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Odegaard vs. Craig: A Comment

Robert E. Beck

ODEGAARD VS. CRAIG*: A COMMENT

ROBERT E. BECK**

In 1965 this author wrote: "Hopefully in future cases on boundary problems the North Dakota Supreme Court will focus on the need for assisting in the practical location of boundaries."[1] The December, 1966, decision in *Trautman v. Ahlert*[2] dealt a severe blow to this hope; and the September, 1969, decision in *Odegaard v. Craig*,[3] has pretty much eliminated it. Not only did the court in *Trautman* and *Odegaard* not focus on such a need, but it seemed by implication to reject the notion. *Odegaard* will be the focal point of this comment as it is the most recent.

Odegaard dealt with adverse possession at the trial level, and apparently counsel raised the question of "acquiescence" for the first time on appeal. Acquiescence is an important doctrine relating to the practical location of boundaries. In handling that proffer the court in its entire discussion of acquiescence said only:

> The issue of establishment of the boundary line between the northeast quarter and the southeast quarter by acquiescence of the parties was not raised or considered in the trial court. It cannot be raised for the first time on appeal. This rule is elementary.
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> Remmick v. Mills, 165 N.W.2d 61 (N. D. 1969).
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> If it may be argued that the issues of acquiescence and adverse possession are so nearly identical that the consideration of either issue in the lower court should permit the other to be raised on appeal, it is our opinion that nothing short of acquiescence for the statutory period required for acquisi-

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* 171 N.W.2d 133 (N.D. 1969).

** Professor of Law, University of North Dakota School of Law; LL.B. University of Minnesota; LL.M. New York University.

1. Beck, *Boundary Litigation and Legislation in North Dakota*, 41 N.D. L. REV. 424, 470 (1965). The classic article on the subject still is Browder, *The Practical Location of Boundaries*, 56 MICH. L. REV. 487 (1958). "The term 'practical location' is used in this discussion as a generic term to refer to the several rules, other than adverse possession, which have been announced for the determination of boundaries on the ground." *Id.* at 489-90.
2. 147 N.W.2d 407 (N.D. 1966). *See* the discussion *infra* at note 20.
3. 171 N.W.2d 133 (N.D. 1969).

tion of title by adverse possession will establish a boundary line by acquiescence.

Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185.

Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243.[4]

The first paragraph of the court's response appears to be justified by previous authority, particularly since acquiescence needs factual data to support its existence, and a defendant should have the opportunity to offer evidence addressed to that issue.[5] It is the second paragraph that presents great difficulties.

In a 1965 article, this author discussed the confused status of the North Dakota law on acquiescence and the need for clarification.[6] Now, at first glance, the statement in *Odegaard* does appear to clarify at least the question of the time period needed for acquiescence. The court says it is to be ". . . the statutory period required for acquisition of title by adverse possession. . . ."[7] But which adverse possession statutory period? North Dakota has two, one for 10 years[8] and one for 20 years.[9] Probably a stronger case can be made for the 20 year statute. It is the only one mentioned in *Odegaard*,[10] in *Bernier*,[11] and in *Trautman*.[12] Neither statute is referred to in *Bichler*.[13] Then too, payment of taxes which must accompany the 10 year statutory claim[14] seems more applicable to adverse possession of an entire tract than to a disputed area between two tracts. But the fact remains that North Dakota has two statory adverse possession periods.

And certainly the introductory "if it may be argued that" phraseology to this one-sentence paragraph does nothing to clarify the law. While many jurisdictions consider the basis for acquiescence to be prescription rather than a form of practical location of boundaries, the difference between adverse possession and acquiescence seems to be suggested by the very terms themselves.

'Adverse' possession suggests an element of hostility. 'Ac-

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4. *Id.* at 137.
5. *See* Remmick v. Mills, 165 N.W.2d 61, 68 (N.D. 1968).
6. Beck, *supra* note 1, at 463-70.
7. 171 N.W.2d at 137.
8. N.D. CENT. CODE § 47-06-03 (1960).
9. N.D. CENT. CODE § 28-01-04 (1960).
10. 171 N.W.2d 133 (N.D. 1969).
11. 60 N.D. 549, 236 N.W. 243 (1931).
12. 147 N.W.2d 407 (N.D. 1966).
13. 63 N.D. 295, 248 N.W. 185 (1933).
14. A title to real property, vested in any person who has been or hereafter shall be, either alone or including those under whom he claims, in the actual open adverse and undisputed possession of the land under such title for a period of ten years and *who*, either alone or including those under whom he claims, *shall have paid all taxes and assessments legally levied thereon*, shall be valid in law. Possession by a county under tax deed shall not be deemed adverse. A contract for deed shall constitute color of title within the meaning of this section from and after the execution of such contract.
N.D. CENT. CODE § 47-06-03 (1960) (Emphasis added).

> quiescence' suggests an element of consent. When one whose land is being claimed under adverse possession says to the claimant, 'You are wrongfully occupying my land', he may be assisting the claimant, for the statement helps show the 'hostile' element. On the other hand, such a statement may well defeat a claimant who is relying on acquiescence, for it negates consent.[15]

One would have hoped that with the unclear state of the North Dakota law on the subject, the court in any new pronouncement would have explored the underlying policy and rationale of the general concept before it proceeded to attempt settling even any portion of the law (here the time period required) on that subject.

The court in *Odegaard* did cite two North Dakota cases[16] in support of its adverse possession time period decision. Neither of these cases, nor both together, require a conclusion that the period for acquiescence is that of adverse possession.[17] In one, the court stated that "[t]he evidence shows that the original grantor claimed the grantee had fenced in too much land."[18] This alone may have been sufficient to negate the implication of consent necessary for the doctrine of acquiescence to apply and thus have served as the basis for the decision. In the other, the period involved appears to have been in excess of thirty years.[19] For the court there to have said that 20 were required would have been *dictum*. And anyway, it is not clear that the court said that 20 were required. Nor does the 1966 *Trautman* case,[20] which the court did not bother to cite in *Odegaard*, require that conclusion, for it can be explained on a strict adverse possession basis. Perhaps it was not cited because the court recognized that it did not require this conclusion. Or per-

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15. Beck, *supra* note 1, at 466.
16. Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933); Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931).
17. *See generally*, the discussion of these two cases in Beck, *supra* note 1, at 467-70. That discussion will not be repeated here.
18. Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185, 190 (1933).
19. Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931).
20. 147 N.W.2d 407 (N.D. 1966). In *Trautman* two boundary lines were at issue; the court stated in support of its decision in favor of the defendant on one boundary that

> . . . during all of this period of time defendant had been in possession which was hostile and under a claim of right actual, open, notorious, exclusive, continuous, and uninterrupted.

Id. at 412. This is certainly traditional adverse possession language and could have explained the decision on a straightforward adverse possession basis. But the Court continued:

> Acquiescence in a boundary line is binding on the parties thereto and those claiming under them, and where successive adverse occupants hold in privity with each other under the same claim of title, the time limit for maintaining an action may be computed by the last occupants from the date the cause of action accrued against the first adverse user.
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> * * * *
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> We are of the opinion that the boundary line between the Southeast Quarter of Section 9 and the Southwest Quarter of Section 9 was established by acquiescence of the parties and their predecessors and grantors.

Id. For each paragraph the Court cited *Bernier*.

haps the court did not review all of the material available in North Dakota on North Dakota acquiescence law; and one begins to wonder what good it does to analyze the law, to present clouded issues, and to urge clarification by way of law review articles, for example, if it falls on deaf ears or no ears at all.

In recent years the court has given us many good examples of how to approach unclear but important issues. These include *Perry v. Erling*,[21] in which the court explored some of the policy underlying doctrines related to accretion. More recently, in *Lembke v. Unke*,[22] the court went so far as to overturn an early North Dakota Supreme Court decision on the doctor-patient privilege after a thorough analysis of the policy involved. And see *In re Estate of Jensen*,[23] where the court found unconstitutional that section of the North Dakota Century Code that treated illegitimate children different from legitimate children. These cases demonstrate sound judicial practices, and it is unfortunate that the same practices were not followed in *Odegaard* on another important topic. Perhaps the lapse in *Odegaard* is so much more noticeable because of the quality we have become used to through cases such as *Perry, Lembke,* and *Jensen.*

The case series of *Bernier, Bichler, Trautman* and *Odegaard* represent a good example of bad decision making. The sum and substance of the nonanalysis process involved in these cases seems to be that North Dakota is committed to a doctrine of acquiescence based on a theory of analogy to adverse possession. This may well have rendered relatively ineffective an otherwise powerful weapon in the practical location of boundaries arsenal.

21. 132 N.W.2d 889 (N.D. 1965). While the ultimate rationale adopted may be questioned, *see* Beck, *supra* note 1, at 446-50, the analytical approach of the Court is commendable.

22. Lembke v. Unke, 171 N.W.2d 837 (N.D. 1969), two justices dissenting.

23. 162 N.W.2d 861 (N.D. 1968), discussed in Heckman, *The Treatment of Some Traditional Problems of Intestate Succession in the North Dakota Century Code,* 45 N.D. L. REV. 465, 475-78 (1969).

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