make them so if they are not navigable in fact, *as against the pre-existing rights of riparian owners*, unless compensation is made to such owners. The United States Supreme Court has said of an approach such as the legislatures: 'Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river granted and vesting before statehood, depends for its validity on nonnavigability of the stream in fact. In such a case, navigability *vel non* is not a local question.' "[76] Of course, the North Dakota legislation was not enacted to remove private title, but to allow state regulation. In *Brace* the Court went on to hold Fuller's lake nonnavigable despite the fact that it was meandered and despite the fact that the trial court had found it to be navigable.

Apparently the "navigability in fact" test does not require a showing of use for commerce or pecuniary value, or capacity for such use. For in *Roberts v. Taylor*,[77] holding Sweetwater Lake to be navigable, the Court said expressly that "a use, public in 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

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were meandered. It is not clear who had the burden of proving what in each case. See *Roberts, Brace* and *Ozark-Mahoning Co., supra* note 70.

73. This is obvious when it is noted that of the seven cases involving meander lines, see notes 34 & 39 *supra*, four were decided to involve navigable bodies of water and three were decided to involve nonnavigable bodies of water. See note 70, *supra*.

74. N.D. CENT. CODE § 61-15-01 (1960).

75. 76 N.D. 314, 36 N.W.2d 330 (1949). (Emphasis added).

76. The Court was quoting from Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 89 (1922).

77. 41 N.D. 146, 181 N.W. 622 (1921).

trade." In *Bissel v. Olson*,[78] the first North Dakota case on navigability, the Court had been very specific in stating that a stream must "be of sufficient capacity to render it capable of being used as a *highway of commerce*, either in the transportation of the products of the mines, forests, or of the soil of the country through which it runs, or of passengers." This would seem to have ruled out use for pleasure as a test, even though the Court later observed: "The authorities are not altogether agreed as to the exact extent to which a stream must be navigable to make it navigable in fact and law. Some hold that the fact that it may be capable of use for hunting and pleasure boating is insufficient, while others hold that any substantial capacity for use in those respects renders it navigable."[79] In *State v. Brace*,[80] the third North Dakota case on navigability, the Supreme Court seemed to revert to the *Bissel* view in concluding that Fuller's Lake was nonnavigable. It said of *Roberts*:

> This quotation [the one above] may imply some expansion of the rules of the common law, but the implications of expansion, when considered in the light of facts then before the court, do not cover Fuller's Lake. *Roberts v. Taylor* involved Sweetwater Lake which both at the time of the survey and time of the trial was a large lake with a vast expanse of water extending many miles to the north and south and extensive in width. It contained both clear and apparently deep water, and was used for hunting and for boating by the public. It was not a pond or marsh. Fuller's Lake is a small, marshy, body of water. Due to the artificial damming of the overflow it is more extensive now than it was at the time of the original survey. This is indicated by the fact that the water now extends beyond the meander lines in most directions. It is located in a well settled portion of the state. It is accessible from a public highway. Despite these circumstances the only evidence of its use by the public in recent years is for hunting. With reference to this use the evidence is meager. No instance has been called to our attention where a court has held a similar body of water to be navigable in fact, and our own search has disclosed none."[81]

And in the fourth North Dakota case, *Ozark-Mahoning Co. v. State*,[82] although the Court examined the facts to see if Grenora Lake No. 2 was or could be used for pleasure purposes, it concluded that it had not been so used and could not be so used.[83] Thus it is not

78. 26 N.D. 60, 143 N.W. 340 (1913) (Emphasis added).
79. *Id.* at 74, 143 N.W. at 344.
80. 76 N.D. 314, 36 N.W.2d 330 (1949).
81. *Id.* at 321, 36 N.W.2d at 334.
82. 76 N.D. 464, 37 N.W.2d 488 (1949).
83. "There is no evidence that any use ever has been or could be made of the waters of the lake either for pleasure or for profit, for travel, or for trade. No boats were used thereon. The water at all times has been of such a character that it was not habitable for fish. Neither the lake nor its surroundings are suitable for any purposes of pleasure. It is true that aquatic birds sometimes rested on its surface and there is evidence that hunters occasionally shot water fowl that flew to or from the lake, but this was an infrequent occurrence." *Id.* at 468, 37 N.W.2d at 491.

entirely clear how much reliance should be placed on the pleasure purposes test.

Whether the test is based on commercial usability alone or on pleasure usability as well as commercial usability, it seems clear from the cases that actual use for such purpose is not required, there need only be capacity for such use.[84] But it must be so usable for a substantial period of time.[85] However, if a stream or lake has been so used, there is obvious evidence of usability. If it has not been so used, the thought arises immediately that perhaps it has not been so used, because it cannot be so used.[86]

Further, it is clear from the cases that the navigability of a body of water is to be determined in its natural state and not in an artificial state.[87]

Since all beds underlying navigable waters passed to the state governments upon entry into the Union, it is obvious that the navigability of the body of water in question must be determined as of the time of statehood. This was recognized by the North Dakota Supreme Court in the *Ozark-Mahoning Co.* case.[88]

Having discussed the basic principles concerning water boundaries, the question arises as to what happens to the boundary lines when the water lines shift. Suppose that a once navigable lake dries up gradually, or that a navigable river moves its channel further to one direction, washing under land on one side and baring land

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84. "The criterion, at all events, is not that it is not used for purposes of commerce and traffic, but that it is capable of such use." Bissel v. Olson, 26 N.D. 60, 74, 143 N.W. 340, 344 (1913). "The proof of the status is rather a proof of capacity than one of then existent use." Roberts v. Taylor, 47 N.D. 146, 154, 181 N.W. 622, 626 (1921). And see the language from Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949), quoted in note 83, *supra.*

85. "We apprehend that each case must stand upon its own facts. It would be unjust to the riparian owners to hold a small brook, which, during the melting of the snow in the spring, may be capable of navigation by a skiff with oars for a few days, but which no one would ever consider using as a regular line of communication or transportation, as a navigable stream. The benefits to be derived from such brief and trifling use would be wholly incommensurate with the damage and detriment occasioned by so holding to the owners of adjoining land and of the bed of the stream. Going a step further, it would work a hardship only in a less degree to hold a small stream navigable on which boats can be propelled only at time of heavy rain storms, occurring with great irregularity, and not at seasons which can be in any degree depended upon." Bissel v. Olson, 26 N.D. 60, 74, 143 N.W. 340, 345 (1913).

86. In Bissell v. Olson, 26 N.D. 60, 74, 143 N.W. 340, 345 (1913), the Court observed: "The value of evidence as to the fact of its being used rests on the proposition that such fact proves it navigable. . . . While the fact that it has never been so used is not of equal weight in proving that it is not navigable, but in an inhabited country, with towns along the river, and commerce being transacted between such towns, the fact that it has never been used to any extent for navigation is entitled to great weight as evidence that it is not capable of being navigated to advantage." See also the language from State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949), quoted in the text at note 81, *supra.*

87. "When a stream is not tide water . . . it must be navigable in fact, in its natural state, without the aid of or reference to artificial means. . . ." Bissel v. Olson, 26 N.D. 60, 66, 143 N.W. 340, 341 (1913). See also the language quoted from State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949), in the text at note 81, *supra.*

88. 76 N.D. 464, 37 N.W.2d 488 (1949). The Court in *Ozark* refers to United States v. Oregon, 295 U.S. 1, 79 (1935), and states that "the Oregon case further holds that if waters in a state are not navigable in fact at the time of its creation the title of the United States to lands underlying them remains unaffected and whether such waters are navigable is a federal question to be determined according to the law and usage recognized in the federal courts." It then concludes "There is nothing in the record to indicate that there is any particular difference between the general character and condition of the lake [Grenora No. 2] now and its character and condition when the state was admitted into the Union or at the time when the survey was made in 1898 and the meander lines about it were run by the surveyors."

on the other side. Does the state lose underlying land on the one hand and gain on the other?

Effect of Shifts in Water Lines

First, terminology should be clarified and four basic factual situations identified.[89] 1. Water may gradually recede baring land in the process. This process is known as "dereliction." 2. Water may gradually deposit soil in a certain place so that it becomes land. This process is known as "accretion." 3. Soil may be lost by the gradual encroachment of water. Generally this process is referred to as "erosion." 4. The location of the water may change suddenly, completely leaving its old bed and forming a new one. The inundating of land in this process is referred to as "avulsion"; the baring of new land is "reliction," as contrasted with "dereliction" above. Many courts and writers today refer to this swift change process in all of its aspects as avulsion and use reliction in the situation described above where they should be using dereliction.[90] Generally deposited and bared soil is referred to as "alluvion." What happens to the boundary line of each riparian owner under each of these changes? Note that each of these processes could result in the creation of an island rather than the creation of additional land contiguous to existing land. The significance of this happening will be discussed later. The basic distinction to be drawn at this point is that generally and in North Dakota land created contiguous to existing riparian[91] land by either accretion or dereliction belongs to the owner of the existing land and land inundated by gradually encroaching water is lost to the owner of the bed while boundaries are not affected by avulsion or reliction.[92]

Accretion and dereliction are discussed properly under a separate heading "Water Boundaries" rather than under "U.S. Government Survey" since the only close connection between the accreted and derelicted lands problem and the United States survey is the question: Where is the boundary when between the time the land

89. See generally 2 BLACKSTONE, COMMENTARIES 262; 1 FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 320-24 (1904); BADE, CASES AND MATERIALS ON REAL PROPTY AND CONVEYANCING 217-220 (1954). Specific citations for the terms discussed in the text will not be given.

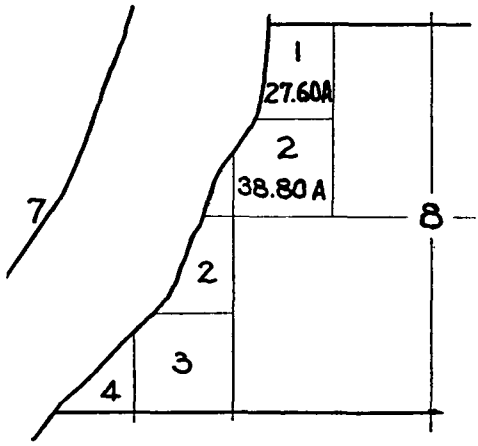
90. Bade, *supra* note 89 at 217. The definition of reliction in two different editions of Black's Law Dictionary illustrates the change: "Reliction. An increase of the land by the *sudden* withdrawal or retrocession of the sea or a river." BLACK, LAW DICTIONARY 1018 (1891). (Emphasis added). "Reliction. An increase of the land by the permanent withdrawal or retrocession of the sea or a river." BLACK, LAW DICTIONARY 1455 (4th ed. 1951).

91. "Riparian" will be used throughout this article to include "littoral" as well. Technically riparian refers to land bounding on rivers and streams whereas littoral refers to land bounding on lakes and ponds. See Darling v. Christensen, 166 Ore. 17, 109 P.2d 585, 592 (1941).

92. Shavely v. Bowlby, 152 U.S. 1, 35 (1894): "The rule, everywhere admitted, that where the land enroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water." See generally 1 FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 320-24 (1904). As to North Dakota law see the discussion of statutes and cases in the text at notes 95-133, *infra*.

is surveyed and the time of conveyance by the United States government there occurs accretion or dereliction but the federal patent makes no reference to it? The United States Supreme Court has said: "[T]he patent passed the title of the United States to [the land], not only as it was at the time of the survey . . . , but as it is at the date of the patent . . . , so that the United States does not retain any interest in any accretion formed between the survey . . . and the date of the patent."[93] This language has been quoted and applied in North Dakota.[94]

Six sections of the North Dakota Code and seven decisions of the North Dakota Supreme Court are relevant to this area.[95] One Code section provides that "Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."[96] Note that this statute refers only to a "river or stream" and says nothing of lakes or ponds. This statute was of great significance in the recent case of *Perry v. Erling*.[97] In *Perry* the 1872 United States survey showed relevant parts of Sections 7 and 8 of Township 138 North, Range 80 West, to be as illustrated in the following diagram:



The plaintiff was the owner of the Northeast quarter of section 8. Apparently between 1872 and the present the Missouri River moved eastward until it had covered all of Lots 1 and 2, the east one-half of the northwest quarter in Section 8, the fractional part of Section 7 which was adjacent to Lot 2 of Section 8, and even a part of plaintiff's northeast quarter. The River then moved back where it came from baring much, if not all, of the land it had covered in the march eastward. Plaintiff claimed that the eastward move made her a riparian owner and that she was entitled as such to the "accretion" formed by the

93. Jefferis v. East Omaha Land Co., 134 U.S. 178, 195 (1890).

94. Gardner v. Green, 67 N.D. 268, 271 N.W. 775 (1937); Oberly v. Carpenter, 67 N.D. 495, 274 N.W. 509 (1937).

95. *Compare* Oberly v. Carpenter, 67 N.D. 495, 274 N.W. 509 (1937) and State v. Loy, 74 N.D. 182, 20 N.W.2d 668 (1945), *with* Gardner v. Green, 67 N.D. 268, 271 N.W. 775 (1937), and Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955), to see why the Court should publish at least a diagram, if not a copy, of the Government Survey with its opinion.

96. N.D. CENT. CODE § 47-06-05 (1960).

97. 132 N.W.2d 889 (N.D. 1965).

backward move to the west and that the old Lots 1 and 2 and the east one-half of the Northwest quarter were gone for good. She relied, in part, on the foregoing North Dakota statute, and, in part, on the fact that the weight of authority of American jurisdictions was in her favor. The Court in a 3-1 decision rejected her claim. Justice Burke's dissent was based primarily on his interpretation that the statute stated unequivocally that accretions to the bank of a stream belong to the owner of the bank and contained no words of limitation, restriction or qualification. Justice Erickstad in his majority opinion, however, said that the language of the statute was not clear, and that, in attempting to apply the statute to the facts in *Perry*, the question arose as to whether "owner of the bank" as used in the statute meant the bank owner according to the original survey or the bank owner at the moment in time when the process of erosion terminated and the process of accretion began. "Believing that the Legislature would not have intended the unjust result of divesting title in the riparian owner forever and giving a nonriparian owner title to the land rebuilt where the former land of the original riparian owner was located,"[98] it was the court's opinion that the Legislature meant the bank owner according to the original survey and that therefore the statute did not extend to this case. In an earlier case, Hogue v. Bourgois,[99] the North Dakota Supreme Court expressed the key to interpreting this statute when it said that the statute "is essentially a restatement of the well-established common law rule governing riparian rights." What was the common law on the problem faced in *Perry* when the statute was first enacted apparently in 1871?[100] Despite the fact that an answer contrary to that reached by the North Dakota Court can be found as far back as the early Roman law,[101] it seems clear from a reading of cases and secondary authority that the common law did not provide a definite answer to the problem.[102] The authority now represented as the weight of authority has built up almost in its entirety since 1871.[103] If this is true and the *Hogue* approach to the statute is the correct one, Justice Burke's dissent is

98. *Id* at 896.

99. 71 N.W.2d 47 (N.D. 1955), 32 N.D.L. REV. 147 (1956). *Hogue* involved an action to quiet title to "Bourgois Island" in the Missouri River basin in Burleigh County.

100. See 1871 DAK. TERR. LAWS ch. 8, § 9, at 86 (CIVIL CODE § 443).

101. See the history traced in Glassie, *Restoration of the Former Front Estate by Alluvion*, 10 VA. L. REV. 106 (1923).

102. See the following cases: Volcanic Oil and Gas Co. v. Chaplin, 27 Ont. L. Rep. 34 (1912); Gifford v. Yarborough, 130 Eng. Rep. F.R. 1023 (H.L. 1828); Foster v. Wright, L.R. 4 C.P. Div. 438 (1878); and those cited in note 103, *infra*. See the following treatises: 1 FARNHAM, WATERS AND WATER RIGHTS 332 (1904); GOULD, WATERS §§ 155, 162 (2d ed. 1891). See the following law review commentaries: Glassie, *supra* note 101; Note, *Principles of Accretion as Affected by Surveyed and Determinable Boundaries*, 8 IOWA L. BULL. 100 (1923); Note, *Water Boundaries and the Law of Accretion—Flexible Versus Fixed Boundaries*, 2 ILL. L. BULL. 519 (1920); 10 MINN. L. REV. 360 (1926); 74 U. PA. L. REV. 743 (1926); 17 MICH. L. REV. 95 (1918).

103. Probably the earliest American case is Welles v. Bailey, 55 Conn. 292, 10 Atl. 565 (1887), with Widdecombe v. Chiles, 173 Mo. 195, 73 S.W. 444 (1903), the leading case. See BADE, CASES AND MATERIAL ON REAL PROPERTY AND CONVEYANCING 224-231 (1954). Farnham, *supra* note 102.

answered effectively. Probably American courts and legislatures when they first faced the problem of whether or not to apply the common law of accretion should have rejected it as inappropriate as many common law rules were rejected. Much of the basic common law of accretions developed concerning the right to newly formed land on the sea coasts. There the dispute was between the Crown which owned the sea and the land underlying it and the riparian owner. When the Courts allowed the land owner to get the newly formed land, no one was harmed unless the land was to accrete as far as France. And even the application of the same rules to internal waters in England should not have been overly persuasive. Certainly there is no river in England to compare with the wandering Missouri. Had we started afresh we might well have fashioned better answers than those we are now getting on wandering boundary problems.

Since the Court in *Perry* was applying a statute apparently declarative of the common law and since there was no clear common law rule on the precise issue when the statute was first enacted, the Court could consider the reasons behind the two current views and apply the better of the two.

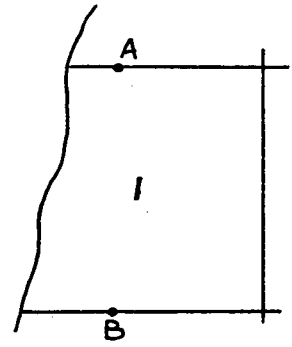
> There are three principal reasons of policy usually assigned for following the changes of a stream. One is that of preserving for the riparian owner his access and riparian rights which are often very valuable. Second is the difficulty of identifying small additions, and the public policy of keeping the narrow strip of land formed by accretion in use. Third is that the accretions should be given to the riparian owner to compensate him for possible losses by reliction. (erosion?)[104]

The North Dakota Court in its combined principal and concurring opinions answered reasons two and three. However, reason one was not discussed as fully as it should have been. Riparian rights including access are important and should be protected. This raises the question: Has the former nonriparian land become riparian through the process of erosion? Why should we be given an automatic "yes" as many courts have done or an automatic "no" as some courts, including North Dakota's, have done? Why should not the court consider the time factor as relevant?[105] If there is a march by a river in one direction and then an immediate about-face and march back, the land as a matter of equity probably should not change its character, but if the river marches in one direction and stays there for 50 years before it moves back, it seems to me that

104. Note, *Water Boundaries and the Law of Accretion—Flexible Versus Fixed Boundaries*, 2 ILL. L. BULL. 519, 522 (1920).
105. "But the worst feature of this treatment is that it wholly ignores the time element which, in the practical view, seems the weightiest single factor." Glassie, *supra* note 101 at 123.

the land abutting the water during that 50 years has a strong equitable claim to be treated as riparian.

The second reason quoted is answered when Justice Erickstad says that "[a]s the controlling boundary line in the instant case is the quarter line between the Northeast Quarter and the Northwest Quarter fraction of Section 8, there could be no difficulty in determining the extent of the accretions to the respective tracts."[106] The interesting question which remains is whether private parties can turn land that was originally riparian into nonriparian land for the purposes of the rule here involved. Lot 1 of Section 8 was originally surveyed as shown:



Suppose the original owner creates a line from point A to point B and conveys that portion of lot 1 east of the line. The easterly land has become nonriparian, but is it so for the accretion rule? Suppose the Missouri inundates all of lot 1 west of line AB and a part of that portion east thereof and then moves back. The principal and concurring opinions seem to focus on government surveys, government boundary lines, and the "bank" as of the time of the original survey. The person who now owns the easterly part of lot 1 owns land that was riparian at the time of the original survey. Will the westerly part of lot 1 be gone for good or will the Court apply the *Perry* rule there as well? If the Court applies the *Perry* rule, will there be much of anything left of the law of accretion when involved with internal waters? As I said earlier, perhaps the American courts and legislatures should have rejected the entire concept to begin with as inapplicable in America.

Reason three is handled by Justice Teigen in his concurring opinion when he concludes that the nonriparian land owner cannot lose:

> The owner of such a governmental subdivision continues to own the land below the water where the stream, either by erosion or avulsion, comes upon his land, subject however to the Federal reservation of control and use for the purpose of commerce.[107]

The full implication of this can be seen from the following diagram:

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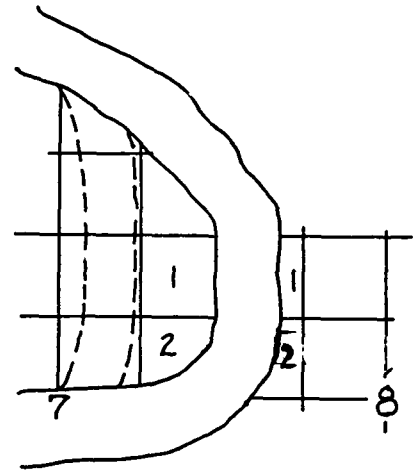
106. Perry v. Erling, 132 N.W.2d at 897.

107. *Id.* at 902. In Hogue v. Bourgois, 71 N.W.2d 47, 52 (N.D. 1955), the court had recognized the mutuality doctrine in these words: "The title of the State of North Dakota to lands below low water mark of a navigable stream is coextensive with the bed of the stream as it may exist from time to time. This is a necessary corollary to the rule that the owner of lands riparian to a navigable stream owns title to the low water mark." The primary reason given was that "otherwise the dominion and control of navigation *by the state* . . . would depend on the vagaries of the river, permitting the



When first surveyed the river ran where the solid lines indicate. Lots 1 and 2 in their respective sections were riparian. The river now runs where the dotted lines indicate. It has moved over by a gradual process. While it was moving west lots 1 and 2 in section 7 were losing by erosion and lots 1 and 2 in section 8 were gaining either by dereliction or accretion. This continued until the river passed the boundary separating lots 1 and 2 in section 7 from the west half of the quarter. There the accretion for the section 8 lots stopped.[108] They now contain all of the old river bed and all that was once lots 1 and 2 in section 7, but they are no longer riparian. That lots 1 and 2 in section 7 would lose to lots 1 and 2 in section 8 was decided in *Oberly v. Carpenter*.[109] This is recognized in *Perry* and there is no indication that the Court would overrule *Oberly*.[110] That lots 1 and 2 of section 8 would become nonriparian certainly modifies the general observation in *Oberly* that: "[T]he law governing riparian rights has no regard for artificial boundary lines, whether between sections or their subdivisions, or between counties, states or nations."[111] This, of course, reinforces the necessity of distinguishing between holding and dicta in determining the rule of a particular case.

Two other Code sections provide, respectively:

> If a river or stream, navigable or not navigable, carries away by sudden violence a considerable and distinguishable part of a bank and bears it to the opposite bank or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.[112]

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state control where the river adhered to its course at the time of admission of the State to the Union and denying the State control where the river, in the process of erosion, subsequently migrated and submerged patented lands. This would lead to absurd and whimsical results." *Id.* at 52. (Emphasis added). But it would seem that what the Court thought in 1955 to be an "absurd and whimsical" result can happen under the *Perry* decision. Note that Judge Teigen in the excerpt quoted in the text recognizes only *federal* control of commerce, whereas the gist of the 1955 language was re *state* control of navigation.

108. I do not see that this would be prevented by the rule for dividing accretion which has as its underlying basis the equity that all riparian owners should share in the new shore line proportionate to their sharing in the old one. See the discussion at notes 120-125, *infra*.

109. 67 N.D. 495, 274 N.W. 509 (1937).

110. See the discussion in 132 N.W.2d at 895, 902.

111. 67 N.D. at 503, 274 N.W. at 513. The Court also pointed out that the section lines had not actually been run north of the river and therefore were not in the way to bar the advancing accretion claim. *Ibid.*

112. N.D. CENT. CODE § 47-06-06 (1960).

> If a stream, navigable or not navigable, forms a new course abandoning its ancient bed, the owners of the land newly occupied take by way of indemnity the ancient bed abandoned, each in proportion to the land of which he has been deprived.[113]

Here again is evidence of sloppy draftsmanship, the latter statute referring only to a "stream," while the former refers to a "river or stream." However, apparently the North Dakota Supreme Court has adopted the usual view on these terms when it found that "the Missouri *River* is a navigable *stream* in this state."[114] If this latter statute is meant to apply only in the avulsion and reliction situation, there probably would be no constitutional problem. But since the statute says nothing about a rapid change, it might be interpreted to include a gradual abandoning of the old bed. This could raise constitutional problems. Nonnavigable water beds are owned by the riparian owners and any attempt to take them away from those riparian owners to give to those who have lost land by the process referred to in the statute might be a deprivation of property without due process of law unless compensated for.[115] If the state, however, wants to give up its ownership of navigable beds in such a situation, perhaps it can do so. But it is at least arguable that this also would be unconstitutional as a deprivation of property without due process of law, since many view the right of riparian owners to get accreted or derelicted land as a property right.

The three sections of the North Dakota Code dealing with the formation or existence of islands have been treated in several North Dakota Supreme Court opinions.[116] These sections, in relevant part, are as follows:

> Island and accumulations of land formed in the beds of streams which are navigable belong to the state, if there is not title or prescription to the contrary. . . .[117]

> An island or accumulation of land formed in a *stream* which is not navigable belongs to the owner of the shore

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113. N.D. CENT. CODE § 47-06-07 (1960).

114. Hogue v. Bourgois, 71 N.W.2d 47, 49 (N.D. 1955), 32 N.D.L. REV. 147 (1956). (Emphasis added).

115. See Gable v. Angle, 7 F. Supp. 967 (W.D. Okla. 1933), where the Court dealt with an Oklahoma territorial and state statute providing "If a stream forms a new course, abandoning its ancient bed, the owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived." The Court said: "Did the territory of Oklahoma have the power to enact the section of the statute relied upon by the plaintiffs in this case? This court is of the opinion that the territory had no such power, for it was directly in conflict with the section of the federal statute above quoted which in effect gives riparian owners the right to the river bed to the center of the stream." The court went on to say that the state did not have the power to pass the legislation either. See the language of the federal statute in the text at note 62, *supra*.

116. Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955); State v. Loy, 74 N.D. 182, 20 N.W.2d 668 (1945); Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921).

117. N.D. CENT. CODE § 47-06-08 (1960). In Hogue v. Bourgois, 71 N.W.2d 47, 52 (N.D. 1955), the court said "The phrase 'if there is not title or prescription to the contrary in Section 47-06-08 contemplates such exceptions as arise when title to an island was vested in the federal government upon admission of the state to the Union or when the state has conveyed title to a person, as was done in the instant case, or when a title is established by adverse possession for the appropriate prescriptive period."

> on that side where the island or accumulation is formed, or if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the *river.*[118]
>
> If a stream, navigable or not navigable, in forming itself a new arm divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner.[119]

It is doubtful that these statutes do anything more than restate the common law.

Assuming then that the alluvion formed by either accretion or dereliction is owned by the riparian owner, how is it to be divided among several riparian owners so as to establish boundaries? To say as the statute says that "such land belongs to the owner of the bank"[120] does not tell us in what direction to proceed from where the old line between two lots ends to reach the current water line. It is clear that the projection of the survey line between riparian lot owners is not necessarily conclusive. In most instances that line will be used only to establish "the boundaries of the tracts as they were laid out and to divide land then in existence between the meander line, as shown on the plat, and the shore line of the river."[121] Two decisions of the North Dakota Supreme Court are fundamental on the rule for apportioning accretions among several riparian owners. In *Jennings v. Shipp,*[122] the Court said that the proper rule was:

> "1. Measure the ancient bank and compute the number of feet owned by each proprietor. 2. Divide the new bank into as many equal parts as there were feet in the old bank and draw lines from the old points of division to the new ones." . . . The application of this rule . . . appears to us to be practical and sensible.

In the earlier case of *Gardner v. Green,*[123] the Court had stated that this was "the fundamental theory" underlying the division of accretion. But it had cautioned that the main object was that the division should be equitable and "give each shore owner *a fair share of the land* to be divided *and* his due portion of the new shore line proportionate to his share on the original line of the water."[124] Although the Court in *Jennings* quoted *Green,* did its failure to emphasize area as it did in *Green* mean that it had abandoned the dual equity test of area and shore line in favor of the single test of shore line? In neither *Jennings* nor *Green* were there enough facts

118. N.D. CENT. CODE § 47-06-09 (1960).
119. N.D. CENT. CODE § 47-06-10 (1960).
120. N.D. CENT. CODE § 47-06-05 (1960).
121. Gardner v. Green, 67 N.D. 268, 271 N.W. 775 (1937).
122. 115 N.W.2d 12 (N.D. 1962).
123. *Supra* note 121.
124. 67 N.D. at 283, 271 N.W. at 783. (Emphasis added).

before the Court to apply the test enunciated. Both cases were remanded for further proceedings.

Owners of islands are entitled to accretions formed to their islands and if they meet with accretions formed to non-island land, each is entitled to the accretions to the line of contact.[125]

So far we have assumed that we have either accretion, dereliction, erosion, avulsion or reliction present. How can it be determined which has occurred? In *Oberly v. Carpenter*,[126] we find the Court stating the issue in the case to be:

> [W]hether the change in the course of the river from that which it followed in 1899 was slow and by imperceptible degrees due to accretion on its north bank and the gradual recession to the south of its waters, or was sudden and perceptible due to the formation of ice gorges and the consequent cutting of wholly new channels.

The court sustained the finding of the lower court that the change was gradual. Various witnesses had testified, and it was proved to the Court's satisfaction that the river had retreated continuously from a few yards to several hundred yards annually and that the change had come about through a process of cutting on the south side and depositing on the north.[127] Generally the test has been in terms of whether or not the process is visible as it is going on.[128] At first it would seem that a movement of "several hundred yards annually" would be visible in process, but perhaps the Court qualified this finding when it later said:

> It is true that there is testimony to the effect that when the river was in flood the rate of cutting where the current struck the bank was relatively rapid and that at times when this was taking place portions of the bank might be seen, when undermined, to fall into the river. But it also appears that the material thus taken by the river was dissolved and washed away and was not at any later time susceptible of identification. And, on the other hand, the new land which was formed was formed slowly and imperceptibly, that is, its formation could not be seen at any particular moment and could only be noted after the lapse of some time.[129]

How long does the building up of alluvion through accretion or dereliction have to last so that it can be said that that "land" has become subject to private ownership? This question was specifically involved in *Rutten v. State*.[130] The state had proposed by artificial

125. Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955).
126. 67 N.D. 495, 498, 274 N.W. 509, 510 (1937).
127. *Id.* at 500, 274 N.W. at 511.
128. See 1 FARNHAM, WATER AND WATER RIGHTS 321-22 (1904).
129. 67 N.D. at 502, 274 N.W. at 513.
130. 93 N.W.2d 796 (N.D. 1958).

means to raise to, and maintain at, 1425 feet above mean sea level the water level of Devil's Lake. Rutten, a riparian owner, objected, sought an injunction and prevailed in the trial court before then District Judge Teigen. Rutten claimed that this action would overflow lands of his without compensation. The state's position was that the land to be flooded still belonged to the state since Devil's Lake was navigable water. Rutten's contention was that the high water level of the lake was 1419 feet and thus the land between 1419 feet and 1425 feet had become his by dereliction. The stipulation agreed to by both parties showed that the last time the level was at 1425 feet was in 1896. And only at two readings since then had it exceeded 1419 feet, in 1910 and 1920 when it was 1422 feet and 1420 feet respectively.[131] The Supreme Court said that "[T]he evidence before the Court fails to warrant the conclusion that there has been a *permanent* reliction to the present level of the lake, or that the waters in the lake will never again reach some higher level."[132] Well, just how much evidence is needed and how long a year span is required before it will be considered permanent? Certainly a period of 55 years should have been sufficient to sustain the trial judge's holding. In *Jennings v. Shipp*,[133] the Court said of the Missouri River: "The Missouri River, which constituted the boundary on one side of this triangular tract, has *characteristically been known to undulate in varying degrees*, thereby causing either accretion or reliction of property bounded by the river." With the Court recognizing that "characteristic" of the Missouri River, how can it ever be established that an accretion or reliction is permanent? It would seem that the state would have an excellent argument to retain title to all lands that were once part of the Missouri River bed on the basis of *Rutten v. State*.

Suppose that a riparian owner conveys land abutting a nonnavigable body of water. Assuming that he owns a portion of the bed thereunder, does title to the bed pass with the title to the abutting land? Certainly if the parties express their intent that it should or should not pass that ought to be conclusive. What happens if the parties do not give any indication as to their intent one way or the other? Suppose that they say, "thence to the lake and along said shore line" or "to the river and by the shore line

131. *Id.* at 797, where the court sets out the following table showing variations in the level of the lake:

Year	Level of Devils Lake above mean sea level	Year	Level of Devils Lake above mean sea level
1867	1438 Ft.	1910	1422 Ft.
1879	1435 Ft.	1920	1420 Ft.
1883	1435 Ft.	1930	1412 Ft.
1887	1427 Ft.	1940	1402 Ft.
1890	1425 Ft.	1950	1416 Ft.
1896	1425 Ft.	1956	1419 Ft.
1901	1419 Ft.		

132. *Id.* at 799.

133. 115 N.W.2d 12, 13 (N.D. 1962). (Emphasis added).

of said river"? Is it intended that the North Dakota Code section providing in part that "in all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both"[134] should be applied? Does this language mean that the owner of a stream bed cannot sever it from the riparian land unless he at least retains ownership of the bank? There does not appear to be any other relevant statute or any relevant case law, although in *Jennings v. Shipp*,[135] the Court said with reference to the analagous problem of whether accretion passes with a conveyance of abutting land: "As to the claim that a conveyance of the upland presumptively carries with it the accretion attached, we find such a presumption rebuttable." Strangely, the Code provides in the same section that the earlier quoted language comes from that "*except when the grant under which the land is held indicates a different intent*, the owner of the upland, when it borders on a *navigable* lake or stream, takes to the edge of the lake or stream at low watermark."[136]

Since there is little North Dakota authority on this issue it may well be that the Court when faced with the problem of interpreting such a grant will apply, as most courts have done[137] the rules that apply to the question of whether beds underlying roadways have been included in a conveyance of abutting land.

III. ROADWAY[138] BOUNDARIES

If a person owns land which abuts on a public roadway, where is the boundary line? Is it the center of the roadway? Or is it the edge of the roadway? The North Dakota Code has provided since territorial days that: "An owner of land bounded by a road or street is presumed to own to the centre of the way, but the contrary may be shown."[139] How would one show "the contrary"? Continued ownership of the land in fee by the abutting owner assumes that the public or governing body maintaining the roadway has an interest less than a fee simple. Assuming this interest less than a fee simple in the public, does an abutting owner necessarily own to the center? Suppose the roadway had been built entirely upon his land. The neighbor should not share in the ownership of the bed. Or suppose that the owner of the bed when he conveyed the abutting land expressly reserved the roadbed; the

134. N.D. CENT. CODE § 47-01-15 (1960). See the discussion at notes 59-67, *supra*.
135. 115 N.W.2d 12 (N.D. 1962).
136. N.D. CENT. CODE § 47-01-15 (1960). (Emphasis added).
137. See, *e.g.*, White v. Knickerbocker Ice. Co., 254 N.Y. 152, 172 N.E. 452 (1930), and the cases cited in note 174, *infra*.
138. The term "roadway" shall be used throughout this section to include highways, streets, avenues, alleys and other public rights of way.
139. N.D. CENT. CODE § 47-01-16 (1960).

new abutting owner should not acquire ownership of it.[140] Finally, however, is the governing body restricted to owning something less than a fee simple? If it could and did acquire the fee simple, obviously the abutting owner's boundary would not extend to the center. What interest does the governing body acquire?

One of the earliest North Dakota Supreme Court expressions is found in *Railway Co. v. Lake:*[141]

> In this state, as in a large majority of the states of the Union, the public has only *an easement* in streets and highways, the fee of the land remaining in the owner, subject to the easement, and he may exercise such acts of ownership and possession as do not interfere with the public use.

The *Railway Co.* case involved a section line roadway that owed its existence to the Act of Congress[142] allowing roadways to be opened on public lands and the acceptance thereof by the Territory of Dakota and the State of North Dakota.[143] There was no purchase, condemnation or dedication by plat in *Railway Co.*

In *Donovan v. Allert,*[144] the North Dakota Supreme Court was involved with a street dedicated by plat under then REV. CODE 1895, § 2422.[145] This section appears today in the North Dakota Code in substantially the same language.[146] The *Donovan* Court said:

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140. See textual discussion at notes 172-177, *infra.*

141. 10 N.D. 541, 545, 88 N.W. 461, 463 (1901).

142. Act July 26, 1866, c. 262, § 8, 14 Stat. 253: "And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Substantially the same legislation appears today in 43 U.S.C. § 932 (1958).

143. Laws, 1871, ch. 33: "Be it enacted by the Legislative Assembly of the Territory of Dakota: Section 1. That hereafter all section lines in this Territory shall be and are hereby declared public highways as far as practicable: Provided, That nothing in this act shall be so construed to interfere with existing highways in the settled portions of the Territory. . . ." See Hillsboro Nat. Bk. v. Ackerman, 48 N.D. 1179, 189 N.W. 657 (1922); Huffman v. West Bay, 47 N.D. 217, 182 N.W. 459 (1921); Faxon v. Civil Township of Lallie, 36 N.D. 634, 163 N.W. 531 (1917); Koloen v. Pilot Mound Twp., 33 N.D. 529, 157 N.W. 672 (1916); Wenberg v. Gibbs Twp., 31 N.D. 46, 153 N.W. 440 (1915); Cosgriff v. Tri-State Tel. Co., 15 N.D. 210, 107 N.W. 525 (1906); Railway Co. v. Lake, 10 N.D. 541, 88 N.W. 461 (1901). The comparable section today is N.D. CENT. CODE § 24-07-03 (1960). Nonsection line roadways were also accepted. REV. CODE 1877, ch. 29, § 37: "All public highways which have been or may hereafter be used as such, for twenty years or more, shall be deemed public highways." See Township v. Skauge, 6 N.D. 382, 71 N.W. 544 (1897). The comparable section today is N.D. CENT. CODE § 24-07-01 (1960).

In Rutten v. Wood, 79 N.D. 436, 439, 57 N.W.2d 112, 113 (1953), another case involving a section line roadway, the Court observed: "The general rule as to the fee title to highways is stated in 25 Am. Jur. page 426, Highways, Section 132, as follows: 'In the absence of a statute expressly providing for the acquisition of the fee, or of a deed from the owner expressly conveying the fee when a highway is established by dedication or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowners.' This is the rule in this state."

144. 11 N.D. 289, 91 N.W. 441 (1902).

145. "When the plat or map shall have been made out and certified, acknowledged and recorded as required by this chapter, every donation or grant *to the public,* or to any individual, religious society, or corporation, marked or noted as such on said plat or map, shall be deemed a sufficient conveyance to vest *the fee simple* of such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against such donors, their heirs or representatives, to said donees, or grantees, for their use for the uses and purposes therein named, expressed and intended, and no other use and purpose whatever; and the land intended to be used for the streets, alleys, ways, commons or other public use in any town, city or addition thereto shall be held in the corporate name thereof in trust to and for the use and purposes set forth and expressed or intended." (Emphasis added). Doesn't that section say that the municipality gets a "fee simple" title?

146. N.D. CENT. CODE § 40-50-05 (1960): "When the plat shall have been made out and certified, acknowledged, and recorded as required by this chapter, every donation or grant *to the public,* or to any individual, religious society, or corporation, marked or

> [I]n construing § 2422 . . . which declares the effect of such dedication, we hold that a proprietor who dedicates by plat does not convey an absolute fee to the public, but reserves the whole estate and title, except *the limited fee* conveyed to the public for the designated and intended use. . . . The fee title to the street in front of plaintiff's dwelling house being in plaintiff, except for street purposes, he owns the lot to the middle of the street, subject to the rights of the public, to the same extent as he owns the portion of the lot on which his dwelling house stands.[147]

Note that in *Railway Co.* the Court said that the public had an "easement," whereas in *Donovan* they said the public had a "limited fee." Perhaps the phrase "limited fee" was used intending to refer to the duration of the public's interest—the fact that it might last forever—rather than to the nature of the ownership. For to say that the public and the abutting owner had a *concurrent* fee ownership would be an unheard of novelty in property law. Dicta in a later North Dakota case supports this view for there the Court said: "This rule has long been established in this state that highways and streets dedicated by plats . . . vest the public with no more than *an easement* for highway purposes."[148] The Court cited *Donovan.* A still later case, however, goes back to the vague approach saying simply that "a municipality is without power to alienate the same, regardless of whether the corporation owns *the fee or* has merely *an easement* and it holds as trustee for the public."[149]

A third way of acquiring a roadway would be by user or prescription for the requisite length of time.[150] This is to be distin-

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noted as such on said plat or map shall be a sufficient conveyance to vest *the fee simple* title in and to such parcel or parcels of land as are designated therein. The mark or note made on such plat or map shall be considered to all intents and purposes a general warranty against the donors, their heirs and representatives, to the donees or grantees for the expressed and intended uses and purposes therein named and for no other use or purpose whatever. The land intended to be used for the streets, alleys, ways, or other public uses in any municipality or addition thereto shall be held in the corporate name of the municipality in trust for the uses and purposes set forth and expressed and intended." (Emphasis added).

147. 11 N.D. 289 at 292, 293, 91 N.W. 441 at 442, 443.

148. Casey v. Corwin, 71 N.W.2d 553, 555 (N.D. 1955). In the earlier case of Gram Const. Co. v. Minneapolis, St. P. S. Ste. M. Ry. Co., 36 N.D. 164, 172, 161 N.W. 732, 734 (1916), the Court had cited *Donovan* in support of the following statement: "Here [in North Dakota] the rule of law is established that the adjacent lot owner owns a fee in the half of the street which is contiguous to his property." The Court then went on to distinguish some of the cited cases by saying that in them "the fee in the street was in the public." The Court did not discuss, however, how the public came to have an interest in the street, whether by plat dedication, section line, condemnation or what.

149. City of Jamestown v. Miemietz, 95 N.W.2d 897, 902 (N.D. 1959). That the municipality whether it holds an easement or the fee holds as trustee is clear. See notes 145 & 146, *supra.*

150. In Koloen v. Pilot Mound Twp., 33 N.D. 529, 536, 157 N.W. 672, 673 (1916), the North Dakota Supreme Court summarized the methods of establishing roads as follows: "Under the laws of the territory of Dakota in force in 1884, public highways might become established in such territory in any one of the following ways: (1.) Section lines, whether traveled or not, were already highways by virtue of legislative declaration, and might be traveled and subjected to such use as far as practicable. (2.) Roads, other than on section or quarter lines, could be established by the board of county commissioners, upon a petition signed by twelve freeholders of the county, six of whom resided in the immediate neighborhood of the proposed road. (3.) Roads might be created by user for a period of twenty years." For other cases recognizing roadways established by prescription see Berger v. Berger, 88 N.W.2d 98 (N.D. 1958); Casey v. Corwin, 71

guished from the issue of how a section line road is to be "opened," for such a roadway could be "opened" by either public user or official action.[151] I mean here to refer to roadways established solely by user or prescription involving no prior grant or reservation therefor. It appears fairly clear from the North Dakota cases that the Court will not consider the public to get more than an easement by this method.[152]

Having discussed section line roadways, plat dedicated roadways, and prescriptive roadways, the next type of roadway to consider is one established on land conveyed to the governing body for that purpose. What interest has the governing body received? This question was involved in *Lalim v. Williams County*.[153] There the Court found the deed involved to be so ambiguous as to allow judicial construction. Prior to this conveyance the grantor owned land adjacent to a highway and the bed underlying that highway to its center. The purpose of this conveyance was to allow a 7-foot widening of that highway. The 33-foot existing strip of highway to its center was expressly excepted from the conveyance. The Court thought, in construing the deed, that it would be unlikely that the grantor would intend to retain the fee to the 33-foot strip of existing highway, but give it up to the intervening 7-foot strip. It held that he did not give it up, concluding:

> If the grantors had not deeded the 7-foot strips to the county, the county could have obtained only *an easement* for a right of way for highway over those strips, and under the circumstances it may be assumed that the county obtained the deed in lieu of acquiring title by eminent domain proceedings.[154]

The result in this case was that the deed did not convey the fee, but the clear implication of the reasoning used was that if the language in a deed was unambiguous it could convey the fee. The

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N.W.2d 553 (N.D. 1955); Kritzberger v. Traill County, 62 N.D. 208, 242 N.W. 913 (1932); Berger v. Morton County, 57 N.D. 305, 221 N.W. 270 (1928); Hillsboro Nat. Bk. v. Ackerman, 48 N.D. 1179, 189 N.W. 657 (1922). See Burleigh County v. Rhud, 23 N.D. 362, 136 N.W. 1082 (1912), for a good discussion of the somewhat confusing early legislation on acquiring highways by prescription which resulted in a gap during which there could be no such acquisition.

151. See Huffman v. West Bay, 47 N.D. 217, 182 N.W. 459 (1921).

152. "There is no evidence whatever in the record that this highway [U.S. 10] was established by any means other than by prescription. . . . While the state has the power under the provisions of chapter 159, Laws of N.D. 1927, Sec. 24-0117, NDRC 1943, to acquire title in fee to rights of way for highways, the rule has long been established in this state that highways and streets dedicated by plats or section line reservations vest the public with no more than *an easement* for highway purposes. [Here the Court cites *Donovan, Railway Co., Gram Constr. Co., Von Bank* and *Rutten* and quotes the same section from 25 Am. Jur. 426 that it quoted in *Rutten*. See note 143, *supra*.] It is clear therefore that under the established law of this State, the interest acquired by the public across the lots involved in this litigation was only *an easement* of passage. All other interest in the property remained in the owner of the fee." Casey v. Corwin, 71 N.W.2d 553, 555 (N.D. 1955). (Emphasis added.)

153. 105 N.W.2d 339 (N.D. 1960).

154. *Id.* at 347. To the same effect see Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 507, 8 N.W.2d 599, 604 (1942): "He gave all the county desired, and that was an easement for highway purposes only. Had the county been forced to condemn, that was all it could have taken."

only argument against this would be that a municipality or county or other governing body did not have statutory authority to own a fee for highway purposes no matter how acquired and therefore a deed even expressly purporting to give a fee for such purposes would not be effective to pass more than an easement.[155]

The conclusion that a county was limited to an easement in condemnation proceedings was based on Code of 1943, § 32-1503,[156] a provision that had remained the same since first enacted in 1895 until amended in 1953. But the power of the state to take land for highway purposes by condemnation was not so limited. In 1941 the North Dakota Supreme Court specifically stated that the "wording" of the legislation authorizing the state to condemn for highway purposes "contemplates not the acquisition of easements for rights of way . . . but the acquisition of lands . . . when necessary to acquire the same for highway purposes, and that the title thereto shall be taken and vested in the state."[157] The statute, however, did

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155. See N.D. CENT. CODE § 32-15-03.2 (1960) quoted in its original version in the text at note 160, *infra*. Suppose, however, that the deed states clearly that a fee is being conveyed, does the fee pass?

156. "The following is a classification of the estates and rights in land subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow or a place for the deposit of debris or tailings of a mine;
2. An easement when taken for any other use;
3. The right of entry upon and occupation of lands and the right to take therefrom such earth, gravel, stone, trees and timber as may be necessary for a public use."

Since highway purposes did not come under (1) or (3), they had to come under (2).

157. State Highway Comm'n. v. State, 70 N.D. 673, 680, 297 N.W. 194, 197 (1941). The first authorization for the State to condemn land for highway purposes came in N.D. Sess. Laws 1919, ch. 141. "Prior [thereto] . . . the power of eminent domain for highway purposes was limited to the counties." Wallentinson v. Williams County, 101 N.W.2d 571, 576 (N.D. 1960). Apparently the Court was distinguishing "highways" from other roadways, as it was clear as early as City of Lidgerwood v. Michalek, 12 N.D. 348, 350, 97 N.W. 541, 542 (1903), that "the plaintiff [city] has the right, under the statute, to lay out and open streets, and to exercise the right of eminent domain, in order to acquire real property for street use." The broad legislation authorizing state condemnation came in N.D. Sess. Laws 1927, ch. 159, § 20. As amended by N.D. Sess. Laws 1933, ch. 128, and involved in the *State Highway Comm'n.* case it read as follows:

"The State Highway Commission or its successor, . . . may purchase, acquire, take over or condemn under the right and power of eminent domain, for the state, any and all lands which it shall deem necessary for present public use, . . . or which it may deem necessary for reasonable future public use, . . . It may, by the same means, secure any and all materials, including clay, gravel, sand or rock, or the lands necessary to secure such material, and the necessary land, lands or easements thereover, to provide ways and access thereto."

"The State Highway Commission may vacate any land or part thereof, or rights in land which have been taken or acquired for highway purposes under the provisions of this Act by executing and recording a deed thereof, and said vacation shall revest the title to the lands or rights so vested in the persons, their heirs, successors or assigns in whom it was vested at the time of the taking."

The court referred to the fact that "easement" was used only once saying: "In no other place in the statute is it intimated that anything less than the title in fee shall be acquired." 70 N.D. 673, 679, 297 N.W. 194, 197. The Court in construing the statute obviously overlooked a pertinent general observation that it had made on condemnations for the first time as far back as Bigelow v. Draper, 6 N.D. 152, 162, 69 N.W. 570, 572-73 (1896): "There appears to be no necessity for the taking of the real estate itself; and it is a familiar principle of law that the wresting of private property from the hands of its owner for a public use should never be permitted to extend beyond such property or such interest in property as is reasonably required to subserve the public interests. It would be unnecessarily burdensome to the company, and inexcusably oppressive against these defendants, to compel or even allow the company to take the fee of the land involved, when the public use required merely that they should be damaged, and not that they should be taken wholly from their owners. . . ."

Further, in view of the general language in the statute one might have thought that the Court would have applied the predecessor of N.D. CENT. CODE § 32-15-03 (1960), *supra* note 156, but the Court refused to do so saying that the legislature could not have intended for it to apply to the state since it was first enacted long before the state was given authority to condemn.

not use either "fee" or "fee simple" in describing the state's interest.[158] In 1953 the Legislature purported to make it clear that the state could acquire the land "in fee simple" as well as by easement, "provided, however, as to any and all lands acquired or taken for highway, road or street purposes, he [the Highway Commissioner] shall not obtain any rights or interests in or to the oil, gas or fluid minerals on or underlying said lands."[159] But the really amazing thing about the 1953 Legislature was that at the same time that it was supposedly clarifying the foregoing legislation to allow the state to condemn a fee simple, it was saying in a different piece of legislation:

> 1. It is hereby declared to be the intent of the legislative assembly that section 32-1503 of the North Dakota Revised Code of 1943 limits the estate that may be taken or acquired *by the state of North Dakota* or its political subdivisions for highway purposes to that of *an easement.* It is further found and declared that in granting conveyances to property for highway purposes it was intended by all parties that only an easement was granted and that the taking or acquiring of an estate greater than an easement for these purposes is without authority, contrary to the intent of section 32-1503 and is null and void.
>
> 2. No transfer *to the state of North Dakota* or any of its political subdivisions of property for highway purposes shall be deemed to include any interest greater than an easement, and where any greater estate shall have been so transferred, the same is hereby reconveyed to the owner from which such land was originally taken, or to the heirs, executors, administrators or assigns of such owner. Such reconveyance shall be subject to any existing contracts or agreements covering such property, and all rights and benefits thereof shall accrue to the grantee.[160]

So, in one breath the 1953 Legislature appeared to be saying that the state could acquire the fee simple, while in another breath it appeared to be saying that the state could not do so. It was not until 1959 that the Legislature amended § 32-1503 to provide that "upon a proper allegation of the need therefor, the court shall have the power to order that a fee simple be taken for such use."[161] At the same time it added a new paragraph:

> However, the provisions of this section shall not authorize the state or any political subdivision thereof to obtain any

158. See note 157, *supra.*
159. N.D. Sess. Laws 1953, ch. 177, § 90. The exact language in print "may purchase acquire, take over, or condemn under the right and power of eminent domain, for the state, any and all lands in fee simple *of* such easements thereof which he shall deem necessary" probably contains a typographical error so that it should read "fee simple *or* such easements." (Emphasis added.)
160. N.D. Sess. Laws 1953, ch. 212, §§ 1 & 2, repealed in part by omission from the 1960 code, N.D. CENT. CODE § 32-15-03.1 (1960). (Emphasis added.)
161. N.D. Sess. Laws 1959, ch. 267, § 1. See N.D. CENT. CODE § 32-15-03 (1960).

> rights or interest in or to the oil, gas or fluid minerals on or underlying any estate or right in lands subject to be taken for a public use.[162]

In 1960 in *Wallentinson v. Williams County*,[163] the Supreme Court of North Dakota upheld the constitutionality of the clause "reconveying" mineral rights to the original owners or their successors,[164] and went on to describe more fully the state's title to underlying road beds:

> Thus the title acquired by the State . . . is more than an easement. It is not, however, a fee simple absolute title. . . . [W]hile the State did acquire a fee title, it was *a limited or determinable fee* and not a fee simple absolute title. The title acquired by the State was subject to reverter when such land, or part thereof, or rights in land were no longer needed for highway purposes.[165]

The status of the title in these highway beds would then appear to be a fee simple determinable in the state for highway purposes, a possibility of reverter and an ownership in fee simple of the mineral rights in the abutting owner. Thus the abutting owner's boundary line would be at the center of the roadway for purposes of his reverter and mineral ownership, but at the edge of the roadway as far as the present possessory estate on the surface is concerned.

In those situations where the abutting owner owns the fee to the center of the roadway, he may use that fee ownership in any manner that does not unreasonably interfere with the easement to which it is subject.[166] This also means that the fee owner can pro-

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162. *Ibid.*

163. 101 N.W.2d 571 (N.D. 1960).

164. The clause had been challenged as being in violation of N.D. CONST. §§ 20 & 185. N.D. CONST. § 20 provides:

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

N.D. CONST. § 185 provides:

"The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

See Solberg v. State Treas., 78 N.D. 806, 53 N.W.2d 49 (1952).

The Court in *Wallentinson* said "The land was taken subject to such reverter," by the Commission (see note 165, *infra*); they thought the fact that the Legislature did it should make no difference, since the Commission got its power from the Legislature originally. The Court went on to presume that in condemnation the state had paid only for what it took. But still the Court said that "the State, as owner of a determinable fee interest . . . had the right to execute nonoperating oil and gas leases so long as the estate of the State . . . continued."

165. 101 N.W.2d 571, 576-77. It should not, however, be concluded that the reverter is automatic. For the Court had earlier and quite properly described its method of operation: "The statute . . . [gives] the highway commission the right to vacate any land so taken for highway purposes, or part thereof, or rights in such land, when such land or rights in land are, *in the discretion of the highway commission*, no longer needed for the purposes for which they were taken." *Id.* at 577.

166. See, *e.g.*, Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 8 N.W.2d 599 (1942), where the abutting owner was permitted to use the land subjected to an easement for certain agricultural purposes. In Hjelle v. J. C. Snyder & Sons, 133 N.W.2d 625 (N.D. 1965), the Court held that a fence and lightpost maintained on a state roadway by the

hibit any use which is not consistent with the easement for roadway purposes. Thus the abutting land owner in North Dakota has been able to prohibit the following uses: erection of telephone poles and wires;[167] erection of telegraph poles and wires;[168] erection of buildings;[169] and hunting.[170] And he has been allowed to recover additional compensation for the construction of a railroad spur track thereon.[171]

But where the abutting land owner owns only a possibility of reverter coupled with fee ownership of the mineral rights he should have much less control over the use of the surface. First, as to the possibility of reverter, it is doubtful that waste would apply, and with respect to the mineral rights his only real interest is access. To the extent that the fee is held in trust on behalf of the public for highway use he might, as one of the public, have the right to enforce the trust. But he certainly should not have any present right to use the surface property except in connection with the mineral rights.

Supposing then that the abutting land owner owns the fee in a roadway to its center, what happens when he conveys the abutting land without express reference to the land underlying the roadway? A section of the North Dakota Code had provided since territorial days until its amendment in 1957 that:

> A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.[172]

In 1957 this section was amended to read as follows:

> A transfer of land bounded by a highway, street, alley, or public right of way passes the title of the person whose estate is transferred to the soil of the highway, street, alley, or public right of way in front to the center thereof unless a different intent appears from the grant. Every conveyance of real estate, which abuts upon a vacated highway, street,

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abutting land owner in connection with a drive-in theater was permissible. The Court pointed out that the evidence failed to "indicate whether the state has a fee simple title or merely an easement for highway purposes." *Id.* at 628. In the absence of a showing by the State of fee ownership or interference with use of the right of way, the decision denying the State an injunction was correct. Had the State shown fee ownership it would have been entitled to an injunction without more. The Court's general statement that "under Otter Tail, an abutting landowner retains the right to use property *subject to highway easement* for any purpose which does not interfere with the use for highway purposes," should be strictly construed to apply only where the abutting land owner owns the fee subject to such an easement and not to apply where the state owns the fee. *Id.* at 630 (emphasis added). Otherwise, traditional rights of fee ownership would be denied the State for no apparent reason.

167. Donovan v. Allert, 11 N.D. 289, 91 N.W. 441 (1902); Cosgriff v. Tri-State Telephone Co., 15 N.D. 210, 107 N.W. 525 (1906). *Cf.* Telephone Co. v. Cosgriff, 19 N.D. 771, 124 N.W. 75 (1909), overruled in part by Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 8 N.W.2d 599 (1942), as to valuing a condemnee's interest.

168. Cosgriff v. Tri-State Telephone Co., *supra* note 167.

169. Railway Co. v. Lake, 10 N.D. 541, 88 N.W. 461 (1901).

170. Rutten v. Wood, 79 N.D. 436, 57 N.W.2d 112 (1953), 29 N.D. L. REV. 289 (1953).

171. Gram Constr. Co. v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 36 N.D. 164, 161 N.W. 732 (1916).

172. N.D. REV. CODE § 47-1010 (1944).

> alley, or other public right of way, shall be construed, unless a contrary intent appears, to include that part of such highway, street, alley or public right of way which attaches either by operation or presumption of law, to such abutting real estate upon such vacation.[173]

Prior to the 1957 amendment the statute expressed nothing more than the common law on the subject.[174] It is doubtful that the fact that the statute referred only to "highway" and not to other roadways, would have made any difference as to the outcome. The Court very probably would have followed the common law on these matters also. But American courts had disagreed with respect to the effect of conveyances of land abutting on vacated roadways,[175] and therefore the statute amendment is helpful in settling North Dakota's position on that point. It is entirely possible that the motivation for the 1957 amendment came from the 1957 case of *Welsh v. Monson*.[176] There a resolution vacating an avenue was recorded over two years before the abutting owners conveyed " 'Lot 6 in Block 82 of Monson's Subdivision (with other property) of Block 82 of McKenzie & Coffin's Addition to the City of Bismarck, N. Dak.' "[177] The Court held that title to the center of the vacated street did not pass to the grantees.

IV. PRACTICAL LOCATION OF BOUNDARIES[178]

When one gets a deed purporting to transfer ownership of a particular tract of land one has only a piece of paper with some words on it. How does one translate those *words* into a particular tract of land *on the ground*? This problem or process may be referred to generally as the practical location of boundaries. It is very likely that two surveyors on two successive days would not locate the boundary line of a particular tract of land on the exact

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173. N.D. Sess. Laws 1957 ch. 309, § 1; now N.D. CENT. CODE § 47-10-10 (1960).
174. See, *e.g.*, Bowers v. Atchison, T. & S.F. Ry. Co., 119 Kan. 202, 237 Pac. 913 (1925); Low v. Tibbetts, 72 Me. 92 (1881).
175. See Greenberg v. L. I. Snodgrass Co., 161 Ohio St. 351, 119 N.E.2d 292 (1954); 1 AIGLER, SMITH & TEFFT, CASES ON PROPERTY 457-58 at note 37 (1960).
176. 79 N.W.2d 155 (N.D. 1956).
177. *Id.* at 157. There is some doubt as to whether the street ever became such. Mere dedication even though by plat is not sufficient; it must be accepted. And acceptance may be either through official action or user by the public. So if no street was ever in existence the rule concerning conveyance of street beds should not apply.

Another North Dakota case involving a conveyance of a roadway bed was Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933). There a conveyance was made according to the following description:

"Beginning at the southwest corner of the southwest quarter of section 11, township 130, range 77, thence running east along the south line of said section 208.71 feet, thence north 208.71 feet at right angles and parallel to the west line of said section, thence west 208.71 feet measured at right angles and parallel to the south line of said section and thence south 208.71 feet to the place of beginning, containing one acre more or less."

Id. at 299, 248 N.W. at 186. The south line of section 11 was the center of a highway which extended for 33 feet to each side of the center. The west line of section 11 also was the center of a highway which, again, extended 33 feet to each side of the center. The Court, even though the buyer measured 208.71 feet from the north and east boundary lines of the two highways respectively, thought it clear that the 33 foot roadbed was to be included in considering the 208.71 feet.
178. By far the most substantial and most important work on this subject is Browder, *The Practical Location of Boundaries*, 56 MICH. L. REV. 487 (1958). See also Browder, *Boundaries: Description v. Survey*, 53 MICH. L. REV. 647 (1955); Keith, *Government Land Surveys and Related Problems*, 38 IOWA L. REV. 86 (1952).

same spot on the ground. This eternal variability, however, cannot be permitted to affect the constancy of boundary location.

In dealing with the U.S. Government survey the problem was solved when the courts said that the monuments as surveyed on the ground would prevail over any possibly inconsistent call in the description according to the survey. The same approach could be extended to private surveys and to some extent it has been.[179] Furthermore, it could be required by legislation that there be surveying and fixing of monuments before any transfer of land is made. But this has not been done yet, except for such legislation as exists on platting; and many metes and bounds descriptions are still used with little regard at times for where the exact boundary line is. Suppose, however, that the adjacent land owners get together and say: "This fence shall be the boundary line between our properties." Is it? What if a surveyor would locate the boundary line five feet further west of where the fence is placed? In considering this problem the courts have developed what are apparently three different concepts:[180] (1) the agreed boundary rule; (2) acquiescence; and (3) estoppel. These concepts have not been uniformly defined, and even within the confines of one jurisdiction they are not always readily distinguishable.

The agreed boundary rule has been stated succinctly as follows:

> If there is an uncertainty or dispute regarding the boundary line of contiguous tracts of land, the owners thereof may agree that a certain line shall be the true division line between their respective tracts; and such agreement, when executed, establishes the boundary line and estops the parties from afterwards contesting it.[181]

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179. See Browder, *supra* note 178, at 541-44. *Cf.* N.D. CENT. CODE chs. 11-24 & 40-50 (1960).

180. See, *e.g.*, Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740, 742 (1893): "The rule of law which counsel attempt to apply is well understood, and may be thus stated: Evidence of what is called a 'practical location' of the boundaries of real property is often competent in cases of controversy respecting division lines, and it is sometimes difficult to determine whether such evidence should be received or rejected. Where there can be no real doubt as to how the premises should be located according to certain and known boundaries described in the deed, to establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be *either* a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations, *or* the erroneous line must have been agreed upon between the parties claiming the land, or both sides thereof, and afterwards acquiesced in, *or* the party whose right is to be barred must have silently looked on while the other party acted or subjected himself to expense in regard to the land, which he would not have done if the line had not been so located. But to establish a practical location which is to divest one of a clear and conceded title by deed, the extent of which is free from ambiguity or doubt, the evidence establishing such location should be clear, positive, and unequivocal. There should be an express agreement made between the owners of the lands, deliberately settling the exact, precise line between them, and acquiescence for a considerable time, or, in the absence of proof of such agreement, it should be as clearly and distinctly shown that the party claiming has had possession of the premises claimed up to a certain, visible, and well-known line, with the knowledge of the owner of the adjoining land, and his acquiescence, continued for a considerable period of time. What this period is, has not been limited or defined, is quite vague and uncertain, and must necessarily depend upon the particular circumstances of each case. It has often been said that this acquiescence must have continued for a period of time scarcely less than that prescribed by the statute of limitations; and in some cases it has been held that the doctrine that an express agreement, recognizing an erroneous boundary line, will conclude a party, must rest, if tenable at all, upon the principle of estoppel." (Emphasis added.)

181 AIGLER, SMITH & TEFFT, CASES ON PROPERTY 199 (Vol. 1, 1960), quoting 4 CAL. JUR. 427, § 53.

This definition contains expressly three elements which must be explored further. The first is the requirement that there be "an uncertainty or dispute" about where the boundary line should be. Does this mean that the parties must consciously differ as to where the boundary should go? Must the uncertainty be in the objective state of facts—that is, the boundary line could not be located with certainty by anyone—or can the uncertainty be simply in the state of mind of the parties? For example, the parties say, "Probably a surveyor could locate the boundary, but it is not worth hiring one so we will adopt this line as the boundary line." The courts have disagreed on these questions.[182] Some sort of dispute requirement can be justified on the ground that if the parties actually know their correct boundary line and merely agree to a different one, they are attempting a transfer of land and a parol agreement would not be sufficient. And this brings us to the second requirement: that the parties "agree." As has already been intimated a parol agreement is sufficient and probably the agreement will always be parol for any problem to exist. But some courts have taken the position that the agreement may be implied as well as express; and some say that it can be implied from a long continued acquiescence in a particular boundary location.[183] This raises difficult problems in many jurisdictions as to whether "acquiescence" is a separate concept for locating boundary lines or merely a part of the agreed boundary rule. The fact that these agreements are parol probably gave rise to the third requirement, that they become effective "when executed."[184] Execution of the agreement could involve acts such as putting up a fence or simply change of possession. Here again, some courts have said that long continued acquiescence is significant or even required as in execution of the agreement. Can it also be a *sui generis* concept in these jurisdictions? The further problem exists whether acquiescence involves anything more than a passive state of affairs on the part of the party to be held, whether he must engage in some active conduct as well.

Not express but implied in the foregoing definition of the agreed boundary rule is another important element commonly referred to as "the mistake rule."[185] The purpose of the agreed boundary rule is to settle a dispute; implicit is the assumption that the true boundary has not been or cannot be located. If the parties mistakenly agree to a certain boundary line on the assumption that it is the "true" boundary line rather than a line agreed upon as a

182. See BURBY, REAL PROPERTY 465 (2d ed. 1954); Browder, *supra* note 178, at 491-93.
183. Burby, *op. cit. supra* note 182, at 465; Browder, *supra* note 178, at 490-504.
184. See Browder, *supra* note 178, at 493-95.
185. See Browder, *supra* note 178, at 498-504.

settlement, and it is later proved not to be the "true" line the agreement is vitiated by this "mistake."

As to acquiescence it should be pointed out first that if it is simply to be used as evidence in proving an agreement under the agreed boundary rule or simply to be used as evidence in proving the execution of an agreement under the agreed boundary rule, it is entitled to no separate consideration. However, it is clear that in some jurisdictions it has a separate existence. Professor Browder has concluded:

> From the confusing blend of agreement and acquiescence concepts of practical location we must conclude that the results in some cases can be explained either in terms of an agreement with subsequent acquiescence or of acquiescence alone but that there are other cases which can be adequately explained only in terms of acquiescence in a somewhat different sense. . . .All this means that the term 'acquiescence' may be used with at least three varying meanings. In one case it may be wholly passive, referring to a post-agreement requirement. In another case with the same facts it may refer both to the initial 'agreement,' express or implied, and to the passive conduct which follows. In a third case it may also refer to both active and passive conduct, but which are blended and often concurrent and perhaps inseparable.[186]

Second, it is necessary to point out that if the same elements are required for acquiescence as for adverse possession,[187] it again should get no separate consideration. But here also, however, it is clear that it has a separate existence. This is true despite the fact that many jurisdictions apparently consider its basis as prescriptive rather than the practical location of boundaries. The difference is suggested by the very terms themselves. "Adverse" possession suggests an element of hostility. "Acquiescence" suggests an element of consent. When one whose land is being claimed under adverse possession says to the claimant, "You are wrongfully occupying my land," he may be assisting the claimant, for the statement helps show the "hostile" element. On the other hand, such a statement may well defeat a claimant who is relying on acquiescence, for it negates consent.[188] Professor Browder has said of various cases including one from North Dakota, Bernier v. Pre-

186. Browder, *The Practical Location of Boundaries, supra* note 178 at 511.

187. This article will not discuss the concept of adverse possession except to the extent necessary to distinguish it from acquiescence. Obviously it can be a definite method of establishing boundary lines. Probably only the 20-year statute of limitations could be effectively used in North Dakota for establishing boundaries by adverse possession since the 10-year statute requires the payment of taxes and unless an entire parcel was being claimed chances are good that taxes would not be paid by the claimant. The 20-year statute is found in N.D. CENT. CODE §§ 28-01-04 through 28-01-14 (1960); whereas, the 10-year statute is found in N.D. CENT. CODE §§ 47-06-01 through 47-06-03 (1960). See also the companion article in this symposium, Ruemmele, *The North Dakota Marketable Record Title Act.*

188. For a general discussion of adverse possession contra acquiescence see Note, *Real Property: Acquiescence in Lieu of Adverse Possession in Boundary Line Cases,* 8 OKLA. L. REV. 486 (1955).

ckel,[189] "it is startling how often courts, although speaking in terms of acquiescence, have not made it clear which doctrine [adverse possession or acquiescence] they were applying or even whether they recognize any difference between them."[190]

The three basic elements of estoppel are representation, reliance and change of position. If "A" owning land adjacent to "B" 's land tells "B": "This fence is the boundary line," knowing that it is not or that he does not know for sure, and "B" having no knowledge where it should be located builds up to the line in reliance on "A" 's representation, "A" ought to be estopped from denying that the fence is the boundary line.[191]

These concepts have been referred to in five North Dakota cases.[192] In only one case did the court find sufficient evidence to apply one of these concepts.[193] Professor Browder's comment on that case has already been noted.[194] After study of all five cases it is difficult to determine exactly what the North Dakota Supreme Court requires for the practical location of boundaries. All three concepts are referred to at one time or another, and it does appear that they are recognized as separate entities. But unfortunately it may be true that the court considers the underlying rationale of acquiescence to be prescriptive rather than practical location of boundaries.

In Bernier v. Preckel, after stating its conclusion that "the boundary line between lots 3 and 4 is established by acquiescence of the parties,"[195] the court adverted to the North Dakota statute of limitations which is the basis for adverse possession[196] and concluded:

> This action was commenced in September 1922, and the plaintiff has wholly failed to prove either possession or seizin, actual or constructive, of any part of the 11 foot strip which he claims, as required by Sec. 7362. . ., but on the contrary the evidence is practically undisputed that the said 11 foot strip was in the actual adverse possession of the defendants and their grantors through privity of contract for more than 30 years.[197]

The material quoted by the court[198] on acquiescence does not make

189. 60 N.D. 549, 236 N.W. 243 (1931).
190. Browder, *The Practical Location of Boundaries*, *supra* note 178 at 512.
191. See Beardsley v. Crane, *supra* note 180.
192. Nystrom v. Lee, 16 N.D. 561, 114 N.W. 478 (1907); Johnson v. Bartron, 23 N.D. 629, 137 N.W. 1092 (1912); Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931); Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933); Stutsman v. State, 67 N.D. 618, 275 N.W. 387 (1937).
193. Bernier v. Preckel, *supra* note 192.
194. See text at note 190, *supra*.
195. 60 N.D. at 555, 236 N.W. at 246.
196. See note 187, *supra*.
197. 60 N.D. at 557, 236 N.W. at 247.
198. This consisted primarily of the following excerpts from *Corpus Juris*: "According to a number of decisions, although the presumption in favor of a boundary line acquiesced in by adjoining proprietors is strengthened by lapse of time, there is no period short of that prescribed by the statute of limitations for acquiring title by adverse possession which will render the presumption conclusive. Each case must furnish its own

it clear whether it considers the basis to be prescriptive or practical location of boundaries; the foregoing quoted material raises substantial doubt as to whether the court saw the difference between adverse possession and acquiescence. It is no wonder that Professor Browder was confused as to the North Dakota view. The two cases subsequent to *Bernier* do not help clarify the situation.

In *Bichler v. Ternes*,[199] we find this confusing language:

> Is the defendant concluded under the facts in the instant case by such acquiescence as the record shows in the boundary line as evidenced by the fences? . . . negative. The evidence shows that the original grantor claimed the grantee had fenced in too much land. It also appears that the boundary was established at the fences without the concurrence of the grantor. So, there is no agreement in fact upon the boundaries as evidenced by the fences. Neither does it appear that the parties had compromised a disputed boundary line by agreement upon a definite line, or that such a line had been established through arbitration or otherwise. Thus, the question resolves to whether or not an erroneous line established by the grantee must be held to be the true line where the grantor adversely interested occupies his premises only up to such line and takes no steps to regain possession of his land erroneously claimed by the grantee for a period of sixteen years. The most the record shows is that there was acquiescence in the existence of the fence and occupancy by the adjoining owners respectively up to the fence only in the sense that no affirmative action was taken to cause its removal. This alone does not amount to agreement upon the fence as the dividing line . . . . For purposes of this opinion, it may be conceded that an agreement between adjoining proprietors followed by acquiescence and possession would be conclusive upon both parties as fixing a boundary line different from that called for in the deed, though such possession and acquiescence continue for a shorter period than

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rule, according to its own circumstances, modifying the conclusiveness of the presumption. And some decisions have held, without qualifications, that nothing short of acquiescence for the period required by the statute of limitations for acquisition of title by adverse possession will suffice. It is very generally held, however, that where the recognition and acquiescence have continued beyond the period fixed by the statute of limitations the presumption becomes conclusive, irrespective of the correctness of the boundary acquiesced in." 9 C.J. *Boundaries* § 197 (1916).

"In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but mutual recognition is necessary. Aside from this, what constitutes an acquiescence or recognation of a boundary line depends on the words or declaration of the parties interested, on their silence, or, as is more frequently the case, on inferences or presumptions from their conduct." 9 C.J. *Boundaries* § 198 (1916).

199. 63 N.D. 295, 308, 248 N.W. 185, 190 (1933). (Emphasis added).

Note that in that portion of the court's opinion hereafter quoted, the court refers to the possibility of establishing boundaries by arbitration. There are no North Dakota cases in which this has been accomplished. N.D. CENT. CODE ch. 32-29 (1960) dealing with arbitration may be used for boundary questions. Section -01 thereof provides:

"Persons capable of contracting may submit to the decision of one or more arbitrators any controversy which might be the subject of a civil action between them, except the question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property."

See State v. Loy, 71 N.D. 243, 299 N.W. 908 (1941). There the question was whether certain lands had been formed by accretion to the bank of the Missouri River or by accumulation as an island in the River. This the court held to be a question concerning title rather than one concerning boundaries so that the submission to arbitration was void.

> the statute of limitations. . . .*Where there is no agreement, however, unless the circumstances create an estoppel, nothing short of adverse possession for the statutory period will work a change of title* (see Hanlon v. Ten Hove, 235 Mich. 227, 209 N.W. 169, 46 A.L.R. 788) *or preclude one from asserting his title.*

In this discussion the court at first appears to reject any separate role for acquiescence, discussing the problem instead in the context of the agreed boundary rule and intimating that acquiescence is a part of the execution of such an agreement. But the court then proceeds to extricate itself in part by saying that Pomeroy considers acquiescence as " 'a quasi estoppel' ".[200] This allows the court to consider acquiescence within the exception of "estoppel" it had just stated. The extrication is only in part because as the court intimates only an "actor" can be estopped. "He [the defendant] has not taken the initiative and sought the aid of a court of equity to enforce his legal claims."[201]

The most recent decision on the subject does not lead to clarification.[202] For it was a case in which there was never any dispute over where the true line established by the United States Survey between the two tracts was.[203] It was being argued that a boundary line some 90 or 91 feet east of the regular United States Survey line had been established by agreement, acquiescence or estoppel. However, the court did not base its decision on the lack of uncertainty as to the location of the true boundary line. Instead it concluded:

> An agreement changing a boundary line may be shown and established by direct evidence, and may be inferred from conduct and especially from long acquiescence. But since the ownership of land is thereby affected, the proof establishing the new or agreed line should be *clear and convincing*. We are of the opinion that the defendant bank has not shown by a *preponderance* of the evidence or at all that the government line dividing the two eighties was changed.[204]

The court is certainly correct that on the facts of this type of case, where a definable boundary line would be changed, the evidence should be clear and convincing as to a change before it is recognized. Query if it should be recognized at all in the absence of a writing or adverse possession. The same is *not* true where there

200. *Id.* at 308, 248 N.W. at 190.

201. *Id.* at 309, 248 N.W. at 191.

202. Stutsman v. State, 67 N.D. 618, 275 N.W. 387 (1937).

203. "Neither of these witnesses testified that there was any controversy between their father and John C. Farrell over the true government boundary line dividing these two eighties, or that there was any doubt concerning the same. There is no evidence in the record that there was ever any dispute between McGee and Farrell over the true government survey line. Their testimony is too indefinite, too general, too uncertain, to carry any conviction." 67 N.D. at 623, 275 N.W. at 390.

204. 67 N.D. at 624, 275 N.W. at 390.

is an attempt to settle a boundary which has been in dispute! Here the philosophy ought to be that expressed by the Texas court:

> These settlements of disputed, conflicting, or doubtful boundaries should be encouraged by the courts as a means of suppressing spiteful and vexatious litigation, and thus banishing from peaceful communities a fruitful source of discord. 'Convenience, policy, necessity, justice — all unite in sustaining such an amicable agreement.'[205]

Hopefully in future cases on boundary problems the North Dakota Supreme Court will focus on the need for assisting in the practical location of boundaries.[206]

V. MISCELLANY

Related, of course, to the question of boundary line location is the general problem of whether or not there is a sufficient description to locate any land. If the land described cannot be located at all there is no problem of locating specific boundary lines.[207] In *Mitchell v. Nicholson*,[208] the following description was used: "Two acres of land located on the North West corner of the southwest quarter of section eighteen (18), Township one hundred thirty-eight (138) west of Range seventy-one (71)." The North Dakota Supreme Court affirmed a lower court holding that the quit claim deed containing that description was void for vagueness. The grantors owned about 155.25 acres adjacent to or surrounding the purported tract. The court rejected the rule that the description should be construed as conveying a square in the corner containing two acres, saying that the rule of the square "is a presumption as to the intent"[209] of the parties which can be destroyed by evidence showing that the parties did not intend it. Here the grantor remained in possession of all of the property and erected buildings on the land that would be *within* a square two-acre tract in the corner. Further, for mortgaging and other purposes the grantor treated that part of the larger tract as his own too.

The *Mitchell* case and *Magnusson v. Kaufman*[210] appear to be the only North Dakota cases dealing with whether a particular description was sufficient to convey an interest in a tract of land. However, there are numerous North Dakota cases dealing with the question of whether a particular tract of land was described

205. McArthur v. Henry, 35 Tex. 802, 816 (1869).
206. The advisability of enacting a suggested *"Model Act For The Determination of Boundaries"* as found in SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 92-93 (1960), ought to be considered for whatever bearing it may have on the problem.
207. The rule and its purpose can be stated generally: "[I]t is essential that the land granted and intended to be conveyed be described with sufficient definiteness and certainty to locate and distinguish it from other lands of the same kind." Mitchell v. Nicholson, 71 N.D. 521, 525, 3 N.W.2d 83, 85 (1942).
208. 71 N.D. 521, 3 N.W.2d 83 (1942).
209. *Id.* at 527, 3 N.W.2d at 86.
210. 65 N.W.2d 289 (N.D. 1954).

sufficiently on the tax assessment rolls so as to justify its forfeiture sale for failure to pay taxes.[211] Most of these cases have been superseded by specific legislation,[212] however, some have not been superseded. Do these latter cases and the legislation have any relevance to the construction of descriptions in grants between private parties? One can readily hypothesize that a court would be more liberal in construing the sufficiency of a description between grantor and grantee than in construing the sufficiency of a description for tax assessment purposes. If this is true, it means that any description sufficient for the latter would surely be sufficient for the former; but any description insufficient for the latter is not necessarily insufficient for the former. This view is born out by the North Dakota cases.[213] In the *Magnusson* case the court concluded:

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211. See cases cited notes 213, 216-220, *infra.*

212. N.D. CENT. CODE § 57-02-02 (1960) now provides: Abbreviations used in describing real estate may be as follows:

1. In all proceedings, lists, advertisements, records, notices, and documents relative to assessing, advertising, or selling real estate for taxes or special assessments, it shall be sufficient to describe such real estate by the use of initial letters, abbreviations, and figures to designate the township, range, section, or part of section, and the number of a lot or block;
2. Whenever the letters N., E., S., W., are used, they shall be construed to mean north, east, south, and west, respectively;
3. Whenever there shall be used the initial letters N.W., S.W., N.E., S.E., whether in capital letters or small letters, and whether each letter is followed by a period or the two are written connectedly without a period to signify the same to be an abbreviation of two words, and whenever said letters shall be used in connection with section numbers to designate land descriptions, and in the absence of proof to the contrary, it shall be presumed that the same are abbreviations for and mean "northwest," "southwest," "northeast," and "southeast," respectively;
4. When two or more sets of such abbreviations shall be used connectedly, as for example N.E. S.E., the same shall be presumed to mean the "northeast quarter of the southeast quarter";
5. When any such initial letters shall be followed with a numeral placed in the position of an algebraic exponent, as N.W.4, or S.W.4, or N.E.4, or S.E.4, with the figure placed on or above the line, the description shall be taken to mean the "northwest quarter," or the "southwest quarter," or the "northeast quarter," or the "southeast quarter," respectively. The abbreviation N.2, or S.2, or E.2, or W.2, shall be presumed to mean the "north half," or the "south half," or the "east half," or the "west half," respectively, of the section or quarter or other portion of land designated immediately following it;
6. Combinations of such letters and figures shall be read accordingly, as S.2N.E.4 shall be taken as intended to mean and describe the "south half of the northeast quarter," and similar combinations of such letters and exponents shall be construed accordingly;
7. In the absence of such figure placed in the position of an exponent, wherever abbreviations N.W., or S.W., or N.E., or S.E. shall be used alone or with similar abbreviations, they shall be presumed to mean and be read as "northwest quarter," or "southwest quarter," or "northeast quarter," or "southeast quarter," respectively, unless it shall appear clearly from the context that another meaning is intended;
8. The abbreviation sec. shall be taken as meaning "section," and the letters "t" or "twp" or "tp" shall be taken to mean "township," and the letters "r" or "rg" or "rge" shall be taken to mean "range" and the abbreviations "b" "blk" or "bk" shall be taken to mean "block" and the abbreviations "add" or "ad" shall be taken to mean "addition," and the abbreviations "sub" or "subd" shall be taken to mean "subdivision";
9. The abbreviation "do" or the characters "„" or other similar abbreviations or character, shall be construed to mean the same name, word, initial, letter, abbreviation, or figure, as the last preceding one written or the one written immediately above; and
10. No description in which the foregoing abbreviations, symbols, initial letters, figures, or characters definitely can be understood by the application of the definitions and rules in this section, shall be held defective because such abbreviations are used instead of words or figures symbolized thereby.

This section dates back to N.D. Sess. Laws 1897, ch. 126, § 98, although it was not until N.D. Sess. Laws 1915, ch. 1, § 1, that today's substantial section was enacted.

213. Consider also the following excerpt from Power v. Bowdle, 3 N.D. 107, 122-23, 54 N.W. 404, 409 (1893): "A defective or ambiguous description in a deed or contract may be cured by ascertaining the intention of the parties to the instrument, and giving effect

> There can be no merit to a contention that a description which is legally sufficient in a tax deed or upon the assessment lists is insufficient in a deed between private parties. The test is whether the description identifies the property . . . .Presumptively, at least, the parties to a deed would intend abbreviations in title descriptions to have the same meanings that the law gives to those abbreviations when they appear upon the county records.[214]

The descriptions used in *Magnusson*[215] were as follows:

> Township 161 North, Range 98 West. Section 30: SW/4
> Township 161 North, Range 99 West.
> Section 23: S/2SW/4 and Lot 2
> Section 25: SW/4SW/4
> Section 26: SE/4SE/4 and NW/4 and Lot 4
> Section 35: E/2NE/4"

The court held them to be sufficient. Under earlier cases and legislation on tax assessments they would not have been sufficient.[216]

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to such intention. But this cannot apply to an assessment. Tax proceedings are in *invitum*, and there are no contracting parties. Primarily, the description must be such that it must be understood by, and will not mislead, the owner. It must also go further, and be such as must be understood by all persons desiring to purchase at a tax sale. Theoretically this includes all persons capable of contracting. A description that must be generally understood should have a more certain basis than a mere fact, because ignorance of fact can always be used as an excuse or defense."

214. 65 N.W.2d at 290.

215. *Ibid.*

216. In the earliest case, Power v. Larabee, 2 N.D. 141, 49 N.W. 724 (1891), the court discussed the following descriptions:

Description	Section	Township	Range
W.2 of W.2	7	143	57
E.2 of E.2	13	143	58
W.2 of S.E.	15	138	58
N.2 N.W.	3	139	58

It said, "We hold that the alleged description is wholly insufficient as a description of the lands in question, or of any lands, and that it cannot be sustained as a means of identifying the lands for purposes of assessment for taxation, or for the ulterior purpose of transferring the title of the realty from the general owner to the tax title holder and his successors in interest. The alleged description is neither written out in words nor is the same expressed by characters or abbreviations commonly used by conveyances, or generally understood and used by the people at large in describing land. . . . It follows that the description of realty in the assessment roll in order to be legally sufficient, must be reasonably full and accurate, though it need not be technically nice and scientifically exact. . . . Subject to this test, it is unnecessary to say that the pretended description in the assessment roll and lists in question were wholly insufficient."

In his concurring opinion Chief Justice Corliss said "2 is not ½, nor 4 ¼, and no usage should be allowed to change their significence." 2 N.D. at 167, 49 N.W. at 733.

In Power v. Bowdle, 3 N.D. 107, 54 N.W. 404 (1893), essentially the same kind of descriptions were involved as in Larabee. The difference was that the numbers were above the letters as follows:

"E2 NW4;
NW4, NW4 of NE4, NE SW, W2 SW;"

followed by the section, township and range numbers. It was offered by affidavits that this form of description was in general use in the state by taxing authorities. In again holding the descriptions insufficient the Court said in part, "[T]he arbitrary combinations of letters and figures, as used in the respective assessment rolls, is not the language of the court or county, *i.e.* is not the English language as commonly used. An inspection of the symbol writing will at once show the correctness of this view. The figure 2, according to its established meaning, represents two units or whole numbers, and the figure 4 represents four units or whole numbers. As employed in the assessment rolls, 2 is made to signify one-half of one whole number, and 4 one-fourth of a whole number. Thus it appears that the symbols in question consist of a combination of letters and figures whereby such letters and figures are perverted from their established significance and use among the people, and made to signify something radically different when used to describe land." 3 N.D. at 117, 54 N.W. at 407.

In Sheets v. Paine, 10 N.D. 103, 86 N.W. 118 (1901), the question was the priority of a mortgage or a tax deed. The tax assessment roll description was in part "S.E. 4 S.W. 4 W.2 S.W.4" and in part "N.W. 4 N.W. 4." The court cited *Larabee* and *Bowdle* and said that the descriptions were "entirely insufficient." But even more, said the court, the township and range are not referred to although ditto marks come all the

In *State Finance Co. v. Mather*,[217] the court found the following description to be insufficient, " 'Grand Forks City, O.T., East middle 22 feet, lot 9, Block 21,' " with the observation that, "Even if we could assume that 'O.T.' means original townsite we are at a loss to know what is meant by the 'East middle' of a tract of land, and counsel have not enlightened us." Query, is parol evidence admissible?

And in *Grand Forks County v. Frederick*,[218] the description was as follows:

Owner	Description Town	Lot	Block
E. B. Frederick	N.23 x 200 ft. deep	2	....

The court said of it:

> This description is not definite. It is impossible to tell from it what north part of lot 2 of block 25 it describes. Lot 2 is about 570 feet in depth. The north 23 feet by 200 feet does not locate any particular part of lot 2. The same descriptions would be quite as applicable to other parts of

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way down to the land described in the line next preceding that of party here involved. And oral testimony is not permitted.

Beggs v. Paine, 15 N.D. 436, 109 N.W. 322 (1906), involved the description:

"Owner's Name	Part of Section	Sec.	Twp.	Range	Acres
Dawson Philip	N.W.	32	130	64	160."

The court distinguished *Larabee* and *Bowdle* saying that they dealt with a combination of letters *and numbers*: "We have no hesitation in holding that the description in this assessment roll is as perfectly intelligible to any person of common understanding, as it would be if written out in full, 'N.W.' is the abbreviation which means 'Northwest' wherever the English language is written. The Northwest part of section 32, in the stated township and range, belonging to Philip Dawson, and containing 160 acres, specifically and clearly identifies the land in question, and could not reasonably be applied to any other tract than the northwest quarter of the section in question. The description was therefore sufficient."

Speaking specifically of *Larabee* and *Bowdle* the court said, "Those decisions have established a rule of property in this state from which we cannot now depart, but we are not disposed to extend the ruling in those cases to cases not within the express terms of those decisions." In Wright v. Jones, 23 N.D. 191, 135 N.W. 1120 (1912), the Court held the following description within the *Larabee* and *Bowdle* cases:

"N.W. ¼ Sec. 35 Twp. 149 Range 56 Acres 160." This decision seems contrary to the decision in *Beggs v. Paine* and clearly not within the specific facts of either *Larabee* or *Bowdle*. Even a cursory examination of the cases should show this to be true. It is rare that a court misses completely the significance of its earlier decisions; but this was one of those rare times.

Other relevant cases are O'Neil v. Tyler, 3 N.D. 47, 53 N.W. 434 (1892); State Finance Co. v. Trimble, 16 N.D. 199, 112 N.W. 984 (1907); State Finance Co. v. Mulberger, 16 N.D. 214, 112 N.W. 986 (1907) [For a discussion of definitions of terms such as "tract", "lot", "contiguous" see Griffin v. Denison Land Co., 18 N.D. 246, 119 N.W. 1041 (1908).]; Hodgson v. Finance Co., 19 N.D. 139, 122 N.W. 336 (1909); Farmers Security Bank v. Martin, 29 N.D. 269, 150 N.W. 572 (1915) (in which all of the prior cases are reviewed); Iowa & Dakota Land Co. v. Barnes County, 6 N.D. 601, 72 N.W. 1019 (1897); Lee v. Crawford, 10 N.D. 482, 88 N.W. 97 (1901);

Court recognition of the change seemed to come in Twedt v. Hanson, 58 N.D. 571, 575, 226 N.W. 615, 617 (1929): "Just as we recognize 8/16/29 at the head of a letter in the usual place for a date as meaning the sixteenth day of August, A.D. 1929, so we recognize Twp. 136-99 as township 136 and range 99. We cannot say that the description is insufficient as a matter of law." The Court said that earlier cases came under earlier statutes. Also under current statutory language see DeNault v. Hoerr, 66 N.D. 82, 262 N.W. 361 (1935). In Klemesrud v. Blikre, 75 N.W.2d 522, 525 (N.D. 1956), the description was "SW ex 3A church S11 T158 R95." The Court found this to be sufficient under the statute, reading it in effect to say the southwest quarter, except three acres thereof belong to the church, in section 11, township 158, range 95.

There were also two early federal cases: Paine v. Germantown Trust Co., 136 Fed. 527 (8th Cir. 1905) (no township or range designation so void); Paine v. Willson, 146 Fed. 488 (8th Cir. 1906) (held defective when township and range were not referred to and when although at the top of the column they were not brought down by ditto marks, one judge dissenting).

217. 15 N.D. 386, 109 N.W. 350 (1906).

218. 16 N.D. 118, 112 N.W. 839 (1907).

> the north side of lot 2. The tract owned by the defendant was an oblong tract in the northwest corner of that lot. From this description a surveyor could not locate the tract. No point is given as the starting point for the dimensions 23 by 200 feet.[219]

The court does not consider whether the absence of "25" in the "Block" column affected the sufficiency of the description. The *Frederick* case was relied upon in *Great Northern Ry. Co. v. Grand Forks County*:[220]

> We hold the assessment to be void, because of the insufficiency of the description. There is nothing in the description of "the Northeast 100 feet of Lot 7, Block 28" . . . to mark out the real property intended to be assessed. The northeast 100 feet may be a square 10 feet by 10 feet in the northeast corner, or it may be a portion of the northeast corner of the lots 100 feet in width or in depth. The same way with the expression 3,800 square feet.

VI. CONCLUSION AND CAVEAT

What has preceded is not a complete law of boundaries. It is only an analysis of the North Dakota statutes and cases that deal with establishment of boundaries, together with an attempt to state principles of law that can be evolved from those statutes and cases and an attempt to indicate some of the problems that they raise but do not settle. Nor is the article "the" analysis of the statutes and cases; it is only "an" analysis. More can be done by another.

219. 16 N.D. at 124, 112 N.W. at 841.
220. 38 N.D. 1, 9 164 N.W. 320 (1917).