Nebraska Cases and Attorney General Opinions

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Abandonment

Abandonment is the voluntary and intentional relinquishment of a right to property. *Mueller v. Bohannan*, 256 Neb. 286, 589 N.W.2d 852 (1999). *See also Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1997).

The fact that there was a diminution in the number of travelers on a road along the river since a bridge was built over the river did not constitute an abandonment of the road. *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981). *See also Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976). The fact that only a few members of the public still use a road does not mean the road has been abandoned. *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998).

"Abandonment of an easement must be pled and proved, the burden of proof being on the party alleging it." *Mueller v. Bohannan*, 256 Neb. 286, 589 N.W.2d 852 (1999); *Hillary Corp. v. United States Cold Storage, Inc.*, 250 Neb. 397, 550 N.W.2d 889 (1996); *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N.W. 236 (1907).

"Nonuse of an easement for a period less than the prescriptive period of 10 years will not itself work an abandonment of the easement. [*citations omitted*] However, nonuse of an easement for a period less than the prescriptive period, accompanied by acts clearly indicating an intention to abandon the right, will work an extinguishment of the easement." *Mueller v. Bohannan*, 256 Neb. 286, 589 N.W.2d 852 (1999); *Hillary Corp. v. United States Cold Storage, Inc.*, 250 Neb. 397, 550 N.W.2d 889 (1996); *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954); *Williams v. Lantz*, 123 Neb. 67, 242 N.W. 269 (1932).

"An intention to abandon an easement cannot be inferred from the mere fact that the easement was not used for a period of years in excess of the prescriptive period. [*citations omitted*] However, nonuse of an easement for a period sufficient to create an easement by prescription will raise a presumption to defeat the right, but this nonuse is open to explanation and may be rebutted by proof that the owner had no intention to abandon his easement while thus omitting to use it." *Mueller v. Bohannan*, 256 Neb. 286, 589 N.W.2d 852 (1999) (quoting *Hillary Corp. v. United States Cold Storage, Inc.*, 250 Neb. 397, 550 N.W.2d 889 (1996)); *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N.W. 236 (1907).

" 'An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case.…' " *Mueller v. Bohannan*, 256 Neb. 286, 589 N.W.2d 852

(1999) (quoting *Hillary Corp. v. United States Cold Storage, Inc.*, 250 Neb. 397, 550 N.W.2d 889 (1996) (quoting *Mader v. Mettenbrink*, 159 Neb. 118, 130, 65 N.W.2d 334, 343 (1954)). *See Williams v. Lantz*, 123 Neb. 67, 242 N.W. 269 (1932).
In determining whether there was an intent to abandon an easement, " ' "[t]ime is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important.…" ' " *Mueller v. Bohannan*, 256 Neb. 286, 589 N.W.2d 852 (1999) (quoting *Hillary Corp. v. United States Cold Storage, Inc.*, 250 Neb. 397, 550 N.W.2d 889 (1996) (quoting *Mader v. Mettenbrink*, 159 Neb. 118, 130, 65 N.W.2d 334, 343 (1954)). *See also Williams v. Lantz*, 123 Neb. 67, 242 N.W. 269 (1932).

Adverse Possession - Accretion

One who owns an island is not required to take possession of the accretion land in order to establish his claim thereto as a matter of right unless someone actually has established the right thereto by adverse possession. *Burket v. Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958).

Adverse Possession - Against Government

No title may be acquired against a state by adverse possession. *State v. Cheyenne County*, 123 Neb. 1, 241 N.W. 747 (1932); *Topping v. Cohn*, 71 Neb. 559, 99 N.W. 372 (1904).

An individual cannot adversely possess a public way. However, when streets are laid out on a plat but are not so used by the public, they are nothing more than private ways and may be adversely possessed. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). See *Schock v. Falls City*, 31 Neb. 599, 49 N.W.468 (1891).

See also Public Highways And Roads

Adverse Possession - Elements of

In order to acquire title by adverse possession, the burden is on one who claims title to prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory

period, namely, 10 years. This occupation of the land by another places the true owner on notice that his or her title is in danger without proper action. *Rush Creek Land and Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *F & J Enterprises, Inc. v. DeMontigny*, 6 Neb.App. 259, 573 N.W.2d 153 (1997); *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997); *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Kelley v. Long*, 3 Neb. App. 467, 529 N.W. 2d 72 (1995)*; Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994); *Thornburg v. Haecker*, 243 Neb, 693, 502 N.W.2d 434 (1993); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993); *Hardt v. Eskam*, 218 Neb. 81, 352 N.W. 2d 583 (1984); *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991); *State Nat. Bank & Trust v. Jacobsen*, 218 Neb. 682, 358 N.W.2d 743 (1984); *Pettis v. Lozier*, 217 Neb. 191, 349 N.W.2d 372 (1984); *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981); *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980); *Purdum v. Sherman, 163 Neb. 889*, 81 N.W.2d 331 (1957)*; Vrana v. Stuart*, 169 Neb. 430, 99 N.W.2d 770 (1959).

"It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete." *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993); *Hadley v. Ideus*, 220 Neb. 878, 881-882, 374 N.W.2d 231, 234 (1985)*; Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957). *See also Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981); *Rentschler v. Walnofer*, 188 Neb. 351, 196 N.W.2d 921 (1967); *Whaley v. Mingus*, 188 Neb. 351, 196 N.W.2d 516 (1972); *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967); *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965).

Claim of right and claim of ownership may both be defined as "hostile" for purposes of showing a claim of ownership by adverse possession. *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980); *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978).

Ordinarily, intent with which occupier possesses land can best be determined by his acts and the nature of his possession. *F & J Enterprises, Inc. v. DeMontigny*, 6 Neb.App. 259, 573 N.W.2d 153 (1997).

Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Rush Creek Land and Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1980).

A tenant may adversely possess real property in the name of his landlord. *Rush Creek Land and Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1980).

An adverse possessor can succeed in his claim even if he does not know he is occupying

land not included in his deed or chain of title. *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997).

Adverse Possession - Establish Boundary Line

Adverse possession is a defense under statute to establish a boundary line. *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983); *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965).

Where quiet title plaintiffs' predecessor in title placed fence inside his own boundary, and for 28-year period thereafter defendants' predecessor in title grazed cattle on disputed strip between fence and adjoining parcel, placed it under tillage, and maintained the fence, with plaintiffs' predecessor in title having always considered fence to be true boundary, acts of defendants' predecessor in title constituted sufficient claim of ownership as to vest title to disputed strip in them by adverse possession. *Horkey v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983).

"The placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those land outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time." *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996) quoting *Martin v. Kozuszek*, 216 Neb. 705, 345 N.W.2d 26 (1984)

Adverse Possession - Evidence

A claim of adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. *Rush Creek Land and Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Horkey v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983); *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983); *McCormick v. Terry*, 205 Neb. 650, 289 N.W.2d 516 (1980).

Evidence that claimant's predecessor had personal knowledge that railroad openly, exclusively, and continuously used right-of-way from 1940 to 1987 did not establish that railroad's use was adverse under claim of ownership. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994).

Adverse Possession - Evidence of Fence Line

County surveyor found a fence to be east of the section line. The fence became the new boundary line by adverse possession because it had been replaced on slightly different locations through the years.*Onstott v. Olsen,* 180 Neb. 393, 152 N.W.2d 919 (1966).

Adverse Possession - Exact Description of Property

A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to find a verdict upon the description. *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983); *Layher v. Dove*, 207 Neb. 736, 739, 301 N.W.2d 90, 92 (1981). *See also Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979).

Adverse Possession - Hostile

The word "hostile", when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *Ballard v. Hansen*, 33 Neb. 861, 51 N.W.295 (1892).

Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of the possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *McCaslin v. Meysenburg*, 229 Neb. 748, 424 N.W.2d 331 (1988).

Adverse Possession - Irregular Tracts

Irregular tracts, other than governmental subdivisions, may be legally described by number, section, township and range for revenue and other purposes following a survey

in accordance with Section 23-304 to 23-307. *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N.W.2d 878 (1942); *Vogel v. Bartels*, 1 Neb. App. 1113, 510 N.W.2d 529 (1993).

Adverse Possession - Land Used Continuously

Continuous means "uninterrupted ... stretching on without break or interruption." It is sufficient if the land is used continuously for the purposes to which it might be naturally adapted. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984); *Knight v. Denman*, 64 Neb. 814, 90 N.W. 863 (1902). See *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

Generally, if an occupier's physical actions on the land constitute visible and conspicuous evidence of the possession and use of the land, such acts will be sufficient to establish that the possession was actual and notorious. *F & J Enterprises, Inc. v. DeMontigny*, 6 Neb.App. 259, 573 N.W.2d 153 (1997); *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). For example, posting signs, maintaining a boundary fence and grazing livestock on the disputed tract of land were actual, open and notorious. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981).

The party claiming adverse possession must occupy the property in the same manner as an owner would occupy the property. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984); *Barnes v. Milligan*, 200 Neb.450, 264 N.W.2d 186 (1978); *Knight v. Denman*, 64 Neb. 814, 90 N.W. 863 (1902). *See also Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960).

No particular acts are required to establish “actual possession.” Rather the acts required depend upon the character of the land and the use that can reasonably be made of it. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *Olson v. Fedde*, 171 Neb. 704, 107 N.W.2d 663 (1961); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993).

Alleged possession of a disputed tract through livestock operations was insufficient to establish continuous use for ten-year period required for adverse possession where there were years in which there was no livestock on the tract and no records were kept regarding the presence or absence of livestock using the tract. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984).

While the law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property for the purposes for which it is adapted, there must be an element of exclusivity under a claim of ownership. *Rush Creek Land and Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998) (quoting *Thornburg v. Haeker*, 243 Neb. 693, 502 N.W.2d 434 (1993); *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981)). Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party. *Rush*

Creek Land and Live Stock Co. v. Chain, 255 Neb. 347, 586 N.W.2d 284 (1998); *Thornburg v. Haeker*, 243 Neb. 693, 502 N.W.2d 434 (1993); *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983). See *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

Generally, seasonal and recreational use and, therefore, occasional use, even if occurring annually, cannot ripen into title for the real estate on which such recreation takes place. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W. 2d 583 (1984).

See also Evidence - Enclosure.

Adverse Possession - Mistaken Boundary

Property may be acquired by adverse possession under the mistaken idea of a true boundary line, even if the possessor does not know that he or she is occupying land not included in his or her deed or chain of title. *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967); *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965). See *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997).

"[T]he possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake...." *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993); *State Bank v. Gaddis*, 208 Neb. 136, 302 N.W.2d 686 (1981); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

Adverse Possession - Motives

The intent to assert ownership of the property is a requirement for adverse possession, although intent is inferred in most cases. The intent of occupant holding possession of property by adverse possession can best be determined by his or her acts. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *F&J Enterprises, Inc. v. DeMontigny*, 6 Neb.App. 259, 573 N.W.2d 153 (1997); *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978); *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976); *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980); *Berglund v. Sisler*, 210 Neb. 258, 262, 313 N.W.2d 679, 682 (1981); *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 302 N.W.2d 686 (1981); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957). However, adverse possession does not depend upon the remote motive of the occupant or whether that motivation is guilty or innocent. *Fitzgerald v. Brewster*, 31 Neb. 51, 47 N. W. 475 (1890); 3 Am. Jur. 2d, *Adverse Possession*, § 104, p. 188.

Claim of right or of ownership means hostile and these terms describe the same element of adverse possession. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993); *Berglund v. Sisler*, 210 Neb. 258, 262, 313 N.W.2d 679, 682 (1981). *See also Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978).

If the railroad's initial use was permissive, the railroad could not have acquired title to the property by adverse possession and, thus, could not have conveyed title to right-of-way to another. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994).

Adverse Possession - Notorious

The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d. 135, 250 N.W.2d 269 (1996); *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997).

Although the enclosure of land renders the possession open and notorious, and tends to show it is exclusive, possession may also be rendered by nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). See *Purdum v. Sherman*, 163 Neb. 8898, 81 N.W.2d 331 (1957).

Adverse Possession - Occupy With Intent to own

If the adverse claimant is not mistaken about the property line and does not occupy the property with the intent of ownership, he or she is not an adverse possessor. *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997); *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). *See Barnes v. Milligan*, 200 Neb. 450, 254 N.W.2d 186 (1978).

Adverse Possession - Quiet Title

The individual seeking to have title quieted in himself or herself by claiming adverse possession is required to recover on the strength of his own title and not the weakness of his adversary's title. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994); *Vogel v. Bartels*, 1 Neb. App. 1113, 510 N.W.2d 529 (1993); *Mack v. Luebbens*, 182 Neb. 832, 341 N.W.2d 335 (1983); *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Bode v. Flobert Indus, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977), *rev'd on other grounds*, 211 Neb. 757, 320 N.W.2d 463 (1982); *Lunzmann v. Yost*, 182 Neb. 101, 153 N.W.2d 294 (1967); *Linch v. Nichelson*, 178 Neb. 67, 134 N.W.2d 796 (1965); *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960); *Tourtelotte v. Pearce*, 27 Neb. 57, 42 N.W. 915 (1889).

Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purposes to which the land is adapted for the statutory period of ten years. *Rentschler v. Walnofer*, 203 Neb. 84 277 N.W. 2d 548 (1979). *See also Kelley v. Long*, 3 Neb. App. 467, 529 N.W.2d 72 (1995); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993); *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985).

Because an action to quiet title is an equitable action, it is the duty of the court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the district court. *Pettis v. Lozier*, 217 Neb. 191, 349 N.W.2d 372 (1984); *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981).

Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor. The land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987); *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984); *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983); *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

Adverse possessor acquiring property held in fee simple does not acquire more than could have been acquired in conveyance from original owner. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996).

Board of Examiners

The State Board of Examiners for Professional Engineers and Architects may restrict the use of "professional engineer" and "architect" by persons other than those so licensed. The Board may refer such individuals to the proper county attorney. However, generic

use of the term engineer or architect, such as in the job title "financial engineer," is acceptable. *1993 Att'y Gen. Op. No. 82.*

In the Simonds' case, there was an accumulation of unlawful procedural circumstances that affected the substantive rights of Simonds who was an experienced surveyor investigated for incompetence. First, James L. Brown, Nebraska's State Surveyor, conducted the investigations, prepared the revocation charges, and testified in support of those charges. Standing alone, those circumstances were not prejudicial to Simonds. Next, Brown was present and participated in all of the formal adjudicative sessions of the board, except voting, when the charges against Simonds were considered, evidence reviewed, findings and decision made, and order entered. Brown was present during the extended executive session, wherein the board considered Simonds' case. The official decision and order of revocation made by the board was prepared by Brown. The participation of Brown in his official capacity at the hearing and his presence during the executive session of the board were irregularities that tended to be prejudice of the substantive rights of Simonds. Under other circumstances it might have required a finding that the proceeding was fundamentally unfair to Simonds. Considering the record as a whole, the court concluded that the circumstances in the Simonds' case does not require that the order of the board be reversed for that reason. *Simonds v. Board of Examiners for Land Surveyors*, 213 Neb. 259, 329 N.W.2d 92 (1983).

Boundaries

Two common methods of establishing a boundary line other than by formal conveyance involve adverse possession and acquiescence. *Hausner v. Melia*, 212 Neb. 764, 325 N.W.2d 31 (1982).

A sidewalk was constructed some 5 to 6 inches from the true lot line dividing two residences. At a later time the sidewalk was widened to abut on the line. The adjoining lot owner claimed that the original sidewalk placement evidenced an acquiescence in his ownership of the 5 to 6 inches. The court held that the placement of the sidewalk was of no importance and that persons claiming lands of another by adverse possession must establish title by their own actions under a claim of ownership. The only evidence of the claimant neighbor's use of the 5- to 6-inch strip was that occasionally a wheel of a vehicle entering the claimant's driveway crossed onto the disputed land. The court held such incidental use was not enough to establish adverse possession; the owner was not required to extend the sidewalk to the property line the first time he constructed it. *Elsasser v. Szymanski*, 163 Neb. 65, 77 N.W.2d 815 (1956).

A farmer placed a fence line some 27 feet inside his northern section line in anticipation of a section road which was never built. His neighbor to the north brought suit to quiet title to the lands lying south of his section line up to the fence. No use of the land by the claimant could be shown other than as a turnaround area for farm machinery. The court

reaffirmed the Elsasser rule and found that the placement of a fence by a landowner inside his boundary does not lead to a relinquishment of ownership of lands outside his fence without an additional showing that the claimant of those lands used them under a claim of ownership. *Linch v. Nichelson*, 178 Neb. 679, 134 N.W.2d 796 (1965).

An ancient fence had been removed, leaving only a few posts on the west bank of the creek. There was a partial ridge on the old fence line resulting from leveling that was essentially undisputed as the old boundary for the length of its distance. The survey was received into evidence, and its correctness was uncontradicted. The claim of title by adverse possession was denied because the claimant's evidence, first of all failed to establish where the specific boundary line was, and secondly, failed to describe the land so as to enable the court to enter a verdict upon the description. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

The claimants by adverse possession were unable to prove the exact location of the original fence. For that reason, and others, their claim was denied. *Petsch v. Widger*, 214 Neb. 390, 397, 335 N.W.2d 254, 259 (1983).

The clearest of the descriptions presented was an admitted estimation, with no factual basis expressed in the record. An exact metes and bounds description was impossible to ascertain from the record, and the appellants' failure to adequately describe their proposed boundary was fatal to their claim of adverse possession. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). *See also Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984).

The claimant used the disputed land for grazing livestock, posted it, closed it to dumping, and maintained the perimeter fence over the requisite 10 years. The court held: "Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession." *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981). *See also Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983).

Boundaries - Acquiescence

Where a corner supposed to have been established by the government in the surveys of public lands has been acquiesced in by adjoining owners of such land for nearly ten years, and improvements made and the land broken up to the line thus established, there is a presumption in favor of such corner being the true one, which can only by overcome by clear proof that it was not established by the government. [*Citation omitted*.] When a line so established is acquiesced in by the parties for a period equal to that fixed by the statute for gaining title by adverse possession, it is conclusive of the location of the boundary line. *Hausner v. Melia*, 212 Neb. 764, 326 N.W.2d 31 (1982); *Clark v.*

Thornburg, 66 Neb. 717, 92 N.W. 1056 (1902).

In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary. The mere establishing of a line by one party and the taking by him of possession up to that line is insufficient. *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997); *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983).

Boundaries - Common Property

Anything planted on the boundary line is common property to owners of land up to the boundary line, and trespass will lie if one owner removes anything from the boundary line without the others' consent. *Patterson v. Oye*, 214 Neb. 167, 333 N.W.2d 389 (1983). For example, when the respective owners have jointly cared for a tree on a lot line and divided the expenses of protecting it, each has an interest in the tree sufficient to demand that the other owner not destroy it. The court found in favor of the party requesting retention of the tree for shade benefits.

The fact that the owner of land trims branches from hedge on land of adjoining owner which extends over property of first owner is no evidence that first owner has interest in or ownership of any part of hedge or that the hedge is the boundary between the lands. *Jurgens v. Wiese*, 151 Neb. 549, 38 N.W.2d 261 (1949).

Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). *See also Wiedeman v. James E. Simon Co., Inc*., 209 Neb. 189, 307 N.W.2d 105 (1981); *Conkey v. Anderson Farms, Inc*., 205 Neb. 708, 289 N.W.2d 541 (1980); *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974); *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966).

See also Boundaries - Fences.

Boundaries - Determine from Evidence

Adjoining landowners could not locate a government corner. The lower court ruled that the location of the corner must be proven by a preponderance of evidence or title can be quieted without a legal proceeding to establish the corner. The Supreme Court overruled the lower court stating an obliterated corner does not affect the plaintiff’s right to recover all the land owned by him. The exact location of the corner may be determined by the

jury from the evidence in an action at law, and it is unnecessary first to establish the corner by an action in equity. *Kittell v. Jensen*, 37 Neb. 685, 56 N.W. 487 (1893). *See also Stryker v. Meagher*, 76 Neb. 610 107 N.W. 792 (1906); *Reed v. Burrell*, 77 Neb. 76, 108 N.W. 155 (1906); *Baty v. Elrod*, 66 Neb. 735, 92 N.W. 1032 (1902), *aff'd*, 66 Neb. 744, 97 N.W. 343 (1903).

Southern landowners who brought action to settle boundary dispute with northern landowners and presented testimony of surveyor and copy of his survey had sustained their burden of proof with respect to where boundary line should be, absent proof that boundary was elsewhere due to adverse possession by northern landowners, even though survey had not been filed in survey record repository within 90 days of completion of survey and was thus not official record of survey entitled to legal presumption that it was evidence of facts stated within survey. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). Neb.Rev.St. Secs. 34-301, 81-8,122.01.

See also Evidence - Expert Witnesses.

Boundaries - Easements

Where land is described as abutting or being bound by public easement, transfer of abutting land includes transfer of fee interest to the center of the easement. *Dowd v. City of Omaha, Douglas County*, 2 Neb. App. 958, 520 N.W.2d 549 (1994). *See also Vaughn v. Fitzgerald*, 511 P.2d 1148 (Ok. App. 1973); *Koviak v. Union Electric Company*, 442 S.W.2d 934 (Mo. 1969); *Carpenter v. Fager*, 188 Kan. 234, 361 P.2d 861 (1961).

Boundaries - Establish by Acquiescence

Establishment of a boundary line by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, or that circumstances exist from which assent may be reasonably inferred. *Hausner v. Melia*, 212 Neb. 764, 326 N.W.2d 31 (1982); *Hakanson v. Manders*, 158 Neb. 397, 63 N.W.2d 436 (1954). When no express agreement as to the location of the boundary line exists, adjoining landowners cannot question a line which they have, for a number of years, recognized as the correct line between their properties. 2 Tiffany, *Real Property* § 654 at 682-83 (3d ed. 1939). A conventional agreement is not necessary, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of the line as a boundary. 11 C.J.S. *Boundaries* § 79 at 652 (1938). *See also Romine v. West*, 134 Neb. 274, 278 N.W. 490 (1938).

The owner of property does not acquiesce in ownership by his neighbor of any part of his

property merely because in constructing a sidewalk near the edge of his property he does not extend it to his property line. *Elsasser v. Szymanski*, 163 Neb. 65, 77 N.W.2d 815 (1956).

Grantor planted a row of trees near the boundary line but never came into agreement with adjoining lot owner that the trees were the new boundary. No party can acquiesce in a line created by himself and bind the other party. Mutual assent must be involved. *Hakanson v. Manders*, 158 Neb. 392, 63 N.W.2d 436 (1954).

Grantors had an agreement to build a fence on a boundary line different from the boundary line found by the surveyor. The fence remained undisturbed from 1934-1956. Such a boundary becomes the controlling line when recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years. *McDermott v. Boman*, 165 Neb. 429, 86 N.W.2d 62 (1957); *Hakanson v. Manders*, 158 Neb. 392, 63 N.W.2d 436 (1954); *Kennedy v. Gottschalk*, 138 Neb. 842, 295 N.W. 813 (1941); *Clark v. Thornburg*, 66 Neb. 717, 92 N.W. 1056 (1902); *Romine v. West*, 134 Neb. 274, 278 N.W. 490 (1938).

Boundaries - Establish by Action in Equity

Parties disputed the location of the north/south boundary line dividing their properties. Comp. St. 1929, §34-301 relates to the establishment of disputed boundaries and contemplates the protection or establishment of title and possession to realty described in pleadings by a determination of boundaries. The statute authorizes an action in equity to determine the boundaries of realty. *McGowan v. Neimann*, 139 Neb. 639, 298 N.W. 411 (1941); *Elsasser v. Szymanski*, 163 Neb. 65, 77 N.W.2d 815 (1956).

Boundaries - Establish by Agreement

Where the true boundary line between adjoining owners is uncertain and unknown to them, and may be ascertained only at more or less trouble and expense, an executed agreement to accept and abide by a certain line as such boundary is binding upon the parties and subsequent purchasers having notice thereof, although the boundary agreed upon may not be the true line. *Lynch v. Egan*, 67 Neb. 541, 93 N.W. 775 (1903); *Egan v. Light*, 4 Neb. Unof. 127, 93 N.W. 859 (1903). *See also* Neb. Rev. Statutes §23-1911.

Parties built a fence between their two farms, but evidence was conflicting concerning agreement that the fence was to be the boundary. Whether there was agreement is a question of fact to be submitted to a jury. *Clark v. Thornburg*, 66 Neb. 717, 92 N.W. 1056 (1902).

Where the true boundary line between adjoining owners of real property can be ascertained, the parties by mistake have agreed upon an erroneous line as such boundary, believing it to be the true line, they will not be precluded by such agreement from claiming the true line when discovered, unless the statute of limitations has run or equitable reasons exist for establishing the erroneous line as the true line. *Hausner v. Melia*, 212 Neb. 764, 326 N.W.2d 31 (1982); *Kimes v. Libby*, 87 Neb. 113, 126 N.W. 869 (1910); *Trussell v. Lewis*, 13 Neb. 415, 14 N.W. 155 (1910); *Goozee v. Grant*, 81 Neb. 597, 116 N.W. 508 (1908).

Joint owners of a tract of land caused a line to be run dividing it, as they supposed, in half, and planted a hedge on the line, up to which either party cultivated. Both owners afterwards sold to parties who knew and purchased with reference to the division line. It was afterwards discovered that the line did not equally divide the property. The court held that the parties were bound by the line so established by the grantors. *Trussell v. Lewis*, 13 Neb. 415, 14 N.W. 155 (1910); *Lynch v. Egan*, 67 Neb. 541, 93 N.W. 775 (1903).

Boundaries - Establish by Agreement and Acquiescence

Where a division line, supposed to be the true line established by the government survey, has been acquiesced by the parties interested for more than 10 years, it is conclusive of the location of the boundary; but whether such line was agreed upon or has been acquiesced in as the true division line is a question of fact to be submitted to the jury in a proper case. *Clark v. Thornburg*, 66 Neb. 717, 92 N.W. 1056 (1902). *See also* Neb. Rev. Statutes §23-1911.

The county surveyor established a boundary line to settle a dispute. Both parties participated and acquiesced in it for a considerable time. The boundary is thereby established and it will not be disturbed because a new survey made some years later shows a mistake in the establishment of such line. *Benson v. Daly*, 38 Neb. 155, 56 N.W. 788 (1893).

Boundaries - Fences

Where a fence is constructed as a boundary line, even though it is not the actual boundary, and a party claims ownership of land up to that fence for the statutory period, that party gains title to such land by adverse possession. *Horkey v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983). *See also McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969); *Olson v. Fedde*, 171 Neb. 704, 107 N.W.2d 663 (1961). Both parties need not consider the fence a boundary, rather, it is the adverse possessor's intent that is relevant.

Wanha v. Long, 255 Neb. 849, 587 N.W.2d 531 (1998); *Horkey v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983).

Where neither party considers a fence a boundary, it does not constitute evidence of adverse possession. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

See also Boundaries - Common Property.

Boundaries - Jury Instructions

In an action to establish a controverted section line, where the trial is conducted by both parties on the theory that the corner established by the government surveyors was not a lost corner, it is not error to charge the jury that they are to determine the location of the original boundary line, even though such evidence was admitted that a corner had been established by the county surveyor who proceeded on the theory that the original corner was lost. *Stryker v. Meagher*, 76 Neb. 616, 107 N.W. 792 (1906). *See also* Neb. Rev. Statutes §23-1908.

Boundaries - Obliterated Corners

An obliterated corner's location may be recovered by reference to acceptable supplemental survey records, physical evidence, or testimony of witnesses having a dependable knowledge of such corner's location. However, that location must be proven beyond a reasonable doubt, and, if based on testimony, it must come from witnesses having positive knowledge of the precise location of the original monument. Testimonial evidence must be tested by relating it to known original corners or other calls of the original field notes. *State Bd. of Educ. Lands & Funds v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985). *See also* Neb. Rev. Statutes §23-1908.

See also Evidence - Generally, and Retracements.

Boundaries - Plat Conflicts with Survey

The proprietor of a section of land to be added to the town, surveyed the area and platted it accordingly. The plat and survey did not coincide, but the lines actually run on the land must control because purchasers of city lots ought not be able to change boundaries of

streets and lots by showing a variance in the survey. *Holst v. Streitz*, 16 Neb. 219, 20 N.W. 307 (1884).

Boundaries - Subdivision of Section

The boundary lines between two quarters of a section of land are ascertained by drawing straight lines between the opposite quarter section corners. *Littlejohn v. Fink*, 109 Neb. 282, 190 N.W. 1020 (1922).

Boundaries - Surveys

In action to establish boundary line, one need not present survey that qualifies as official record of survey. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). Neb.Rev.St. Secs. 34-301, 81-8,122.01.

While a boundary line may be fixed in accordance with a survey, see *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981), when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is to be determined between the parties and no that of the original survey. *Kraft v. Mettenbrink*, 5 Neb.App. 344, 559 N.W.2d 503 (1997). See *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965).

Boundaries - Trees and Hedges

Parties had adjoining land and the plaintiff's had a hedge near the boundary line. The defendants trimmed the side of the hedge which faced their property and plaintiff sued for damages. One whose property is invaded by the boughs of trees growing on adjoining premises may cut them at the point where they enter his property without claiming any interest or ownership therein. *Jurgens v. Wiese*, 151 Neb. 549, 38 N.W.2d 261 (1949).

Boundaries - Variance

On a line of the same survey, and between remote corners, the whole length of which is found to be variant from the length called for, it is not to be presumed that the variance was caused from a defective survey of any part, but it must be presumed, in the absence of circumstances showing the contrary, that it arose from imperfect measurement of the whole line, and such variance must be distributed between the several subdivisions of the line in proportion to their respective lengths. *Brooks v. Stanley,* 66 Neb. 826, 92 N.W. 1013 (1902). *See also* Neb. Rev. Statutes §23-1911.

Boundary Disputes - Evidence

It is the general rule that only a preponderance of the evidence is required to establish an issue in civil actions, and the rule applies to boundary disputes. *Bock v. Potterfield,* 80 Neb. 523, 114 N.W. 597 (1908).

Conveyance - Accretion

Accretions must be expressly excepted or reserved in a conveyance to avoid a transfer. *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946); *Mulhall v. State*, 140 Neb. 341, 299 N.W. 481 (1941).

Grantors conveyed to A with rights to accretion. A conveyed to B without mentioning accretion. B's trustees conveyed to the defendant again without mentioning any accretion from the past or in the future. A then conveyed the accreted land to C. The court held that the fact that the deed from A to B did not describe the accretion was unimportant because the deed conveyed any accretion to the land which was specified in the deed. Accretion must be expressly excluded from a conveyance to avoid a transfer of it. The deed from A to C was null because A retained no interest. *Wemmer v. Young*, 167 Neb. 495, 93 N.W.2d 837 (1959).

The U.S. government granted a section of land to the state of Nebraska. Nebraska conveyed the land to the defendant not described by metes and bounds expressed in deeds which purported to convey title to her. The defendant claims title to the disputed tract by accretion granted in his deed. The trial court found for the plaintiff. The Supreme Court held that deeds described by government field notes include title to any accretion which attaches to the property and reversed the trial courts decision and found for the defendant. *Topping v. Cohn,* 71 Neb. 559, 99 N.W. 372 (1904).

Where at the time of a grant from the U.S., the bank of a river was a part of the boundary, subsequent accretions, formed by the gradual recession of the bank, become a part of the grant. *Topping v. Cohn,* 71 Neb. 559, 99 N.W. 372 (1904).

Conveyance - Acres Stated

A definite description of lands in a deed designating the initial point and courses and distances, followed by a statement of the number of acres conveyed, passes the quantity of land embraced in the specific boundaries, though greater or less than the number of acres stated. *Pohlman v. Lohmeyer*, 60 Neb. 364, 83 N.W. 201 (1900).

Conveyance - Intent

Eminent domain statutes are strictly construed so that where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary for the public purpose. If land in which the grantor has the underlying interest is bounded by a highway, the fee carries to the center of the highway. This rule is not absolute, but one of construction, and ambiguities favor the grantee. *Carter v. State Dept. of Roads*, 198 Neb. 519, 254 N.W.2d 390 (1977).

Conveyance - Intent of Parties Prevail

To justify reformation of instrument, mistake must be proven by clear and convincing evidence. Where there is no mistake as to identity of land intended to be conveyed, but there is a mistake in description of it, equity may reform the instrument to conform to the true intentions of the parties. In this case, the mistake was discovered when a survey was made. *Booth v. Wilkinson*, 195 Neb. 730, 240 N.W.2d 578 (1976); *Ready Sand and Gravel Co. v. Cornett*, 184 Neb. 726, 171 N.W.2d 775 (1969); *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 796 (1965).

Conveyance - Legal Description

All prior negotiations and agreements are deemed merged into the agreement for the execution, delivery, and acceptance of an unambiguous deed and, in the absence of a preponderance of clear and convincing evidence showing fraud or mistake of fact, the deed is held to express the intentions of the parties. *Ludwig v. Matter*, 210 Neb. 87, 313 N.W.2d 234 (1981); *Beren Corp. v. Spader*, 198 Neb. 677, 693, 255 N.W.2d 247, 256 (1977).

The land was not surveyed for the sale to the plaintiff who made a down payment. Plaintiff demanded return of the down payment when he discovered some of the property was subject to a lien and none of the property was adequately described. Defendant had to return the down payment. *Plummer v. Fie*, 167 Neb. 367, 93 N.W.2d 26 (1958).

In contract for sale of land, there must be a sufficient description of the land to be sold. *Kubicek v. Kubicek*, 186 Neb. 802, 186 N.W.2d 923 (1971).

Conveyance - Lot Numbers

Where owner of a lot abutting on a street, which street if vacated during his ownership, conveys such lot by number and without reservation of any rights in the street, such conveyance transfers, in addition to lot, all rights which grantor may have acquired by reason of such vacation, even though metes and bounds description in conveyance extends only to the side of the street. *Seefus v. Briley*, 185 Neb. 202, 174 N.W.2d 339 (1970).

Conveyance - Lot Numbers or Land Markers

If adjoining owners purchase with reference to a boundary line, then marked on ground and not by lot numbers, such boundary line, as marked on the ground by common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of length of time which has elapsed thereafter. *Phillipe v. Horns*, 188 Neb. 304, 196 N.W.2d 382 (1972).

Conveyance - Metes and Bounds

The fact that the grantor did not specifically include railroad right-of-way in his metes and bounds descriptions of lots into which tract was subdivided did not mean that grantees of lots abutting right-of-way did not acquire land underlying right-of-way. The grantor was a fee simple owner of servient land underlying easement, and did not explicitly retain right-of-way upon subdividing tract, with result that easement and servient estate underlying it were transferred when tract was subdivided. *Dowd v. City of Omaha, Douglas County*, 2 Neb. App. 958, 520 N.W.2d (1994).

Where metes and bounds description, taken as a whole is sufficiently clear to indicate intended bounds of subject parcel, with courses and distances set out clearly, and there is clear indication of legislative intent that such courses and distance control, conflicting statements therein erroneously fixing particular property or street lines may be rejected as inadvertent error. *Christensen v. City of Tekamah*, 432 N.W.2d 798, 230 Neb. 576 (1988).

Conveyance - Reference to Second Document

Where map, plat, plan or survey of premises conveyed is adequately referred to in a deed, it is usually considered a part of the deed and construed in connection therewith, and courses, distances, or other particulars which appear on such map, plat, plan, or survey are, as a general rule to be considered as a true or part of the true, description of land conveyed. *Hoke v. Welsh*, 162 Neb. 831, 77 N.W.2d 659 (1956).

Conveyance - Riparian Land

Grants of land bounded upon rivers carry with them the exclusive right and title of the grantees to the center or thread of the stream unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942); *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948).

Conveyance - Streets and Alleys

In connection with conveyances of lots described as bounded by an alley, the fee and title extend to the center of the alley. *Dowd v. City of Omaha, Douglas County*, 2 Neb. App. 958, 520 N.W.2d 549 (1994); *Seefus v. Briley*, 185 Neb. 202, 174 N.W.2d 339 (1970).

When the owner of land abutting upon a street or highway or upon a body of water or watercourse conveys the land, the conveyance will carry title to and fix the boundaries of the grantor's land by the center of the street or highway or the thread of the body of water or watercourse if the grantor's title extends thereto, notwithstanding the land is described as being bounded by the road, highway, or watercourse. *Dowd v. City of Omaha, Douglas County*, 2 Neb. App. 958, 520 N.W.2d 549 (1994); *Carter v. State*, 198 Neb. 519, 254 N.W.2d 390 (1977).

Conveyance - Survey Included in Document

Plaintiff sold land to the defendant without surveying it. Defendant had the land surveyed and the survey was used in the document of conveyance. Plaintiff could not prove that he had actually indended to convey less property than that in the survey. *McGinty v. McGinty*, 195 Neb. 281, 237 N.W.2d 855 (1976).

County Surveyor - Duties

A county surveyor is not prevented from performing work and labor for the county which is not part of his official duties. *Pethoud v. Gage County*, 83 Neb. 497, 120 N.W. 154 (1909). *See also* Neb. Rev. Statutes §23-1901.

An information in the nature of quo warranto will not lie to inquire into the right of county surveyors in counties having more than a given population to perform and exercise the duties of county engineer, where the legislature did not intend to create a new and independent office in counties having the required population, but that all that was attempted was the imposition of new duties upon the office of county surveyor in such counties. *State v. Scott*, 70 Neb. 681, 97 N.W. 1021, *aff'd*, 70 Neb. 685, 100 N.W. 812 (1904). *See also* Neb. Rev. Statutes §23-1901.

A county surveyor, in the performance of his official duties, may compel the attendance of witnesses, whose testimony must be reduced to writing and subscribed by such witnesses. *State Bd. of Educ. Lands & Funds v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985). *See also* Neb. Rev. Statutes §23-1903.

The county surveyor, when in the performance of his official duties, is not liable to prosecution for trespass. *Kissinger v. State*, 123 Neb. 856, 244 N.W. 794 (1932). *See also* Neb. Rev. Statutes §23-1906.

County Surveyor - Qualifications

Where a county surveyor is also a member of the county board, and as a member of such board votes for a resolution establishing a highway, he has passed judgment upon the expediency of establishing such highway and has thereby disqualified himself from acting as a commissioner to view and pass upon the expediency of the road. *Shirley v. Harlan County*, 117 Neb. 846, 223 N.W. 284 (1929). *See also* Neb. Rev. Statutes §23-1901.

Dedication - Acceptance of

When the acts of the owner of the land are relied on to establish a dedication of land for the purposes of a public road, an acceptance of the same by the public must be proven. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969); *Warren v. Brown*, 31 Neb. 8, 47 N.W. 633 (1890).

To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public by user or otherwise, accepted the land for that purpose. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969); *Close v. Swanson*, 64 Neb. 389, 89 N.W. 1043 (1902).

Although no formal declaration is necessary, there is no public use until such time as there is "use or some other act" indicating the city's acceptance of the dedication and intent to use the dedicated land. *Aro Inv. Co. v. City of Omaha*, 179 Neb. 569, 575, 139 N.W.2d 349, 352 (1966).

In a consent dedication of private property for a public highway, it is necessary to prove the acceptance of the land for highway purposes by proving that a road was opened or used. Until it is opened or used by the public it is not finally established. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969).

Evidence of long-continued use by the public tends to show the establishment of a road by dedication over the public domain. So, also, does the surveying, marking out, platting, and improving of a road by the public authorities. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969).

Even if land over which alleged road passed was not a part of public domain, consent entry by board of county commissioners was not sufficient to show an appropriate acceptance absent proof that the land was not reserved for public use or that there was no entryman on it. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969).

See also Highway - Establish.

Dedication - by Acts

Official acceptance [of a dedication] may consist in any positive conduct of the proper public officers evincing their consent on behalf of the public. *Western Fertilizer and Cordage Co. v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993); *Village of Maxwell v. Booth*, 161 Neb. 300, 306, 73 N.W.2d 177, 182 (1955) (quoting 16 Am.Jur. *Dedication* Sec. 33 (1938)). Thus, passage of an ordinance or resolution may be sufficient to indicate acceptance even when actual control over the property is not exercised at that time. However, more recent cases have indicated that something more may be required to show acceptance of a dedication. *Western Fertilizer and Cordage Co. v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993); *Village of Maxwell v. Booth*, 161 Neb. 300, 306, 73 N.W.2d 177, 182 (1955). *See also Banner County v. Young*, 184 Neb. 546, 552, 169 N.W.2d 280, 284 (1969); *Aro Inv. Co. v. City of Omaha*, 179 Neb. 569, 575, 139 N.W.2d 349, 352 (1966) (although no formal declaration is necessary, there is no public use until such time as there is "use or some other act" indicating the city's acceptance of the dedication and intent to use the dedicated land).

In *Western Fertilizer and Cordage Co. v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993), the City passed ordinances regarding the dedications, apparently published those ordinances, and began construction of the improvements pursuant to the ordinances. However, the record is silent as to when actual construction began or was completed. Thus, the court was unable to determine when the City exercised physical control over the property. The court stated, "the various dedications and ordinances apply to different parts of the property in question and provide the City with easements for a variety of purposes." The court held that since some of the dedications and ordinances occurred more than 10 years before the action was filed, even if passage of the ordinances established the City's dominion over the land, the statute of limitations had run on some portions of the action. However, some of the later dedications and ordinances may also have effected a taking and may not be time-barred. Thus, the date of any taking is a factual question which should have been determined by the trial court. *See also Village of Maxwell v. Booth*, 161 Neb. 300, 306, 73 N.W.2d 177, 182 (1955).

Dedication - Common Law Distinction

At common law, dedication of a street or alley passed to a municipality merely an easement and the dedicator still continued to own the fee, subject to the easement. *Belgum v. City of Kimball*, 163 Neb. 774, 81 N.W.2d 205 (1957).

Dedication - Effect of Vacating -- Dedicate Street

When streets are dedicated to the city, the city retains a fee simple determinable. At such time as the city vacates a street, avenue, alley, or lane, the land within such street or alley reverts to the owners of the adjacent real estate, one-half on each side thereof. *Belgum v. City of Kimball*, 163 Neb. 774, 81 N.W.2d 205 (1957).

Dedication - Evidence of

The court held that leaving a road for public use between two separate fences was sufficient evidence of dedication in a shorter period than ten years of public use. *Robinson v. Gebauer*, 98 Neb. 196, 152 N.W. 329 (1915).

Dedication - Fee Held in Public Trust

Where land is surveyed and platted into an addition to a city, in pursuance of the statute, the fee-simple title to the streets and alleys rest in the pubic in trust for the use for which they were dedicated and not for any single individual's personal use. *Jaynes v. Omaha Street Railway Co.*, 53 Neb. 631, 74 N.W. 67 (1898).

Dedication - Filing Plat

When plat of proposed subdivision is prepared, executed, and files by landowner without any representations by city with regard to disputed easement, it operates as a deed of portion of land set apart for public use. *Vakoc Constr. Co. v. City of Wayne*, 191 Neb. 45, 213 N.W.2d 721 (1974).

Dedication - Intent to Dedicate

A public road over unenclosed prairie lands cannot be established by mere use. The owner must have the intent to dedicate the road to public use. Here, the owner helped to stake out the road and allowed continual public use. Such action amounted to dedication. *Rathmann v. Nohrenberg*, 21 Neb. 467, 32 N.W. 305 (1887).

Dedication - Knowledge and Acquiescence

The road through defendant's property was only means of ingress and egress from plaintiff's buildings since 1888. The road had been used extensively by the public with knowledge and acquiescence of the prior owner of the defendant's land. The road was subject to uninterrupted use by the owner of the plaintiff's land and by the public. *Butts v. Hale*, 157 Neb. 334, 59 N.W.2d 583 (1953).

Dedication - Parol, Implied by Acts, by Time

An acceptance of an offer of dedication may be made by the public by its entering on the land and enjoying the privilege tendered by the owner. *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N.W.2d 878 (1942).

Dedication - Permissive Use of Land

A street may be established by an implied dedication. To constitute an implied dedication, there must be an intent by the owner to appropriate the land for public use. *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N.W.2d 878 (1942).

An implied dedication must include intent by the owner to appropriate the land for public use. When a strip of ground was used for 40 years as a road, 20 years as a full-width street, and was paved without objection of the owner, dedication of the strip of ground by the owner is implied by its use as a public street. *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N.W.2d 878 (1942); *Burk v. Diers*, 102 Neb. 721, 169 N.W.2d 263; *City of McCook v. Red Willow County*, 133 Neb. 380, 275 N.W.2d 396 (1937).

Dedication - Through Prescription

A county road was used adversely by the public for more than ten years prior to 1887. Around 1901, the county dedicated the road for public use to the city of Omaha when it became part of the city limits. The county gained a right to the road through prescription, which occurs when the public uses a road adversely to the owner for a period of ten years. *City of Omaha v. Douglas County*, 125 Neb. 640, 251 N.W. 262 (1933). See *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998).

Dedication - Vacation of Dedicated Street

Generally, only owners whose property abuts on vacated part of street need join in deed vacating part of village plat, and such proprietors need not own property back any particular distance from street line. Deeds vacating portion of street which was part of village plat held not insufficient because owner of land which did not abut on any part of street vacated failed to join in deed. *Village of Hay Springs v. Hay Springs Commercial Co.*, 131 Neb. 170, 26 N.W. 398 (1936).

Dedication - Width of Dedication

The width of a public highway, acquiesced by dedication, is to be determined as a question of fact by the character and extent of the user, or the amount actually dedicated to public use. *Donovan v. Union Pacific Railroad Co.*, 104 Neb. 364, 177 N.W. 159 (1920). *See also Burkhardt v. Cihlar*, 149 Neb. 712, 32 N.W.2d 197 (1948).

See also Road Width.

Definition - Accretion

An accretion to land is generally defined as the imperceptible increase thereto on the bank of a river by alluvial formations, occasioned by the washing up of the sand or earth, or by dereliction as when the river shrinks back below the usual watermark; and when it is by addition it should be so gradual that no one can judge how much is added each moment of time. *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943); *Lammers v. Nissen*, 4 Neb. 245 (1876); *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940).

Webster's New International Dictionary defines accretion as follows: "The increase or extension of the boundaries, or the acquisition, of land by the gradual or imperceptible action of natural forces, as by the washing up of sand or soil from the sea or a river, or by a gradual recession of the water from the usual watermark." *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943).

Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957).

Definition - Acquiescence

To establish a boundary line by "acquiescence" it is essential that owners of adjoining tracts mutually recognize and accept the line as the boundary for a period of ten years of more. *Kennedy v. Gottschalk*, 138 Neb. 842, 295 N.W. 813 (1941).

Definition - Avulsion

Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream. *Anderson v. Cumpston*, 258 Neb. 891, ___ N.W.2d ___ (2000);*Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976); 78 Am. Jur. 2d,*Waters*, § 406, p. 852. *See also Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957); *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943);*Mercurio v. Duncan*, 131 Neb. 767, 269 N. W. 901 (1936).

Where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, 'avulsion.'" *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943); *State of Nebraska v. State of Iowa*, 143 U.S. 359, 12 S.Ct. 396, 397 (1892) .

Definition - Batture

The term "batture" is defined as "An elevation of the bed of a river under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface." 1 Bouv. Law Dict., Rawle's Third Rev., p. 332. In fact, a batture is a filling in of the stream of water from the bottom. During the early stages it appears as a growth, slowly filling from the bottom, and as it continues to grow it ultimately forms an island. In any event it is a form of an accretion and the title thereto becomes the property of the owner of the original bank. Its accretion will generally go to the owner of the bank to which it is attached. *Clark, Surveying and Boundaries* (2d ed.) sec. 294, note 4. *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943).

Definition - Extent

"Extent" within term extent of easement claimed in land as right-of-way for road, means the width. *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260 (1982).

Definition - Geographic Centerline

Mean center line of river is determined by dividing the distance between meander lines of the river is arbitrary location of center of stream and is not discrimination of the thread of the stream in this jurisdiction; accordingly, it cannot be said that any rights of the riparian owner are established or supported by such mean center line. *Hartwig v. Berggren*, 179 Neb. 718, 140 N.W.2d

Definition - Island

Traditionally, an island is defined as "a permanent body of land, separate and distinct from the mainland, and above mean high water. An island must be surrounded by distinct channels of the river, which separate the island from the mainland." *U.S. v. Wilson*, 523 F.Supp. 874 (1981). *See also Summerville v. Scotts Bluff County*, 182 Neb. 311, 154 N.W.2d 517 (1967); *Burket v. Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958).

Definition - Littoral Land

Littoral lands are lands that border on a lake or ocean. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990).

Definition - Monument

A monument is a permanent landmark established for purpose of indicating boundaries, and for a monument to control over field notes, a description of a survey of a picturization by plat, survey should show relation of original survey marked out on ground or other artificial or natural monument. *Hoke v. Welsh*, 162 Neb. 831, 77 N.W.2d 659 (1956).

Definition - Profession

The term profession is defined as "a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of public service. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 32 (1988).

Surveyor's petition against original surveyor of property seeking indemnification and alleging original surveyor incorrectly placed pins on boundary of surveyed property and knew or should have known of pins placed would be relied upon by subsequent surveyors did not set forth sufficient facts to establish whether professional negligence statute of limitations applied to original surveyor's activities in performing survey. Accordingly, the trial court incorrectly sustained the original surveyor's demurrer on basis that statute of limitations barred claim. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

Subsequent surveyor of property failed to state cause of action against original surveyor for alleged negligence in performance of its contract with a party which was not described in the pleadings. The pleadings did not allege the original surveyor's duty of reasonable care extended beyond obligation to party for whom original survey was performed, the petition did not indicate why a duty extended to the subsequent surveyor as a third party, and the petition did not allege that damage was reasonably foreseeable

nor did it state why damages were reasonably foreseeable. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

Definition - Reliction

Reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957**).**

Land added and uncovered by a gradual subsidence of water from any cause is considered reliction. *U.S. v. Wilson*, 523 F.Supp. 874 (1981). *See also Dartmouth College v. Rose*, 172 Neb. 764, 112 N.W.2d 256 (1961); *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960); *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618 (1959).

Definition - Riparian Land

Riparian lands border rivers or streams. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990).

Definition - Thread of the Channel

Titles to riparian lands run to the thread of the contiguous stream. *See Oliver v. Thomas*, 173 Neb. 36, 112 N.W.2d 525; *Nebraska v. Iowa*, 406 U.S. 117, 92 S. Ct. 1379 (1972). The thread or center of a stream is that line which would give owners on either side access to the water at its lowest ebb. *Anderson v. Cumpston*, 258 Neb. 891, ___ N.W.2d ___ (2000); *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946). *See also Curren v. All Persons Having or Claiming Any Interest in Certain Real Estate*, 149 Neb. 477, 31 N.W.2d (1948); *Higgins v. Adelson*, 131 Neb. 820, 270 N.W. 502 (1936).

The "thread or center of a channel" is the line which would give the owners on either side access to the water, whatever its stage might be, particularly at its lowest flow. *Heider v. Kautz*, 165 Neb. 649, 87 N.W.2d (1958). *See also Oliver v. Thomas*, 173 Neb 36, 112 N.W.2d 525 (1961); *Curren v. All Persons Having or Claiming Any Interest in Certain Real Estate*, 149 Neb. 477, 31 N.W.2d (1948); *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948); *Mingus v. Bell*, 148 Neb. 735, 29 N.W.2d 332 (1947); *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942); *Higgins v. Adelson*, 131 Neb 820, 270 N.W. 502 (1937).

See also Riparian Rights - Own Soil to Thread of Stream.

Easements by Prescription - Creation

'An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, exclusive and adverse.' *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948) (quoting *Onstott v. Airdale Ranch & Cattle Co.*, 129 Neb. 54, 260 N.W. 556, 558 (1966)). *See also Omaha & R. V. Ry. Co. v. Rickards*, 38 Neb. 847, 57 N.W. 739 (1894).

The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948). *See also* 28 C. J. S., *Easements*, § 10.

'A prescriptive right is not looked on with favor by the law, and it is essential that all of the elements of use and enjoyment, stated above, concur in order to create an easement by prescription.' *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948); (quoting 28 C. J. S., *Easements*, § 10).

'A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued, * * *.' *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948) (quoting 28 C. J. S., *Easements*, § 14).

To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948). *See Sachs v. Toquet*, 121 Conn. 60, 183 A. 22 (1936).

"A permissive use of the land of another is not adverse and cannot give an easement by prescription no matter how long it may be continued." *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995); *Chalen v. Cialino*, 206 Neb. 106, 291 N.W.2d 256 (1980). The use and enjoyment which will create an easement by prescription must be: (1) adverse, (2) under a claim of right, (3) continuous and uninterrupted, (4) open and notorious, (5) exclusive, and (6) with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period. *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995),

Mere nonuse of an easement for any period of time cannot by itself extinguish an easement acquired by deed. *Mueller v. Bohannon*, 256 Neb. 286, 589 N.W.2d 852 (1999). However, "[i]f the an owner of an easement, by his own act, renders the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him." *Mueller v. Bohannon*, 256 Neb. 286, 589 N.W.2d 852 (1999) quoting *Toelle v. Pruess*, 172 Neb. 239, 109 N.W.2d 293 (1961).

Easements - Avigation

"An avigation easement grants the holder of the easement the right to navigate aircraft in the designated airspace overlying another's land." *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995). *See also Johnson v. Airport Auth.*, 173 Neb. 801, 115 N.W.2d 426 (1962).

The Legislature has acknowledged the existence of avigation easements and the right of certain political subdivisions to acquire such easements through eminent domain. *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995). The statutory right of freedom of transit through the navigable airspace of the United States is, in effect, a license. *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995) (citing Federal Aviation Act of 1958, §§ 101(29), 104, 49 U.S.C.App.(1988 Ed.) §§ 1301(29), 1304).

Easements - Elements to Prove a Prescriptive Right

The six elements which must be established to prove a prescriptive right are delineated in *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993):

First, continuous and uninterrupted use may be established by use of the easement "whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed." *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979). In *Leu* the evidence established that she used the trail road when it was necessary to go from south of Clark's property to Leu's land north of Clark's property. Leu and other witnesses established that the public traversed the trail road when there was reason to use it. There was no dispute that a clear trail road existed. The evidence established this element.

Second, the use must be "open and notorious so that the owner will learn of the use, assuming that he keeps himself informed about the condition of his property." (*Emphasis omitted*) *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979). In *Leu*, the court found that the well-established trail road would notify the owner that somebody was

traveling not only across her land, but from her land in both directions. Significant parts of the trail road on Clark's land could have no purpose other than to get across her land to Leu's land. Apparently, Clark did not keep herself informed of the current use, but she did admit she knew and approved of the auto gates. The evidence established this element.

Third, the use must be exclusive. As used in this connection, the word "exclusive" could be misunderstood. It does not mean that no one but the claimant uses the road. It simply means the claimant's right to use the property does not depend upon a similar right in others. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979).

The fourth element is that the claimant's use of the prescriptive easement is under claim of right, and the fifth element is that the claimant's right must be adverse. The court in *Leu* found the following holding from *Svoboda* to be quite applicable to the situation where the use of the trail road predated the memories of the litigants who were in their eighties:

> [I]f a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence.

(*Emphasis omitted*) *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979).

Sixth, the assertion of a prescriptive easement may be defended against on the basis that the use was made by permission. To get to this sixth element, it is required that a claimant show open, visible, continuous, and unmolested use of the land for the necessary period, and the use will be presumed to be under a claim of right. Once so established, this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission. *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993); *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981). In *Leu*, Clark attempted to dispute Leu's evidence that use of the trail road was made by the public. However, the existence of so visible a trail road for so long a period made Clark's challenge difficult to accept. The reality of the matter is that the trail road existed because it is used. In other words, the vehicle tracks in the sand which formed the trail road were there because it was used. Use was the trail road's only maintenance.

See *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998); *F & J Enterprises, Inc. v. DeMontigny*, 6 Neb.App. 259, 573 N.W.2d 153 (1997).

Easements - Extent of

The nature and extent or scope of an easement must be clearly established. *Leu v. Littel*, 2 Neb. App. 323, 513 N.W.2d 24 (1993); *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986).

"The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. * * * If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel." *Leu v. Littel*, 2 Neb. App. 323, 513 N.W.2d 24 (1993); *Smith v. Bixby*, 196 Neb. 235, 239-40, 242 N.W.2d 115, 118-19 (1976). *See also State ex rel. Game, Forestation & Parks Comm'n v. Hull*, 168 Neb. 805, 97 N.W.2d 535 (1959).

The extent of an easement created by a conveyance is fixed by the conveyance. *Schram Enterprises, Inc. v. L & H Properties*, 254 Neb. 717, 578 N.W.2d 865 (1998).

Easements - Implied

The elements required to create an implied easement from former use include:

1. the use giving rise to the easement was in existence at the time of the conveyance subdividing the property;
2. the use has been so long continued and so obvious as to show that it was meant to be permanent; and
3. the easement is necessary for the proper and reasonable enjoyment of the dominant tract.

O'Connor v. Kaufman, 250 Neb. 419, 550 N.W.2d 902 (1996); *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996). *See also Hengen v. Hengen*, 211 Neb. 276, 318 N.W.2d 269 (1982).

To determine whether an implied easement from former use was created, courts look to "the time of the conveyance subdividing the property" that first brought into question whether an implied easement was created. *O'Connor v. Kaufman*, 250 Neb. 419, 550 N.W.2d 902 (1996). *See also Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996); *Hengen v. Hengen*, 211 Neb. 276, 318 N.W.2d 269 (1982).

There are two types of implied easements: (1) those that arise as an element of necessity

or (2) those that arise from what has been said or done by the parties to the transaction. *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996).

In *Hillary*, the court stated " ' "[a] way of necessity usually arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers...." ' " *Id*. (quoting *Johnson v. Mays*, 216 Neb. 890, 895, 346 N.W.2d 401, 404 (1984)). Generally, when the court alludes to implied easements that arise by necessity, they are referring to easements that are created to reach land that is otherwise landlocked and could not be utilized. *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996).

The degree of necessity required to prove the existence of an implied easement from former use is "reasonable necessity." *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996). In *Bennett v. Evans*, 161 Neb. 807, 74 N.W.2d 728 (1956), the court made it clear that there is a well-recognized distinction between implied grants and implied reservations in that the rule of strict necessity is applied to implied reservations, but not to implied grants [easements arising from former use]. *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996).

In *Hengen v. Hengen*, 211 Neb. 276, 318 N.W.2d 269 (1982), the court addressed whether the owners of the southwest quarter of a section of land had an implied easement, arising from use before severance of the section, to obtain irrigation water from a canal in the northwest quarter. The court found an implied easement existed, stating "[t]he necessity involved ... is to transport the irrigation water from the canal in the northwest quarter to the southwest quarter...." The court found the easement was necessary for the proper and reasonable enjoyment of the dominant and did not discuss alternative methods of transporting the irrigation water.

"[O]nce it is determined that the elements required for the creation of an implied easement existed at the time of the conveyance subdividing the property, the easement becomes appurtenant to the property and the elements for creation are no longer relevant to a determination of the continued existence of that easement upon a subsequent conveyance." *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996). An implied easement remains in existence upon subsequent conveyance unless and until it is somehow terminated. *Id*.

Evidence - Easements

"To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence...." *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993); *Svoboda v. Johnson*, 204 Neb. 57, 62, 281 N.W.2d 892, 897 (1979).

In the absence of any evidence to the contrary, the easement's terms must be given their plain and ordinary meaning, as ordinary, average and reasonable persons would understand those terms. *University Place-Lincoln Assoc. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995). *See Fritsch v. Hilton Land & Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994); *Prawl Engineering v. Charles Vrana & Son Constr.*, 241 Neb. 49, 486 N.W.2d 24 (1992).

Where the use of an easement has been adverse, notorious, and uninterrupted for the statutory period, it will be presumed to have been under a claim of right. The owner of the servient tenements is charged with knowledge of such use and acquiescence in it is implied. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976); *Dunnick v. Stockgrowers Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974). *See also Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967).

Evidence - Enclosure

The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993); *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981).

See also Adverse Possession - Land Used Continuously.

Evidence - Expert Witnesses

In determining boundary lines between lands, the testimony of a nonexpert, who claims to have located the line from government monuments then in existence, may be accepted by the jury in preference to that of surveyors who have subsequently located a different line independently of such monuments. *Baty v. Elrod*, 66 Neb. 735, 92 N.W. 1032 (1902), *aff'd*, 66 Neb. 744, 97 N.W. 343 (1903). *See also* Neb. Rev. Statutes §23-1907 and §23-1908.

Evidence - Field Notes

In the absence of a government corner, or of satisfactory proof of its location, the field notes of government survey will govern and determine the true line, and such field notes and government plats in such case are prima facie evidence of its true location. *Knoll v. Randolph*, 3 Neb. 599, 92 N.W. 195 (1902). *See also* Neb. Rev. Statutes §23-1911.

Government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected, and will control the field notes for courses and distances of any subsequent survey. *Knoll v. Randolph*, 3 Neb. 599, 92 N.W. 195 (1902). *See also* Neb. Rev. Statutes §23-1911.

If the location of section and quarter section corners by the original government survey can be ascertained, they are not to be moved, but will control all other surveys; but when the marks of the government survey have been obliterated, and the location of the corners by that survey cannot be established by witnesses who know where they were located, resort must be had to other evidence, and in the absence of any other proof, the measurements indicated by the field notes of the government survey must control. *Clark v. Thornburg*, 66 Neb. 717, 92 N.W. 1056 (1902). *See also* Neb. Rev. Statutes §23-1911.

See Also Evidence - Generally and discussion of *State v. Ball*.

See Also Evidence - Location of Obliterated Corners and discussion of *State Bd. of Educ. Lands & Funds v. Jarchow*.

Evidence - Generally

Monuments erected by the government surveyor to mark the section corners according to his survey will control, although in conflict with his field notes. If the monuments have been obliterated, but their location can be ascertained from testimony of witnesses who know and testify to the fact, the site thus established will control. If the monuments have been destroyed, and their original location cannot be established by other proof, recourse may be had to the field notes which are to be accepted as presumptively correct, and can only be overcome by clear and satisfactory evidence. *State v. Ball*, 90 Neb. 307, 133 N.W. 412 (1911). *See also* Neb. Rev. Statutes §23-1908.

Evidence - Government Survey

In determining the boundaries of land depending upon the true center of a section line where various surveys by different surveyors disagree as to the true center, monuments fixed by the government survey will control as to the location of the section corners. *Runkle v. Welty,* 86 Neb. 680, 126 N.W. 139 (1910). *See also* Neb. Rev. Statutes §23-1908.

Where the original mounds or monuments established during a government survey can be identified and ascertained, they will control course and distance. *Peterson v. Skjelver,* 43 Neb. 663, 62 N.W. 43 (1895). *See also* Neb. Rev. Statutes §23-1908.

The location of the corner as established by the government surveyor is controlling. *Morrison v. Neff,* 16 Neb. 179, 20 N.W. 254 (1884).

Evidence - Improvements

Owners of adjacent lots employed the county surveyor to mark the boundaries of their respective tracts. The original corners were found and fences built along those boundaries. Later, another county surveyor resurveyed the section. Because he could not find the original corners, he made his survey by measuring from the known corners and then by dividing distances which did not coincide with the original survey. even if distances in the field notes do not reveal the true corners, construction of the fences according to the government corners was sufficient evidence of the location of the corners. *Hurn v. Alter,* 80 Neb. 183, 113 N.W. 986 (1907). *See also Runkle v. Welty*, 86 Neb. 690, 126 N.W. 139 (1910); and *State v. Ball*, 90 Neb. 307, 133 N.W. 412 (1911).

Evidence - Monuments

See Evidence - Generally and discussion of *State v. Ball*.

See Evidence - Government surveys and discussion of *Peterson v. Skjelver*.

Evidence - Location of An Obliterated Corner

An obliterated corner's location may be recovered by reference to acceptable supplemental survey records, physical evidence, or testimony of witnesses having a dependable knowledge of such corner's location. However, that location must be proven beyond a reasonable doubt, and, if based on testimony, it must come from witnesses having positive knowledge of the precise location of the original monument. Testimonial evidence must be tested by relating it to known original corners or other calls of the original field notes. *State Bd. of Educ. Lands & Funds v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985). *See also* Neb. Rev. Statutes §23-1908.

Evidence - Physical Evidence Found

County surveyor gave evidence as to the location of a former fence as a boundary line. The only remains of a fence were bits of barbed wire in a tree, and court found for plaintiff. *Whaley v. Mingus*, 188 Neb. 351, 196 N.W.2d 516 (1972).

Evidence - Plats

The testimony of an expert surveyor, including the plats prepared by him, negate any notion of a natural drain or watercourse which is defined as "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook." (Neb.Rev.Stat. §31-202 (Reissue 1978)). *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982). At least some of the distinctive attributes of a watercourse must be demonstrated to constitute an exception to the general rule that surface water may be repelled. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982); *Muhleisen v. Krueger*, 120 Neb. 380, 232 N.W. 735 (1930).

Evidence - Resurvey

The Supreme Court had to assume that the survey of southern landowners was correct and that an easement granted by the state to northern landowners lay in a location other than that testified to by a northern landowner, which location would place a survey stake in middle of an easement on land owned by the state, where northern landowner who testified to that effect did not have land resurveyed to show southern landowners' survey

was in error, and the landowner testified at trial he did not have copy of state's survey with him. Absent a conflicting survey or other evidence that the easement was actually in the place described, the Supreme Court had to assume that the survey was correct and that the easement lay elsewhere. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987).

Evidence - Secondary Evidence

In a dispute over the proper location of a quarter section of land, the original monuments established during a government survey control course and distance. If the original monuments have been destroyed, the location may be determined by secondary evidence. *Johnson v. Preston*, 9 Neb. 474, 4 N.W. 83 (1880). *See also Cunningham v. Covalt*, 204 Neb. 512, 283 N.W.2d 53 (1979).

Evidence - Subsequent Survey

In an action to establish boundary corners common to school lands and private tracts, the survey fell short of the required standards when the wrong marker was used. *State Bd. of Educ. Lands and Funds v. Jarchow*, 219 Neb. 271, 362 N.W.2d 19 (1985).

Evidence - Testimony

Raymond Bailey, Cuming County Surveyor, testified about the direction of the flow of a creek, but his testimony did not establish what may have caused the change in the direction of the flow. Plaintiff claims that a town's work on a man-made ditch diverted the waters of a creek to flow into another ditch which flooded his pastures. Court held that evidence failed to establish that the activity of the defendants caused the damage to plaintiff's pastures. *Steffen v. County of Cuming*, 195 Neb. 442, 238 N.W.2d 890 (1976).

Government Corners

Where a corner, supposed to have been established by the government in the surveys of public lands has been acquiesced by adjoining owners of such lands for nearly 20 years,

and improvements made, and the land broken up to the line thus established, there is a presumption in favor of such corner being the true one, which can only be overcome by clear and convincing proof that it was not established by the government. *Coy v. Miller*, 31 Neb. 348, 47 N.W. 1046 (1891). *See also* Neb. Rev. Statutes §23-1908.

Monuments of original government survey, if found, control location of section corners. *Runkle v. Welty*, 86 Neb. 680, 126 N.W. 139 (1910).

Government Corners - Reestablish

If the location of section and quarter section corners as established by government surveyors can be ascertained, such corners will control the boundary between coterminous quarter sections of land. *Stanley v. Hermanson*, 88 Neb. 823, 130 N.W. 573 (1911)

Government Corners - Rule for Locating

Reliance upon misrepresentation must be justified before the misrepresentation is actionable; where ordinary prudence would have prevented the deception, an action for fraud perpetuated by such deception will not lie. *Bibow v. Gerrard*, 209 Neb. 10 , 306 N.W.2d 148 (1981); *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976).

Highways

The State Department of Roads acquired a 33 foot tract of land by eminent domain for the construction of the interstate. The new owner of the land which originally contained the 33 foot tract erected signed for advertisement along the roadside. The court found the state to be the owner of the strip of land and would not allow plaintiffs to erect signs. However, land which is bounded by a highway and not owned by the state carries the fee to the center of the highway. *Carter v. State Dept. of Roads*, 198 Neb. 519, 254 N.W.2d 390 (1977).

Fact that basic plats contained usual symbols for unimproved road, i.e., two dotted lines, at position that plaintiff alleged was public road did not show a public road; rather, existence of such notations on publicly circulated material was relevant as tending to

show that public at least had notice that "trail road," unimproved and unmaintained road, existed. *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993).

In the case of public roads the fact that only a few members of the public still use the road does not mean that the road has been abandoned. *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998); *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984); *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

Highway - Access

Measure of right of owner of property abutting street or highway to have access to and from property by way of street is reasonable ingress and egress under all circumstances. *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 916 (1995).

Highway - Establish

In establishing a road on a section line, neither a petition nor a record that the board found that the public good required the road is necessary. *Banner County v. Young*, 184 Neb. 546, 169 N.W. 2d 280 (1969); *Howard v. Brown*, 37 Neb. 902, 56 N.W. 713 (1893); *Barry v. Deloughrey*, 47 Neb. 354, 66 N.W. 410 (1896). But even in such a case there must be notice and proceedings with respect to damages. 'The county board may, without petition or notice, make a preliminary order establishing a section line road, or declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages.' *Banner County v. Young*, 184 Neb. 546, 169 N.W. 2d 280 (1969) (quoting *Barry v. Deloughrey*, 47 Neb. 354, 66 N.W. 410 (1896)).

In *Warren v. Brown*, 31 Neb. 8, 47 N.W. 633 (1890), the court held the filing of a written consent was necessary to confer jurisdiction upon the county board to establish a consent road. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969). This is a condition precedent to the establishment of such road. Without it, the proceedings are a nullity. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969); *Deloughery v. Lapsley*, 110 Neb. 105, 193 N.W. 109 (1923).

To determine the question whether or not a highway has been established the court is required to examine the proceedings had to determine if the jurisdictional requirements necessary for that purpose have been met. If they have not been met, the right does not exist and lapse of time will not supply the defect. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969). *See Kunz v. Bornemeier*, 170 Neb. 463, 102 N.W.2d 842 (1960).

Mere entry in the minutes of a meeting of the board of county commissioners that a

consent road was established was not sufficient itself to establish a road where there was no proof of any nature that action to effectuate that entry was ever taken. *Banner County v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969); R.R.S. 1943, Sec. 23-1305.

See also Dedication - Acceptance of.

Highway - Establish by Prescription

A highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993). *See Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984); *Lancaster County, ex rel. Rosewell v. Graham*, 120 Neb. 785, 235 N.W. 338 (1931).

To establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period. Furthermore, "there must be a use by the general public under a claim of right adverse to the owner of the land of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more." *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993); *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984).

For purposes of determining the extent of public prescriptive easement with respect to a "trail road" which is an unimproved and unmaintained road, the public's right to use the "trail road" was not limited to the actual beaten path, but extended to such width as was reasonably necessary for public travel, including reasonable width to drive livestock, and the public had a prescriptive right to pass eroded areas within a reasonable distance. *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993).

Evidence in action to enjoin lot owner from obstructing road running through his property in an unincorporated village and for damages for assault and destruction of personal property established a prescriptive public use and existence of easement for public road across lot before defendant became owner thereof more than 20 years before trial in view of testimony of continual use of such road by plaintiff and public since the early 1900's, contrary to contention of defendant that the use of road was permissive only. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

Evidence supported trial court's determination of a 20-foot width for public road acquired by prescription across defendant's lot. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

Highway - Statutory

Where a prescriptive right for highway use has been acquired along section line, right extends to beaten path and such width as is reasonably necessary for public travel; it does not extend to statutory width unless that width has been established by the use. *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260 (1982).

Evidence did not establish that prescriptive right was acquired to statutory width of highway, which varied during prescriptive period from 66 to 40 feet. *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260 (1982).

Land Survey - By Electronic Means

Company was hired to survey an area for development and to make an electronic land survey to determine boundaries. This court held that the electronic survey had been completed and had to be paid for, minus a small amount for not having made the survey by conventional filed methods. *L. Robert Kimball Consulting Engineers, Inc. v. Ryan*, 195 Neb. 677, 240 N.W.2d 40 (1976).

Land Surveyor - Negligence

The establishment and perpetuation of reliable land corners, monuments, plats, and surveys, together with their official records, are historically of public concern, necessary for the orderly transaction of public affairs and business, and require high standards of care on the part of qualified surveyors. In this case, the surveyor incompetently located corners, failed to file survey records showing corners found and set, failed to perpetuate corners, and failed to designate corners. Surveyor was found guilty of misconduct and his certificate was revoked for thirty days. *Simonds v. Board of Examiners for Land Surveyors*, 213 Neb. 259, 329 N.W.2d 92 (1983).

Natural Stream

A natural stream requires a permanent supply of water by a flow in the same channel with such a degree of regularity that there is running or live stream for considerable periods of time, although it is not necessary that there be a constant or continuous flow and the

volume of flow may fluctuate. *1979 Att'y Gen. Op. No. 82*. *See Rogers v. Petsch*, 174 Neb. 313, 117 N.W.2d 771 (1962); *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954); *Kinney on Irrigation and Water Rights*, Second Ed., Volume 1, Section 307.

Plats - Consent to Contents

Land surveyor prepared plats that included easement lines for public utilities. When the plaintiff signed the plats, it is assumed that he consented to the contents of the plat. *Vakoc Const. Co. v. City of Wayne*, 191 Neb. 45, 213 N.W.2d 9 (1974).

Public Highways and Roads

"A public highway may be established by prescription by continuous adverse use thereof by the public for a period of 10 years." *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966); *Kunz v. Bornemeier*, 170 Neb. 463, 102 N.W.2d 842 (1960). See *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998).

"Public roads" are defined in Neb.Rev.Stat. § 39-1401 (Reissue 1993) as "all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years." Under this definition of "public roads," neither the obligations of a sanitary and improvement district nor those of a county depend upon construction or ownership. *Scherer v. Madison Co. Comm'rs*, 247 Neb. 384, 527 N.W.2d 615 (1995). In the absence of abandonment, vacation, or relinquishment of the roads within a sanitary and improvement district, the county retains the statutory authority to supervise, control, improve, and maintain these roads. *Sanitary and Imp. Dist. No. 2 of Stanton County v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997). The lack of maintenance does not establish that the county does not claim the road is public, and a traveler need not assume that the lack of public maintenance is an indication that the road is not for public travel. *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998).

"The law is well established that it is not possible to acquire title to a public road against a county by adverse possession." *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966). *See Krueger v. Jenkins*, 59 Neb. 641, 81 N.W. 844 (1900), where the court stated: 'Title to a part of a country road can not be acquired by adverse possession.' See *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996) (railroad property acquired by private sale and held in fee simple is subject to adverse possession).

Where the basic plats contained the usual symbols for unimproved road (two dotted lines,

at a position plaintiff alleged was a public road) did not show a public road; rather, the existence of such notations on publicly circulated material was relevant as tending to show that the public at least had notice that a "trail road," unimproved and unmaintained road, existed. *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993).

In the absence of abandonment, vacation, or relinquishment of the roads, a county retains the statutory authority to supervise, control, improve and maintain roads over which a sanitary and improvement district had concurrent authority. *Sanitary and Imp. Dist. No.2 of Stanton County v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997).

County cannot, even under applicable statutes, open a section line road without giving notice to the landowner, giving the landowner a claim for damages, or appointing appraisers and making provisions for payment of the landowner's damages. *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998).

Gates across a trail tend to negate the existence of the trail as a road, but when the evidence shows the gates are opened at will and left open, except in pasture season, such gates to no effectively controvert the public's right to travel the clearly marked way between what appears to be private property. *Breiner v. Holt County*, 7 Neb. App. 132, 581 N.W.2d 89 (1998).

Retracements

In *State Bd. of Educ. Lands & Funds v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985), the parties each relied on separate surveys. The State of Nebraska relied on a survey conducted by a state surveyor in 1975 and Jarchow relied on a survey conducted in 1976 by a state registered surveyor who had been a former county surveyor. Additionally, two earlier related surveys were discovered. None of the original government survey corners were found for two sections. The Court found that the former county surveyor's survey seeking to establish obliterated corners of public school lands was not sufficient to establish their locations where testimony relied upon did not meet applicable standards for witness testimony. The surveyor's witnesses could hardly be relied on because their knowledge was not firsthand as required for obliterated corners. The surveyor did not attempt to tie his corners to any known perpetuated corners from the original government survey and the surveyor attempted to act upon the equities or inequities that may have been involved. The State's surveyor had properly established the boundaries of the affected sections as required by law. *State Bd. of Educ. Lands & Funds v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985).

See also Boundaries - Obliterated Corners.

Riparian Rights

The principles applicable to riparian and littoral lands are the same. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990). *See also Alexander Hamilton Life Insurance Co. v. Virgin Islands*, 757 F.2d 534 (3d Cir. 1985).

As long as water continues to flow in a watercourse, private ownership does not attach because the possession that is necessary for ownership cannot occur. *Meng v. Coffee*, 67 Neb. 500, 93 N.W. 713 (1903); *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903).

Unlike the appropriation laws adopted in the 1800's, the riparian system currently in existence recognizes no priority among riparian proprietors utilizing the supply, nor does the use of the water create such a right. *Metropolitan Utils. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

'Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. * * * 'The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.' *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948); *Higgins v. Adelson*, 131 Neb. 820, 270 N.W. 502 (1936). *See also Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942).

'Where title to an island in a nonnavigable stream is conveyed to a grantee by government patent, and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel.' *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948) (quoting *Higgins v. Adelson*, 131 Neb. 820, 270 N.W. 502 (1936)). *See also Wiggenhorn v. Kountz*, 26 Neb. 690, 37 N.W. 603 (1888).

The public may not utilize those riparian lands below the high water line for the purpose of hunting, fishing, boating and other recreation activities without the permission of the landowner except to portage or otherwise transport a non-powered vessel around a fence or obstruction in the river. Nebraska property adjoining the Missouri River is not affected by Iowa's grant of public access to the banks to the high water mark. *1985 Att'y Gen. Op. No. 55*.

The common law, where not inconsistent with any statutory law, determines such ownership rights as whether the bed of such stream belongs to the state or the riparian owner. The common law, as it applies to the navigable rivers of the State of Nebraska, grants exclusive right and title to the riparian owner to the bed of the river to the mid-point of the stream, subject to the public's right to navigation or right of passage. *Kinkead v. Turgeon*, 74 Neb. 580, 109 N.W. 744 (1906).

Riparian Rights - Accretion

When accretion lands are added by natural forces, the owner of the original body of land acquires title to the new land that is formed. According to the doctrine of title by accretion, when land conveyed is bounded by water, it is to be regarded as an expectancy of both the grantor and grantee that is should be continued to be so bounded. Title to this land, unless preserved, passes with any conveyance of the land which is appurtenant. *Bear v. United States*, 611 F.Supp. 589 (D.C. Neb. 1985), *aff'd*, 810 F.2d 153 (8th Cir. 1987). In *Bear*, title to accretion lands on the Nebraska/Iowa border passed to the grantee, where accretions were expressly provided for in one parcel, and accretion lands were not mentioned in the deeds for the other two parcels.

The rule as to the ownership of accretion land remains the same, even though the processes of accretion are caused or accelerated by the construction work of third parties. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Krumwiede v. Rose*, 177 Neb. 570, 129 N.W.2d 491 (1964).

The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *citing, Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957).

Where, at the time of a grant from the United States, the bank of a river formed a part of the boundary of the grant, subsequent accretions, formed by the gradual recession of such bank, attached to and became a part of the grant. *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946); *Topping v. Cohn*, 71 Neb. 559, 99 N.W. 372 (1904).

If accretions are added to government land they become a part of the tract. *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946); *Wiltse v. Bolton*, 132 Neb. 354, 272 N.W. 197 (1937).

Grants of land bounded upon a river carry with them the rights and title to the center of the stream. *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946); *McBride v. Whitaker*, 65 Neb. 137, 90 N.W. 966 (1902).

Where school land belonging to the state was sold for $7 an acre in accordance with the Constitution in force on date of sale and new land was added thereto by changes in river flowing along such land, the new land belonged to the present owner of such school land. *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946).

The evidence clearly showed that the alleged accretive area was an alluvial formation or "river-made" land. The lands in existence in the area at the time of the original government survey had all been washed away by the action of the river. The survey shown on the map is merely a reproduction of the old original survey lines on this newly formed alluvial soil. *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943).

Riparian Rights - Accretion and Reliction

The basis of the riparian doctrine, and an indispensable requisite of it, is actual contact of the land and the water. Proximity or closeness short of contact is unavailing. The right to acquisition through an accession or reliction is one of the riparian rights. *Stratbucker v. Junge*, 153 Neb. 885, 46 N.W.2d 486 (1951). In *Stratbucker v. Junge*, 153 Neb. 885, 890, 46 N.W.2d 486, 488 (1951), the Nebraska Supreme Court quoted from the Restatement of Torts:

Land is riparian by virtue of the fact that it is so located in respect to a watercourse or lake that the possessor of it has lawful access to the water for his private use. The mere fact that a parcel of land is close by or adjacent to the water does not make that land riparian when the water itself is on another's land, for insuch case there is no access to the water, for private use at least, without intruding on the land on which the water lies.

Where by process of accretion and reliction, or either, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Krumwiede v. Rose*, 177 Neb. 570, 129 N.W.2d 491 (1964). *See also Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940); 134 A.L.R. 458; *Conkey v. Knudsen*, 141 Neb. 517, 4 N.W.2d 290, *vacated*, 143 Neb. 5, 8 N.W.2d 538 (1943).

Riparian Rights - Accretion Caused by Water

'Where the water of a river recedes slowly and imperceptibly, changing the channel of the stream, and leaving the land dry theretofore covered by water, such land belongs to the riparian proprietor. In case the alteration takes place suddenly, the ownership remains according to former bounds.' *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946) (quoting, *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894)).

'Where, at the time of a grant from the United States, the bank of a river formed a part of the boundary of the grant, subsequent accretions, formed by the gradual recession of such bank, attached to and became a part of the grant.' *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946) (quoting *Topping v. Cohn*, 71 Neb. 559, 99 N.W. 372 (1904)).

Riparian Rights - Accretion to an Island

Accretions to an island, when occupied for more than the statutory period, may be acquired by title by prescription by the owner of the island, rather than the riparian owner to whom it would otherwise belong. *Hartwig v. Berggren*, 179 Neb. 718, 140 N.W.2d 22 (1966).

Where the accretion from the shore of an island extends to the mainland or any distance short thereof, all the accretion belongs to the owner of the island, but where the accretion and the mainland eventually meet, the owner of each owns the accretions to the line of contact. *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618 (1959). *See also Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976); *Krimlofski v. Matters*, 174 Neb. 774, 119 N.W.2d 501 (1963); *Burket v. Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958); *Roll v. Martin*, 164 Neb. 133, 82 N.W.2d 34 (1957).

An owner of land on shore, in the absence of restrictions on his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Krumwiede v. Rose*, 177 Neb. 570, 129 N.W.2d 491 (1964).

The owner of an island has title to any land between the island and the center or thread of each surrounding channel. If title to an island which is surrounded by a nonnavigable stream is in the name of one owner, and title to the land on the shores opposite the island is in the name of other owners, the same riparian rights pertain to the island as to the mainland. For example, when land reappeared between an island owned by one person and the shore which was owned by another, the islands in the middle belong to the owner of the original island. *Winkle v. Mitera*, 196 Neb. 821, 241 N.W.2d 329 (1976); *Heider v. Kautz*, 165 Neb. 649, 87 N.W.2d 226 (1957). *See also* 78 Am. Jur. 2d, *Waters*, § 437, p. 883.

Island property that was surrounded on three sides by land owned by others and on the fourth side by the main channel of a river was "isolated" within the meaning isolated land statute. *Young v. Dodge Co. Bd. of Sup'rs*, 242 Neb. 1, 493 N.W.2d 160 (1992).

See also Riparian Rights - Subsequently Formed Islands.

Riparian Rights - Avulsion

Title to riparian lands runs to the thread of the contiguous stream. *Anderson v. Cumpston*, 258 Neb. 891, ___ N.W.2d ___ (2000). Under conditions when changes to a main river channel made by water flowing around intervening land to gradually deepen an smaller channel which was on the other side of an island until it becomes the main channel, the

previously established boundary remains designated as the main channel. *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983); *Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976); *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618 (1959); *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946).

The applicability of the law of avulsion is not dependent upon the navigability of the waterway. *Anderson v. Cumpston*, 258 Neb. 891, ___ N.W.2d ___ (2000).

Riparian Rights - Boundary Follows Channel

'The general rule on this subject is: (1) That where the thread of the main channel of the river is the boundary between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; (2) but, where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. There is a well-established and rational exception: It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.' *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946) (quoting *Commissioners of Land Office of State of Oklahoma v. United States*, 270 F. 110, 113 (8th Cir.1929)).

Where the thread of the main channel of river is boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Anderson v. Cumpston*, 258 Neb. 891, ___ N.W.2d ___ (2000); *Ziemba v. Zeller*, 86 N.W.2d 190, 165 Neb. 419 (1957).

A new main channel will not necessarily displace the previous main channel as the boundary between riparian owners. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994). *See Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976) (where the river cut a new main channel); *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618 (1959); *State v. Eckland*, 147 Neb. 508, 23 N.W.2d 782 (1946) (where an existing channel was supplanting a parallel channel as the thread of the stream); *Anderson v. Cumpston*, 258 Neb. 891, ___ N.W.2d ___ (2000) and *Ziemba v. Zeller*, 86 N.W.2d 190, 165 Neb. 419 (1957) (where a stream which is a boundary from any cause suddenly

abandons its old and seeks a new bed, such change of channel works no change of boundary, and the boundary remains as it was the center of the old channel, although no water may be flowing therein).

Where the stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary, and the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

The flood plain of a stream is considered part of the channel of such stream, and no one may obstruct the flow of floodwaters in the natural drainage to the detriment of another. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Kluck v. Mentzer*, 217 Neb. 8, 347 N.W.2d 306 (1984); *Bahn v. Raikes*, 160 Neb. 503, 70 N.W.2d 507 (1955).

Riparian Rights - Change in River Bank

The parties owned adjacent land commonly bounded on the north by a river. When the river curved changing the original bank line, the court ruled that the frontage of each riparian owner on the new bank should be divided in proportion to the frontage on the original bank. *Swanson v. Dalton*, 178 Neb. 55, 131 N.W.2d 704 (1964).

Riparian Rights - Converse of Streams

Plaintiffs own an island and defendants own the mainland. In such a case, the same riparian rights appertain to the island as to the mainland. Therefore, where two tributaries form both sides of the island meet and form one stream, the center lines of the two streams are extended until they meet and form the center line of the single stream and become the boundary lines. *Application of Central Neb. Public Power & Irrigation Dist*., 138 Neb. 742, 295 N.W. 386 (1941).

Riparian Rights - Evidence of Accretion

A party who seeks to have title in real estate quieted in him on the ground that it is accretion land to which he has title has the burden of proving accretion by a preponderance of the evidence. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977).

Riparian Rights - Navigable Watercourses

Title to beds beneath navigable waters is held by the sovereign as a public trust for the public. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990); *Bonelli Cattle Co. v. U.S.*, 414 U.S. 313, 94 S.Ct. 517 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 353, 97 S.Ct. 582 (1977).

Such waters ... are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing.... *Id*. at 322, 94 S.Ct. at 524.

In order for the states to guarantee full public enjoyment of their navigable watercourses, the sovereign's title automatically follows gradual changes in the boundary of a water body. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990); *Bonelli Cattle Co. v. U.S.*, 414 U.S. 313, 94 S.Ct. 517 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 353, 97 S.Ct. 582 (1977); *Roberts v. Taylor*, 47 N.D. 146, 181 N.W. 622 (1921).

Riparian Rights - Meander Lines

Meander lines of a river as established by original government survey are not boundary lines unless made so by the instrument of conveyance, the waters themselves constitute the real boundary. *Summerville v. Scotts Bluff County*, 182 Neb. 311, 154 N.W.2d 517 (1967). *See also Hartwig v. Berggren*, 179 Neb. 718, 140 N.W.2d 22 (1966).

Riparian Rights - Own Soil to Thread of Stream

When the riparian owner of lands on one side of a navigable river above the flow of the tide owns to the thread of the stream, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and the owner still holds to the same line. *Valder v. Wallis*, 242 N.W.2d 112, 196 Neb. 222 (1976). *See also Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. "The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at

its lowest flow." *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948); *Higgins v. Adelson*, 131 Neb. 820, 270 N.W. 502 (1936). *See also Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942).

Riparian Rights - Reasonable Use of Water

Water for domestic use and for irrigation purposes in the State of Nebraska is a natural want. Nebraska Constitution, Art. XV, § 4.

While the owner of land is entitled to appropriate subterranean or other waters accumulating on his land, as part of the realty, the waters may not be extracted or appropriated in excess of a reasonable and beneficial use for the land he or she owns that is unconnected with the beneficial use of the land, especially if such use is in exceeds the reasonable and beneficial and is injurious to others who have substantial rights to the water. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978); *Metropolitan Utils. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966); *Luchsinger v. Loup River Public Power Dist*., 140 Neb. 179, 299 N.W. 549 (1941); *Olson v. City of Wahoo*, 124 Neb. 802, 248 N. W. 304 (1933).

The landowner's right to use ground water is an appurtenance to the ownership of the overlying land, but ground water use is not a unlimited private property right. *Springer v. Kuhns*, 6 Neb.App. 115, 571 N.W.2d 323 (1997); *Sorensen v. Lower Niobrara Nat. Resources Dist*., 221 Neb. 180, 376 N.W.2d 539 (1985).

Riparian Rights - Reliction

Under the doctrine of reliction, the upland landowner takes title to lands uncovered by the gradual recession of the water. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990). *See Bear v. United States*, 611 F.Supp. 589 (D.C. Neb. 1985), *aff'd*, 810 F.2d 153 (8th Cir. 1987).

Where by process of accretion and reliction, or either, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Krumwiede v. Rose*, 177 Neb. 570, 129 N.W.2d 491 (1964). *See also State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Worm v. Crowell*, 165 Neb. 713, 87 N.W.2d 384 (1958); *Burket v. Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958); *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943); *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940).

Riparian Rights - Submergence

Under the doctrine of submergence, title to land which becomes submerged by the gradual rise in water level reverts to the sovereign "in order to guarantee full public enjoyment of the watercourse." *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990); *Bonelli Cattle Co. v. U.S.*, 414 U.S. 313, 94 S.Ct. 517 (1973), *overruled on other grounds*, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 353, 97 S.Ct. 582 (1977); *Hogue v. Burgois*, 71 N.W.2d 47 (N.D. 1955).

Were the rule otherwise, the dominion and control of navigation by the state ... would depend on the vagaries of the [water level], permitting state control where the [water] adhered to its course at the time of admission of the State to the Union and denying the state control where the [water] ... subsequently migrated and submerged patented lands. This would lead to absurd and whimsical results. *Hogue*, 71 N.W.2d at 52.

Neither judgment quieting title to relicted lands in owners of land adjacent to navigable lake nor quitclaim deed from state of North Dakota were effective to defeat public's interest in lake as navigable waterway, as owner in each instance received only such rights as it was entitled to have as a riparian owner upon public waters and thus lands were subject to doctrine of submergence, and United States, to which state had conveyed lake bed, had title in lands which subsequently became submerged. *101 Ranch v. U.S.*, 905 F.2d 180 (8th Cir. 1990).

When a river completely submerged his land, previous owner lost his title to the land and when land reappeared after the river moved north, the previous owner had no claim to it. *Winkle v. Mitera*, 196 Neb. 821, 241 N.W.2d 329 (1976). *See also State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977).

Riparian Rights - Subsequently Formed Islands

'An owner of land on the shore of an un-navigable river, in the absence of restrictions in his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands.' *Mingus v. Bell*, 148 Neb. 735, 29 N.W.2d 332 (1947) (quoting *Haney v. Hewitt*, 105 Neb. 746, 181 N.W. 861 (1921)). *See also In re Central Nebraska Public Power & Irrigation District*, 138 Neb. 742, 295 N.W. 386 (1941); *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942); *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946).

See also Riparian Rights - Accretion to an Island.

Riparian Rights - Thread of Stream

Along the Missouri River, accretion is sometimes more rapid than avulsion because the abandoned bed often forms a cut-off lake or is filled again in flood periods. *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943); *Kinkead v. Turgeon*, 74 Neb. 573, 104 N.W. 1061, 109 N.W. 744 (1906).

"Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law." *Valder v. Wallis*, 242 N.W.2d 112, 196 Neb. 222 (1976); *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744 (1906).

Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of an island formerly under waters of the stream as far as the thread of the stream. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Summerville v. Scotts Bluff County*, 182 Neb. 311, 154 N.W.2d 517 (1967).

The thread or center of a channel, as the term is employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946). In other words, the thread of the stream is the deepest groove or trench in the bed of a river channel, the last part of the bed to run dry. Where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates. *See also Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942).

Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994); *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957).

See also Riparian Rights - Own to Thread of Stream, Riparian Rights Thread of Channel, and Definition - Thread of the Channel.

Riparian Rights - Thread of the Channel

Under Nebraska law, establishment of boundaries and the thread of the river is not based on the "Geographical Center Line" unless agreed by the parties. *Cofer v. Kuhlmann*, 214 Neb. 341, 33 N.W.2d 905 (1983).

"The thread or center of a channel, as the term is above employed, must be the line which would give to the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow." *Hardt v. Orr,* 142 Neb. 460, 6 N.W.2d 589 (1942); *Higgins v. Adelson,* 131 Neb. 820, 270 N.W. 502 (1936).

Riparian Rights - Upstream Use of Water

"It is generally held that a riparian owner may restore to its former channel a stream which has formed a new channel upon his land, providing he does so within a reasonable time after the new channel is formed, and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part.... The time within which a stream may be restored to its original channel does not depend upon a statute of limitations but upon whether the public have acted with justification on the belief that the change was to be permanent, and have made changes in their property in reliance on that belief." *Whipple v. Nelson,* 143 Neb. 286, 9 N.W.2d 288 (1943); *Johnk v. Union P. R. Co.*, 99 Neb. 763, 157 N.W. 918 (1916).

Where upper riparian landowner and predecessor in title of lower riparian landowner, by agreement, changed channel of stream under circumstances that showed an intent on their part as adjoining landowners that new channel should thereafter be course of the stream, and successor in title likewise accepted such condition, and the old channel gradually filled up with silt, and was, in places, filled in and leveled off by upper riparian owner, and both parties farmed over old creek bed for a number of years, upper riparian owner was "estopped" from restoring water into its former channel. *Whipple v. Nelson,* 143 Neb. 286, 9 N.W.2d 288 (1943).

In *Wasserburger v. Coffee*, 180 Neb. 569, 144 N.W.2d 209 (1966), the Nebraska Supreme Court held that the plaintiffs, who were lower riparian owners, were entitled to sufficient flow to provide watering capacity for the number of cattle that could normally be pastured on riparian lands, and granted an injunction to prohibit diverting water for irrigation purposes. The court applied factors taken from the Restatement of Torts including (1) the character of the interest protected, (2) the public interest, (3) the relative adequacy to the plaintiff of an injunction or other remedies, and (4) the relative hardship likely to result to the defendant and the plaintiff. The court has been severely criticized for using these factors favoring domestic purposes, although it is likely from the holding in *Brummond v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969), that the court's intention was to apply these criteria solely to this factual situation.

In *Brummond v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969), the plaintiff, a downstream stock waterer with no apparent riparian rights, sued to halt construction of a dam by defendants holding valid water storage permits. The court held that the plaintiff's right to use water for domestic purposes was superior to the defendants state permit to impound

water. However, this right was not strong enough to justify an injunction. The court held that the plaintiff's right to use the water for domestic purposes is superior to the defendant's right to construct a dam.

A dam may be constructed and maintained across a stream by a riparian proprietor provided that it does not appreciably diminish the amount of water which should naturally flow onto or by the land of lower proprietors, or materially affect the continuity of the flow. 56 Am. Jur., *Waters*, § 27, p. 517 The plaintiff bears the burden of proof to establish that the upper proprietor will cause damage by an unreasonable use of the waters of the stream. 93 C. J. S., *Waters*, § 37g, p. 678, § 36(9), p. 666.

The owner of a dam may abandon his or her prescriptive right to overflow the land and may also return the river to its natural state by removing or destroying the dam. *Kiwanis Club Found. v. Yost*, 179 Neb. 598, 139 N.W.2d 359 (1966).

Road Width

"The extent and nature of an easement is determined from the use made of the property during the prescriptive period, and the width of the public highway acquired by prescription must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use, but it may be more or less than the width of a public highway as prescribed by statute." *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260 (1982)

In the General Statues of 1873, Chapter 67, Sec. 3, the width of all public roads was established with the requirement that "All county, state, and other public roads shall have a width of sixty-six feet..." *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966); *See also 1971 Att'y Gen. Op. No. 65*. This width requirement originally appeared in Chapter XLVII, Section 3, Revised Statutes of 1866 and continued to be the law until 1903, when the Section was amended, as found in c. 78, section 2, Laws of Nebraska, 1903 to read that "all public roads shall have a width of not less than 40 feet nor more than 66 feet to be determined by the County Board." This provision remained essentially the same for a number of years, and appeared in the original 1943 statutory revision as Section 39-104, R.S. 1943. Then a substantial recodification of the highway laws occurred and in c. 155, Art. IV, Section 2(2)(a), Laws of Nebraska 1957, provided that the right-of-way for county roads should be of such width as was deemed necessary by the County Board. *1971 Att'y Gen. Op. No. 65*. This provision is still found in Section 39-1702 of the Nebraska Revised Statutes.

"Extent," within the term extent of easement claimed in land as right-of-way for a road, means the width. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel. *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260

(1982); *State ex rel. Game, Forestation & Parks Comm'n*, 168 Neb. 805, 97 N.W.2d 535 (1959).

'If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel.' *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966); (quoting, *State ex rel. Game, Forestation & Parks Comm'n v. Hull*, 168 Neb. 805, 97 N.W.2d 535 (1959)).

In *Bredehoft v. County of Platte*, 167 Neb. 603, 94 N.W.2d 18 (1959), the owners of land adjoining a public highway regularly established by the county in 1895 under the statute then in effect, requiring all public roads to be 66 feet wide, could not acquire any prescriptive right to any portion of roadway adverse to the county, regardless of the maintenance of fences so as to enclose a portion of the roadway with adjoining land.

See also Dedication - Width of Dedication.

State Survey Record Repository

A survey which had not been filed in the survey record repository within 90 days of completion of survey, as required by statute for records of survey to be official, would not be considered official record of survey or afforded legal presumption that it was evidence of facts stated within survey. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). Neb.Rev.St. Sec. 81-8,122.01 (Cum. Supp. 1986).

Trespass

To bring an action in trespass, the complaining party must have had title or legal possession of the land when the acts complained of were committed. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994); *Flobert Indus. v. Stuhr*, 216 Neb. 389, 343 N.W.2d 917 (1984). *See also Franz v. Nelson*, 183 Neb. 137, 158 N.W.2d 606 (1968); *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984) (holding that plaintiffs were not entitled to damages for trespass because plaintiffs failed to prove ownership by adverse possession).

The party bringing a trespass action has the burden of establishing that he had title or possession of the property before he can proceed with his trespass action. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). *See Flobert Indus. v. Stuhr*, 216 Neb. 389, 343 N.W.2d 917 (1984) (addressing ownership issue before considering the trespass action).

Plaintiffs were not entitled to any damages alleged to have been sustained as a result of trespass on disputed tract by defendants inasmuch as their recovery depended on a title to tract which plaintiffs did not have. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984).

Land contract purchaser who placed fence posts outside fence line, on disputed strip to which adjoining landowners had acquired title by adverse possession, was required to pay cost of filling in potholes and returning land to its former condition. *Horkey v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983). *See also Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983); *Wiedeman v. James E. Simon Co., Inc*., 209 Neb. 189, 307 N.W.2d 105 (1981); *George Rose Sodding & Grading Co., Inc. v. City of Omaha*, 187 Neb. 683, 193 N.W.2d 556 (1972), *appeal on remand* 190 Neb. 12, 205 N.W.2d 655 (1973).

County cannot, even under applicable statutes, open section line road without giving notice to landowners, hearing the landowners claim for damages, or appointing appraisers and making provisions for payment of landowners' damages, and if it attempts to do so it is a trespasser. *Breiner v. Holt County*, 7 Neb.App. 132, 581 N.W.2d 89 (1998); *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260 (1982); *Scotts Bluff County v. Tri-State land Co.*, 93 Neb. 805, 142 N.W. 296 (1913); *Henry v. Ward*, 49 Neb. 392, 68 N.W. 518 (1896); *Chicago, B. & Q. R. Co. v. Douglas County*, 1 Neb. (Unoff.) 247, 95 N.W. 339 (1901).

The Department of Roads has authority to enter upon any property to make surveys. *State v. Merritt Brothers Sand & Gravel Co.*, 180 Neb. 660, 144 N.W.2d 180 (1966).