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THE PRACTICAL LOCATION OF BOUNDARIES

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EARLY in the development of the common law of conveyancing, as everyone knows, the practice of physically consummating a conveyance by acts on the land itself was abandoned in favor of the more flexible and convenient devices authorized or required by the Statute of Uses and the Statute of Frauds. Now we do it all on paper and consummate the transaction at any convenient place. One of the requirements of this process is to make clear what land is being conveyed. So we describe the land on paper in one of the several ways which have been approved for this purpose. The courts, with admirable liberality, have not specified that any particular sort of description is required, but only that it shall be possible, in some lawsuit brought for the purpose, for a court to decide, from the language used and perhaps from certain other extrinsic matter, just where the land described is located. But these more civilized refinements may have lost something of value which was of the essence of the cruder feoffment. And thereby hangs a tale which, by your leave, I mean to tell in this space.

The rub comes in the unquestioned assumption that when you have done what is mentioned above you have done all that needs to be done for the expeditious, peaceable, and conclusive transaction of this sort of business. A paper description will be enough, to be sure, to tell you in a general way where your land lies. But anyone at all familiar with litigation over boundaries will know that, for a variety of reasons, few if any of these descriptions admit of a single and precise application to the ground. It is this hiatus in our conveyancing practice between a deed describing land and the actual location on the ground of the boundaries described which causes most of our trouble over boundaries.

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How is this gap to be bridged? The proper time to bridge it is at the time of a conveyance. But under existing practices this is rarely done. What, then, is the situation of adjoining landowners whose respective deeds are consistent on paper? Either they are left without precise knowledge of their boundaries or, what is worse, their only way to a certain resolution of their doubts is by means of litigation. And even this may not be conclusive, but only the substitution of a paper decree for a paper description, leaving the gap still unbridged. All that such parties usually want is to know their boundaries, and at the beginning of their inquiry they are usually amicably inclined. Someone may tell them to have their lands surveyed, but of course this alone settles nothing. They do not want to quarrel about it, but we must tell them that if they want to be sure, they must begin a long and costly process which, if they are not quarreling at the beginning, will leave them quarreling at the end. If the consequences of these conditions have not been as deplorable as might be expected, the explanation no doubt lies in the fact that most people live out their lives not knowing their precise boundaries and not caring. But there are times when a matter of inches or of feet becomes a matter of some importance, which is usually when one of the parties proposes to make some improvement of his property.

In certain long-settled areas boundary troubles are rare. So it is in England, which may be explained in part by the fact that most land-holdings are marked by fences, hedges, or walls of long standing and acceptance as boundaries. Much of our country, on the other hand, has not yet reached such a stabilized condition, and the continuing processes of subdivision in a rapidly growing society have sorely aggravated the problems inherent in our system of conveyancing.

It is not surprising that under the circumstances mentioned parties will try to take their boundary problems into their own hands. Nor is it surprising that the American courts have been disposed to give legal sanction to such private arrangements in the furtherance of a declared policy of quieting peaceable possession and discouraging litigation.

A traditional method for accomplishing such an objective is the doctrine of adverse possession. But the courts have not been willing to confine adjoining landowners to that doctrine. They have sought rather to evolve some principle which would bind such parties to a private, mutual designation of a boundary on

the ground so as to preclude any further question over its proper location. Not fully recognizing that the problem is probably *sui generis,* the courts have sought to adapt to their purpose several disparate existing doctrines. This has led to disagreement and misunderstanding of the nature of the problem or the legal theory or theories which would adequately explain or support judicial action. Vagueness of theory has led in turn to vagueness and disagreement on the facts which will merit judicial recognition. The result has been the growth of a gnarled and hoary knot upon this branch of the law of property. One who seeks to work his way into the core is tempted simply to lay bare a cross-section of the mass for the exercise of students of legal method. But after more than a century of judicial groping through upwards of a thousand cases, without the benefit of any comprehensive legal scholarship beyond that which the courts themselves could afford, it is high time that someone attempted a survey of the cases, together with some definitive legal analysis. The reader should know that, in my effort to do this in an article of acceptable extent, it has been necessary to skim off for the footnotes only a small illustrative fraction of the mass of cases. He should be warned further of the dangers of deception inherent in such an undertaking. At this time I am able merely to spread before him the various solutions which have been offered to the problem, some of their ramifications, and some comment upon them. It will not do to assume that the cases cited represent the law in any of the respective jurisdictions, for in many of them other cases can be found which qualify or are inconsistent with those cited. This suggests that any adequate appraisal of this law for the benefit of practitioners should include a survey of the cases on a state-by-state basis. Such a survey cannot be made at this time.

No examination of the law of adverse possession in relation to boundary problems will be made, except to the extent required for an adequate analysis of other related doctrine. Nor is it necessary to do more than mention the undisputed recognition of the practical location of boundaries as evidence of their proper location where the applicable description is ambiguous.[1] The term "practical location" is used in this discussion as a

[1] E.g., Day v. Stenger, 47 Idaho 253, 274 P. 112 (1929); Mt. Carmel v. McClintock, 155 Ill. 608, 40 N.E. 829 (1895); Magoon v. Davis, 84 Me. 178, 24 A. 809 (1892); Lovejoy v. Lovett, 124 Mass. 270 (1878); Lundgreen v. Stratton, 73 Wis. 659, 41 N.W. 1012 (1889).

generic term to refer to the several rules, other than adverse possession, which have been announced for the determination of boundaries on the ground.

I. PAROL AGREEMENT

It has been recognized by a majority of American courts that the determination of a boundary by what is called an oral "agreement" between adjoining landowners will, according to various standards, become binding on them,[2] and perhaps also on their successors in interest.[3] The most obvious and orthodox example of this is the settlement of a boundary dispute by an agreement in the nature of an arbitration agreement. Evidently, however, not much use has been made of this device. It presupposes the compromise of a dispute and an express or implied agreement to be bound by the award,[4] which in these cases will probably take the form of a designation of the boundary on the ground by the person chosen for this purpose. Some arbitration agreements

2 *Arkansas:* Havlik v. Freeman, 214 Ark. 761, 218 S.W. (2d) 364 (1949); *California:* Young v. Blakeman, 153 Cal. 477, 95 P. 888 (1908); *Connecticut:* Rathbun v. Geer, 64 Conn. 421, 30 A. 60 (1894); *Delaware:* Lindsay v. Springer, 4 Harr. (Del. Super.) 547 (1848); *Florida:* Watrous v. Morrison, 33 Fla. 261, 14 S. 805 (1894); *Georgia:* Bunger v. Grimm, 142 Ga. 448, 83 S.E. 200 (1914); *Idaho:* Paurley v. Harris, 75 Idaho 112, 268 P. (2d) 351 (1954); *Illinois:* Ginther v. Duginger, 6 Ill. (2d) 474, 129 N.E. (2d) 147 (1955); *Indiana:* Horton v. Brown, 130 Ind. 113, 29 N.E. 414 (1891); *Iowa:* Kitchen v. Chantland, 130 Iowa 618, 105 N.W. 367 (1906); *Kansas:* Steinhilber v. Holmes, 68 Kan. 607, 75 P. 1019 (1904); *Kentucky:* Garvin v. Threlkeld, 173 Ky. 262, 190 S.W. 1092 (1917); *Louisiana:* Griffin v. Mahoney, (La. App. 1951) 56 S.W. (2d) 208; *Michigan:* Hanlon v. Ten Hove, 235 Mich. 227, 209 N.W. 169 (1926); *Minnesota:* Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740 (1893); *Mississippi:* Archer v. Helm, 69 Miss. 730, 11 S. 3 (1892); *Missouri:* Journey v. Vikturek, 8 S.W. (2d) 975 (1928); *Montana:* Box Elder Livestock Co. v. Glynn, 58 Mont. 561, 193 P. 1117 (1920); *Nebraska:* Lynch v. Egan, 67 Neb. 541, 93 N.W. 775 (1903); *New Hampshire:* Gray v. Berry, 9 N.H. 473 (1838); *New Mexico:* Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912); *New York:* Vosburgh v. Teator, 32 N.Y. 561 (1865); *North Dakota:* Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933); *Ohio:* Bobo v. Richmond, 25 Ohio St. 115 (1874); *Oregon:* Lennox v. Hendricks, 11 Ore. 33, 4 P. 515 (1883); *Pennsylvania:* Perkins v. Gay, 3 Serg. & R. (Pa.) *327 (1817); *Rhode Island:* Aldrich v. Brownell, 45 R.I. 142, 120 A. 582 (1923); *South Carolina:* Davis v. Elmore, 40 S.C. 533, 19 S.E. 204 (1893); *Tennessee:* Houston v. Matthews, 9 Tenn. 116 (1826); *Texas:* Bailey v. Baker, (Tex. Civ. App. 1893) 23 S.W. 454; *Utah:* Warren v. Mazzuchi, 45 Utah 612, 148 P. 360 (1915); *Vermont:* Burnell v. Maloney, 39 Vt. 579 (1867); *Washington:* Egleski v. Strozyk, 121 Wash. 398, 209 P. 708 (1922); *West Virginia:* Gwynn v. Schwartz, 32 W. Va. 487, 9 S.E. 880 (1889); *Wisconsin:* Peters v. Reichenbach, 114 Wis. 209, 90 N.W. 184 (1902). See dicta, *South Dakota:* Wood v. Bapp, 41 S.D. 195 at 209, 169 N.W. 518 (1918); *Wyoming:* Carstensen v. Brown, 32 Wyo. 491 at 500, 236 P. 517 (1925). In the following cases the acceptability of boundary agreements is not made entirely clear: *Maine:* Bemis v. Bradley, 126 Me. 462, 139 A. 593 (1927); *Oklahoma:* Lake v. Crosser, 202 Okla. 582, 216 P. (2d) 583 (1950).

3 See Part V, "Status of Subsequent Purchasers" infra.

4 Pionke v. Washburn, 176 Wis. 417, 186 N.W. 1012 (1922).

which have been upheld have been in writing.[5] In Massachusetts, where the submission was to referees under a rule of court, the awards were held binding,[6] but otherwise an oral submission was not binding.[7] Although there is other authority to the same effect,[8] oral submissions have been upheld.[9] It is said that the Statute of Frauds is not a bar because the undertaking does not create new rights, but only establishes existing ones.[10]

The great mass of judicially enforced boundary agreements, however, have not involved anything like a submission to arbitration. It is the conduct of the parties themselves, rather than that of an arbitrator, which fixes the boundary. The nature and circumstances of such agreements are without exact parallel or clear analogy elsewhere in the law. The requirements which the courts have laid down for them relate, for the most part, either to the pre-existing conditions out of which an agreement can be made or to the acts which must follow the agreement if it is to affect a boundary. Very little has been said about what facts will constitute the agreement itself.

The Requirement of Uncertainty

It is a universally accepted requirement that no binding agreement can be made unless it is made to resolve an "uncertainty" regarding the location of a boundary. This requirement is variously phrased in terms of the boundary being uncertain, unascertained, unsettled, doubtful, indefinite, or that there is an "honest difficulty"[11] or "room for controversy."[12] But what or who must be uncertain? Is the reference made to an objective state of facts or to the state of mind of the parties? Acceptance of the former criterion is indicated by statements

[5] Forguson v. Newton, 212 Ky. 92, 278 S.W. 602 (1925); Gaylord v. Gaylord, 48 N.C. 367 (1856); Rottman v. Toft, 187 Wis. 558, 204 N.W. 585 (1925). Cf. Wilson v. Stork, 171 Wis. 561, 177 N.W. 878 (1920), which seems to hold that a mistake in the survey vitiates its effect.

[6] Searle v. Abbe, 79 Mass. 409 (1859); Goodridge v. Dustin, 46 Mass. 363 (1842).

[7] Whitney v. Holmes, 15 Mass. 152 (1818).

[8] Camp v. Camp, 59 Vt. 667 (1887).

[9] Smith v. Seitz, 87 Conn. 678, 89 A. 257 (1914); Jones v. Dewey, 17 N.H. 596 (1845); Bowen v. Cooper, 7 Watts (47 Pa.) 311 (1838). The following were arbitration cases in fact, although the courts did not treat them strictly on that basis: Box Elder Livestock Co. v. Glynn, 58 Mont. 561, 193 P. 1117 (1920); Vosburgh v. Teator, 32 N.Y. 561 (1865).

[10] Smith v. Seitz, 87 Conn. 678, 89 A. 257 (1914).

[11] Smith v. Hamilton, 20 Mich. 433 (1870).

[12] Shiver v. Hill, 148 Ga. 616, 97 S.E. 676 (1918).

that a boundary is certain which can be made certain,[13] or is readily ascertainable,[14] or that the requirement is not met if the parties made no effort to find the line;[15] or, if a line is marked on the ground, mere doubt about it is not enough.[16] One court said that a line is not uncertain merely because it had never been run.[17] Another even seems to require that the uncertainty must appear from the face of a deed or from an attempt by survey to apply the description to the ground.[18] These courts are not conscious of the illusory nature of an objective standard of uncertainty where a boundary has not been judicially established. Other courts are equally insistent that the requirement is met even though the line is alleged to be readily ascertainable,[19] or because its ascertainment would entail considerable trouble and expense.[20] One court recently said that the requirement is merely that the parties not know where the true line is.[21] In the great majority of the cases the requirement is merely stated in terms of one or more of the various labels, with perhaps a finding that the requirement was satisfied in the particular case, but without any effort to explain what is meant by it.[22]

There is some indication that the uncertainty requirement is imposed to supply consideration for a boundary agreement. As in the case of an agreement for arbitration, consideration exists where there is a dispute about a boundary which the agreement is intended to resolve. Indeed there are a few cases which indicate that nothing less than a dispute will suffice to support a boundary agreement.[23]

13 Meacci v. Kochergen, 141 Cal. App. (2d) 207, 296 P. (2d) 573 (1956).

14 Cienki v. Rusnak, 398 Ill. 77, 75 N.E. (2d) 372 (1947); George v. Collins, 72 W. Va. 25, 77 S.E. 356 (1913).

15 Skinner v. Francisco, 404 Ill. 356, 88 N.E. (2d) 867 (1949); Lennox v. Hendricks, 11 Ore. 33, 4 P. 515 (1883).

16 Lewallen v. Overton, 28 Tenn. 76 (1848).

17 Burnell v. Maloney, 39 Vt. 579 (1867).

18 Elofrson v. Lindsay, 90 Wis. 203, 63 N.W. 89 (1895); Hartung v. Witte, 59 Wis. 285, 18 N.W. 175 (1884).

19 Galbraith v. Lunsford, 87 Tenn. 89 (1888); Harn v. Smith, 79 Tex. 310, 15 S.W. 240 (1891); Willie v. Local Realty Co., 110 Utah 523, 175 P. (2d) 718 (1946).

20 Lynch v. Egan, 67 Neb. 541, 93 N.W. 775 (1903).

21 Madera School District v. Maggiorini, 146 Cal. App. (2d) 390, 303 P. (2d) 803 (1956). Cf. Hunt v. Devling, 8 Watts (48 Pa.) 403 (1839).

22 Cf. Klaar v. Lemperis, (Mo. 1957) 303 S.W. (2d) 55, where the court said that the parties were not uncertain, and the only doubt was in the mind of a prospective purchaser from one of them.

23 Brock v. Muse, 232 Ky. 293, 22 S.W. (2d) 1034 (1929); De Long v. Baldwin, 111 Mich. 466, 69 N.W. 831 (1897); Le Comte v. Freshwater, 56 W. Va. 336, 49 S.E. 238 (1904); Hartung v. Witte, 59 Wis. 285, 18 N.W. 175 (1884).

Most courts, however, seem to be more concerned with the requirements of the Statute of Frauds than the need for consideration. There is no appreciable authority for allowing adjoining landowners to adjust or alter their boundaries by oral agreement. It is generally agreed, therefore, that if the parties, or one of them, "know" where the true line is,[24] or, not knowing, they know that their agreed line is not the true line,[25] their agreement is not valid.[26] A disputed boundary, on the other hand, can be the basis for a valid agreement, by analogy to an arbitration agreement, which, as indicated above, is not regarded as constituting a conveyance of any land. In like manner, most courts are willing to uphold an agreement which does not resolve a boundary dispute, provided that it does resolve a pre-existing uncertainty about a boundary. But any arrangement between the parties which has the effect of fixing a line different from that which a proper application of their title papers would require is in a sense an informal transfer of land. What is the ultimate test for distinguishing between a transaction which falls under the Statute of Frauds and one which the courts will sustain as a boundary agreement? No clear definition of the present requirement will be possible until a clearer picture emerges of the nature of this unusual sort of transaction, and until the pervading effects of what may be called the "mistake rule" have been examined.

Post-Agreement Requirements

Most of the courts which recognize boundary agreements insist that certain circumstances must exist following an agreement before it can be regarded as binding, or determinative of the boundary. But the courts are not agreed on the nature of such circumstances, and they are vague about the reasons for requiring

[24] Lewis v. Ogram, 149 Cal. 505, 87 P. 60 (1906); Smith v. Lanier, 199 Ga. 255, 34 S.E. (2d) 91 (1945); Kunkle v. Clinkingbeard, 66 Idaho 493, 162 P. (2d) 892 (1945); Wright v. Hendricks, 388 Ill. 431, 58 N.E. (2d) 453 (1944); Peterson v. Hollis, 90 Kan. 655, 136 P. 258 (1913); Duff v. Turner, 201 Ky. 501, 256 S.W. 1105 (1923); Thoman v. Gross, 148 Mich. 505, 112 N.W. 111 (1907); Volkart v. Groom, (Mo. 1928) 9 S.W. (2d) 947. *Contra:* Tate v. Foshee, 117 Ind. 322, 20 N.E. 241 (1889). Cf. Gray v. Berry, 9 N.H. 473 (1838), where a second agreement was allowed to supersede a prior agreement.

[25] Loverkamp v. Loverkamp, 381 Ill. 467, 45 N.E. (2d) 871 (1942); Voigt v. Hunt, (Tex. Civ. App. 1914) 167 S.W. 745.

[26] *Contra:* Bobo v. Richmond, 25 Ohio St. 115 (1874). See Stutsman v. State, 67 N.D. 618 at 624, 275 N.W. 387 (1937). But note that the Ohio court requires acquiescence for the statutory period after an agreement. In the Bobo case it was indicated that the result was one of estoppel.

them. In several cases it is indicated, but not beyond doubt, that such an agreement is binding when made.[27] A number of courts have held that such agreements are binding if "executed" by physical manifestations of the agreement on the ground.[28] Execution will often take place by the erection of a fence, but other acts, including a change of possession, will suffice. A still larger body of authority requires that the agreement be followed by acquiescence in it or possession consistent with it for an undefined period of time which, however, may be less than the period of the statute of limitations for adverse possession.[29] At the other end of the spectrum are the views of the Ohio[30] and possibly the Washington[31] courts that a boundary agreement becomes binding only after acquiescence in it for the statutory period; or the position of the Wisconsin court, asserting a special sort of estoppel and requiring that valuable improvements be made in reliance on the agreement.[32] Account should be taken of the blurring effect of other cases, if the emphasis is placed on the facts of those cases rather than on the language of the courts. Cases which state no requirement of acquiescence, for example, or permit acquiescence for less than the statutory period, may show in fact that there was

[27] Davis v. Elmore, 40 S.C. 533, 19 S.E. 204 (1893); Houston v. Matthews, 9 Tenn. 116 (1826). Cf. Wilson v. Hudson, 16 Tenn. 398 (1835); Davis v. Jones, 40 Tenn. 603 (1859).

[28] Lindsay v. Springer, 4 Harr. (Del. Super.) 547 (1848); Bunger v. Grimm, 142 Ga. 448, 83 S.E. 200 (1914); Tate v. Foshee, 117 Ind. 332, 20 N.E. 241 (1889); Garvin v. Threlkeld, 173 Ky. 262, 190 S.W. 1092 (1917); Journey v. Vikturek, (Mo. 1928) 8 S.W. (2d) 975; Lynch v. Egan, 67 Neb. 541, 93 N.W. 775 (1903); Gray v. Berry, 9 N.H. 473 (1838); Bowen v. Cooper, 7 Watts (47 Pa.) 311 (1838); Aldrich v. Brownell, 45 R.I. 142, 120 A. 582 (1923); Bailey v. Baker, (Tex. Civ. App. 1893) 23 S.W. 454; Gwynn v. Schwartz, 32 W. Va. 487, 9 S.E. 880 (1889). Archer v. Helm, 69 Miss. 730, 11 S. 3 (1892), may be in accord, but it is not clear whether the agreement is executed upon taking possession, or whether such possession must continue for some period.

[29] Havlik v. Freeman, 214 Ark. 761, 218 S.W. (2d) 364 (1949); Watrous v. Morrison, 33 Fla. 261, 14 S. 805 (1894); Paurley v. Harris, 75 Idaho 112, 268 P. (2d) 351 (1954); Ginther v. Duginger, 6 Ill. (2d) 474, 129 N.E. (2d) 147 (1955); Kitchen v. Chantland, 130 Iowa 618, 105 N.W. 367 (1906); Steinhilber v. Holmes, 68 Kan. 607, 75 P. 1019 (1904); Griffin v. Mahoney, (La. App. 1951) 56 S. (2d) 208; Hanlon v. Ten Hove, 235 Mich. 227, 209 N.W. 169 (1926); Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740 (1893); Box Elder Livestock Co. v. Glynn, 58 Mont. 561, 193 P. 1117 (1920); Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912); Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933); Lake v. Crosser, 202 Okla. 582, 216 P. (2d) 583 (1950); Lennox v. Hendricks, 11 Ore. 33, 4 P. 515 (1883). See Wood v. Bapp, 41 S.D. 195 at 210, 169 N.W. 518 (1918). The following may be to the same effect, although the courts have not made themselves entirely clear on the point: Cavanaugh v. Jackson, 91 Cal. 580, 27 P. 931 (1891); Knowles v. Toothaker, 58 Me. 172 (1870); Vosburgh v. Teator, 32 N.Y. 561 (1865); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925). Cf. Loustalot v. McKeel, 157 Cal. 634, 108 P. 707 (1910).

[30] Bobo v. Richmond, 25 Ohio St. 115 (1874).

[31] Egleski v. Strozyk, 121 Wash. 398, 209 P. 708 (1922).

[32] Peters v. Reichenbach, 114 Wis. 209, 90 N.W. 184 (1902).

acquiescence for the statutory period or substantial changes of position.[33]

It is odd that several courts have indicated that a boundary agreement which becomes binding when "executed" may later be abrogated by abandonment[34] or by a later agreement.[35]

A few courts have not yet indicated what post-agreement requirements will be imposed.[36] There is almost a total lack of explanation for imposing one such requirement rather than another, or for imposing such a requirement at all.

The Nature and Theory of Boundary Agreements

The courts have prescribed certain pre-existing conditions for such agreements, as well as certain post-agreement requirements, but there is a general vagueness in the opinions about just what it is that takes place when such an agreement is made. In those few cases where the agreement is essentially one of arbitration, its essential features are obvious. But most of these transactions are not contractual in the sense of involving anything that is executory or promissory. The agreement, rather than looking to the future, refers to an existing fact, a line somehow designated on the ground, and amounts to a recognition or acceptance of that line as a boundary. Commonly such assent follows a survey, which is strikingly different from the arbitration-type of agreement, which calls for a survey or other factual determination in the future. But a survey is nowhere imposed as a requirement, and less formal or reliable bases for agreement are to be found in the cases. There is indeed some conflict, as indicated in the discussion of the uncertainty requirement, on whether the parties need make any effort to ascertain their true boundary.

Commonly the required acceptance of or assent to a line on the ground is manifested by express verbal statements by the parties. We are rarely told just what was said, but merely that the parties "agreed." There is nothing to indicate that this must

[33] Watrous v. Morrison, 33 Fla. 261, 14 S. 805 (1894); Kitchen v. Chantland, 130 Iowa 618, 105 N.W. 367 (1906); McBeth v. White, 122 Kan. 637, 253 P. 212 (1927); Shafer v. Leigh, 112 Kan. 14, 209 P. 830 (1922); Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912); Aldrich v. Brownell, 45 R.I. 142, 120 A. 582 (1923).

[34] Brummell v. Harris, 162 Mo. 397, 63 S.W. 497 (1901); Kellum v. Smith, 65 Pa. 86 (1870).

[35] Gray v. Berry, 9 N.H. 473 (1838).

[36] Horton v. Brown, 130 Ind. 113, 29 N.E. 414 (1891); Bemis v. Bradley, 126 Me. 462, 139 A. 593 (1927); Warren v. Mazzuchi, 45 Utah 612, 148 P. 360 (1915); Burnell v. Maloney, 39 Vt. 579 (1867).

be done in any particular way or at any particular time or place, or that it must be done by one party in the other's presence, or that they must do it at the same time. Clearly mutuality of assent or recognition will be insisted on.[37]

The necessary assent which is called an agreement may be manifested by conduct as well as by words.[38] In fact it is seldom that one will find parties standing on their respective parcels and, in something of the manner of a feoffment, solemnly declaring in each other's presence that they thereby accept a line on the ground as a boundary. Boundary agreements grow out of the innumerable combinations of speech and conduct to be found when parties confer or do the various acts which neighbors often do in respect to their common boundary. Such circumstances may fairly bristle with implications of intention, and it is inevitable that courts will draw inferences, or allow juries to do so, for or against the existence of an agreement. Some of the more common acts are equivocal in their significance. Such is the erection of fences or similar barriers. Since these may be built for reasons other than to mark boundaries, evidence of such other purpose will defeat an inference of agreement.[39] So also may evidence that one or both of the parties understood that the agreement was to be provisional or conditional on the existence or occurrence of some other fact.[40] Although the question has not been specifically ruled on, presumably the intention behind such equivocal acts can be proved by testimony of the parties in a lawsuit over the validity of the agreement.

Because of the legal effect given to these agreements, an obvious requirement is imposed that an agreement can affect only a common boundary between parcels owned by the parties.[41]

37 Gregory v. Jones, 212 Ark. 443, 206 S.W. (2d) 18 (1947). Cf. Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930), where, although the initial agreement was mutual the erection of a fence as required to execute it was done by one party without the knowledge of the other.

38 Ernsting v. Gleason, 137 Mo. 594, 39 S.W. 70 (1897); Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931); Pickett v. Nelson, 71 Wis. 542, 37 N.W. 836 (1888); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925).

39 Ackerman v. Ryder, 308 Mo. 9, 271 S.W. 743 (1925); Satchell v. Dunsmoor, 179 Ore. 463, 172 P. (2d) 826 (1946); Ungaro v. Mete, 68 R.I. 419, 27 A. (2d) 826 (1942); Lacy v. Bartlett, (Tex. Civ. App. 1934) 78 S.W. (2d) 219; Wood v. Webb, 148 Wash. 161, 268 P. 150 (1928).

40 Oliver v. Daniel, 202 Ga. 149, 42 S.E. (2d) 363 (1947); Krider v. Milner, 99 Mo. 145, 12 S.W. 461 (1889); Campbell Banking Co. v. Hamilton, (Tex. Civ. App. 1919) 210 S.W. 621; Railsback v. Bowers, (Mo. 1923) 257 S.W. 119, where a later survey, ignored by the parties, showed that the agreed line was not tentative.

41 Crowell v. Maughs, 7 Ill. 419 (1845), where ownership on both sides was in the

Theoretical explanation by the courts of the nature of boundary agreements rarely goes beyond answering the argument that insofar as an agreement calls for a boundary other than that which the relevant documents of title would prescribe it amounts to an oral conveyance contrary to the Statute of Frauds. Reference has already been made to the occasional assumption by the courts that boundary agreements are analogous to agreements for the arbitration of boundary disputes and for this reason they escape the requirements of the Statute of Frauds, provided the requirement of uncertainty is satisfied.[42] In view of the differences that have been noted between arbitration agreements and the more typical boundary agreements, however, there may be a question whether the enforcement of the latter is best explained in contractual terms. At any rate, about all that most courts say in answer to the argument against parol conveyances is that a proper boundary agreement does not operate by way of conveyance but only by way of defining or locating on the ground the existing titles of the parties.[43] This answer also, on first thought, may not seem sufficient, but it contains, I believe, the germ of the real explanation of what the courts are trying to do in these cases and why they are doing it, a fuller elaboration of which is offered below.[44] It may be said here that this answer at least has the practical advantage of preserving the integrity of the muniments of title. There is no need to adjust paper descriptions according to agreed locations where the latter are re-

government; Merrill v. Hilliard, 59 N.H. 481 (1879); Rogers v. White, 33 Tenn. 68 (1853).

[42] See Gibson, J, in Perkins v. Gay, 3 Serg. & R. (Pa.) *327 at *331 (1817).

[43] Hoyer v. Edwards, 182 Ark. 624, 32 S.W. (2d) 812 (1930); Berghoefer v. Frazier, 150 Ill. 577, 37 N.E. 914 (1894); Steinhilber v. Holmes, 68 Kan. 607, 75 P. 1019 (1904); Garvin v. Threlkeld, 173 Ky. 262, 190 S.W. 1092 (1917); Archer v. Helm, 69 Miss. 730, 11 S. 3 (1892); Hitchcock v. Libby, 70 N.H. 399, 47 A. 269 (1900); Gwynn v. Schwartz, 32 W.Va. 487, 9 S.E. 880 (1889).

This idea early appeared in Penn v. Lord Baltimore, 1 Ves. Sr. 444, 27 Eng. Rep. 1132 (1750), which was a portent of the problem that was to harass the American courts. A controversy arose between the heirs of William Penn and Lord Baltimore over the boundaries between "their provinces" (Pennsylvania and Maryland). An agreement had been entered providing for the settlement by drawing certain lines and directing how they were to be run and for commissioners to do the running. Specific performance of the agreement was decreed in this suit. Chancellor Hardwicke said that this controversy was "of a nature worthy of the judicature of a *Roman* senate rather than of a single judge." He also declared, "To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits." 27 Eng. Rep. at 1135.

[44] See Part VI, "The Meaning of Practical Location," infra.

garded as but practical constructions of the former.[45] There is some indication that the Iowa court believes that the Statute of Frauds is involved, but is avoided by possession in accordance with the agreement.[46]

It is scarcely surprising that someone would think of estoppel in this connection. Of course such an explanation is particularly indicated where the agreements are binding only if improvements are made in reliance upon them.[47] This is explained as a special kind of estoppel, confined to cases of this sort, and not requiring any express representations. But there are other references to estoppel where the ordinary requirements therefor are not present, and where it may be inferred that the courts were simply yielding to the common temptation to make estoppel serve to cover a lack of more precise analysis.[48]

One court was willing to bring its declared policy directly to bear without borrowing any theoretical catalysts, saying that convenience, policy, necessity, and justice unite in favor of enforcing such amicable agreements.[49]

Effect of Mistake

The frustration experienced in searching through the cases for a clear idea of the nature and theory of boundary agreements or the meaning of the requirement of uncertainty may be caused in part by a corollary rule of startling and far-reaching implications. A large proportion of the courts which have approved the practical location of boundaries by parol agreement have declared that, under certain circumstances, if such a location is founded on a mistaken belief as to the location of the true line, the agreement is not binding.[50] It would be preposterous to say that every

[45] See especially Young v. Blakeman, 153 Cal. 477, 95 P. 888 (1908).

[46] Kitchen v. Chantland, 130 Iowa 618, 105 N.W. 367 (1906). Cf. Stevenson v. Robuck, 179 Iowa 461, 161 N.W. 462 (1917); Fredricksen v. Bierent, 154 Iowa 34, 134 N.W. 432 (1912); Uker v. Thieman, 132 Iowa 79, 107 N.W. 167 (1906).

[47] Gove v. White, 20 Wis. 425 (1866). See also Turner v. Baker, 64 Mo. 218 (1876); St. Bede College v. Weber, 168 Ill. 324, 48 N.E. 165 (1897), where there was a building in conformity to the agreement, although this fact was not emphasized.

[48] Berghoefer v. Frazier, 150 Ill. 577, 37 N.E. 914 (1894); Adams v. Betz, 167 Ind. 161, 78 N.E. 649 (1906); Edwards v. Fleming, 83 Kan. 653, 112 P. 836 (1911); Griffin v. Mahoney, (La. App. 1951) 56 S. (2d) 208; Terry v. Chandler, 16 N.Y. 354 (1857); Rutledge v. Presbyterian Church, 3 Ohio App. 177 (1914); Wilson v. Hudson, 16 Tenn. 398 (1835).

[49] Levy v. Maddox, 81 Tex. 210, 16 S.W. 877 (1891). Cf. Box Elder Livestock Co. v. Glynn, 58 Mont. 561, 193 P. 1117 (1920), where the court said that an agreement was the best way of determining a true boundary and tends to prevent litigation.

[50] Schraeder Mining Co. v. Packer, 129 U.S. 688 (1888); Short v. Mauldin, (Ark.

agreement on a line which was later proved not to be the true line was void, for then no such agreement could have any independent significance.[51] The courts have not said this, and evidently they do not mean it. One court seems to be using by analogy the mistake rule which many courts apply to adverse possession. If the parties possess according to a line which they accept as the true line but claiming only to the true line, they are not bound if the former is proved not to be the true line.[52] Several other courts, although speaking in terms of mistake, really seem to be objecting to an agreement because it was not made to resolve a dispute over the boundary.[53] But most courts would not explain the mistake rule in such terms as these. They sometimes say merely that it is the mistaken attempt by the parties to find the true line which deprives the agreed line of legal significance.[54] If this is not meaningful, it has sometimes been said that the acceptable alternative to a mere attempt to find the true line is that the parties shall have agreed to adopt an unascertained or disputed line[55] or shall have sought to "establish" a line.[56]

The sort of agreement which would most obviously avoid the difficulty which seems to be bothering the courts at this point is the arbitration-type of agreement, where the parties settle a dispute over their boundary by agreement to have their line run and to be bound by it.[57] Such an agreement could be supported

1956) 296 S.W. (2d) 197; Sonnemann v. Mertz, 221 Ill. 362, 77 N.E. 550 (1906); Kyte v. Chessmore, 106 Kan. 394, 188 P. 251 (1920); Skaggs v. Skaggs, 212 Ky. 836, 280 S.W. 150 (1926); Bemis v. Bradley, 126 Me. 462, 139 A. 593 (1927); Blank v. Ambs, 260 Mich. 589, 245 N.W. 525 (1932); Benz v. St. Paul, 89 Minn. 31, 93 N.W. 1038 (1903); Klaar v. Lemperis, (Mo. 1957) 303 S.W. (2d) 55; Kimes v. Libby, 87 Neb. 113, 126 N.W. 869 (1910); Lake v. Crosser, 202 Okla. 582, 216 P. (2d) 583 (1950). The following possibly may be to the same effect: Teasley v. Roberson, 149 Miss. 188, 115 S. 211 (1928); Lennox v. Hendricks, 11 Ore. 33, 4 P. 515 (1883); Wood v. Bapp, 41 S.D. 195, 169 N.W. 518 (1918); Burnell v. Maloney, 39 Vt. 579 (1867); Pickett v. Nelson, 79 Wis. 9, 47 N.W. 936 (1891). See Small v. Robbins, 33 Nev. 288 at 300, 110 P. 1128 (1910). Cf. Coon v. Smith, 29 N.Y. 392 (1864); Perkins v. Gay, 3 Serg. & R. (Pa.) *327 (1817); Rocher v. Williams, 183 Okla. 221, 80 P. (2d) 649 (1938), where the court said that mistake would defeat an agreement, but not after acquiescence had continued for the statutory period.

[51] See Gibson, J. in Perkins v. Gay, 3 Serg. & R. (Pa.) *325 at *331 (1817).

[52] Chostner v. Schrock, (Mo. 1933) 64 S.W. (2d) 664; Barnes v. Allison, 166 Mo. 96, 65 S.W. 781 (1901). See also Hatfield v. Workman, 35 W.Va. 578, 14 S.E. 153 (1891).

[53] Skaggs v. Skaggs, 212 Ky. 836, 280 S.W. 150 (1926); De Long v. Baldwin, 111 Mich. 466, 69 N.W. 831 (1897); Hatfield v. Workman, 35 W.Va. 578, 14 S.E. 153 (1891).

[54] Kyte v. Chesmore, 106 Kan. 394, 188 P. 251 (1920); Blank v. Ambs, 260 Mich. 589, 245 N.W. 525 (1932); Benz v. St. Paul, 89 Minn. 31, 93 N.W. 1038 (1903); Patton v. Smith, 171 Mo. 231, 71 S.W. 187 (1902).

[55] Sonnemann v. Mertz, 221 Ill. 362, 77 N.E. 550 (1906).

[56] Bemis v. Bradley, 126 Me. 462, 139 A. 593 (1927).

[57] But cf. Wilson v. Stork, 171 Wis. 561, 177 N.W. 878 (1920), which seems to hold that mistake vitiates the agreement even in this situation.

where the parties are not disputing but are only "uncertain" about their line, as long as they could be said to have conclusively submitted the question to determination by survey or otherwise. But most of the boundary-agreement cases do not involve this sort of undertaking. As has been seen, it is often only *after* a line has been run, with varying degrees of formality, that the parties "agree" to accept the line as their boundary. In this situation what meaning can there be to the distinction between agreeing to establish a line and merely seeking to find the true line? It may be assumed that every acceptable boundary agreement is founded on some effort to find the true line or on an assumption as to its location. Surely it is not the fact that the parties sought to find the true line which vitiates their agreement. References to several decisions and dicta may better serve to reveal the distinction which many courts may have apprehended but have not yet made articulate.

The Nebraska court in one case applied the mistake rule where the parties, after a survey, had agreed to accept the surveyed line;[58] but in another case it seemed that after a survey had been made, there still remained some uncertainty, of which the parties were aware, about the location of the true line, and they nevertheless agreed on the surveyed line rather than go to the trouble and expense which the court said would have been required finally to resolve the doubt.[59] In the latter case the agreed boundary was approved. The Oklahoma court, in one of its leading cases,[60] approved an agreement which it said was made to avoid the expense of a survey. The court also said that the parties acted knowing that the line agreed on might not be the true line. The implication is clear that if they had agreed on a surveyed line on the assumption that the survey had located the true line, subsequent proof that the true line was elsewhere would have vitiated their agreement. One hundred fifty years ago, Justice Gibson, speaking for the Pennsylvania court in *Perkins v. Gay*,[61]

58 Kimes v. Libby, 87 Neb. 113, 126 N.W. 869 (1910).

59 Lynch v. Egan, 67 Neb. 541, 93 N.W. 775 (1903).

60 Lake v. Crosser, 202 Okla. 582, 216 P. (2d) 583 (1950).

61 3 Serg. & R. (Pa.) *327 at *331 (1817): "It was laid down in general terms, that if, at the time of an agreement to establish a consentable line, as we technically call it, the parties labour under a mistake as to their respective rights, they will not be bound. To this doctrine I do not assent; no boundary of the sort could in any case prevail, if it were law, for the consideration of the agreement, is, in ninety-nine cases out of a hundred, the settlement of a dispute arising from ignorance and misapprehension of right on both sides. If, to prevent irritation until the true line be ascertained, a temporary

presented a fuller analysis of this problem than has since appeared in any other case. His statement is not free from ambiguity, but after rejecting the argument that mistake generally defeats a "consentable line" (that court's term for an agreed boundary), he did say in effect that where the parties proceed on the basis that the subject of the agreement is doubtful, and take account of the risk that each must assume as a consequence of that doubt, their agreement will be binding notwithstanding any mistake. Something of the same idea seems to be expressed by Smith, J, speaking for the Arkansas court in the most recent case in that state on the subject.[62] He put the distinction in terms of "conscious" and "unconscious" mistake. In the former case the parties assume the risk that the agreed line may not coincide with the true line.[63] But an unconscious mistake vitiates the agreement.

Attempting to summarize these observations, it appears that the courts may wish to require that one of the essential features of agreements which call for arbitration shall also be present in those agreements which do not; that in the latter case, while it is the conduct of the parties themselves, rather than that of an arbitrator or surveyor, which determines the location of the line, they must intend or be aware that what they are doing is to settle that which until the moment of their agreement remained in some doubt. If what they have done before their agreement convinces them that they have found the true line, and they agree to it on that basis but are later proved to have been mistaken, their agreement is not binding. They must either not have tried very

boundary, predicated on the avowed ignorance of the parties, be established, to a full understanding that it is not to be permanent; there is no doubt it will not have effect beyond the terms of the agreement. So if the parties, from misapprehension, adjust their fences, and exercise acts of ownership, in conformity with a line which turns out not to be the true boundary; or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement, or be binding as the assent of the parties; and I agree it is a principle of equity, that the parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can call for respecting them, else they will not be bound. The reason is, that they proceed under an idea that the fact which is the inducement to the agreement, is in a particular way, and give their assent, not absolutely, but on conditions that are falsefied by the event. . . . But where the parties treat upon a basis that the fact which is the subject of the agreement is *doubtful,* and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party, that would affect any other contract."

62 Short v. Mauldin, (Ark. 1956) 296 S.W. (2d) 197 at 198. Cf. Peebles v. Starnes, 208 Ark. 834, 188 S.W. (2d) 289 (1945), where an agreement without a survey was upheld.

63 Cf. Peters v. Reichenbach, 114 Wis. 209, 90 N.W. 184 (1902).

hard to find their line, or having tried, they must still remain in doubt about having found it before it can be said that they have "established" a line and have not merely tried to find it.

Such a doctrine may reflect the courts' fear of catching the parties in a trap of their own setting and their reluctance to give legal sanction to the informal acts of parties unless they understand the full import of what they are doing.[64] It may also reflect the tacit influence of a contract rationale: the necessity for some semblance of consideration, which can be found here only to the extent that each of the parties consciously surrenders a potential claim to assert a boundary different from the one agreed on. If the mistake rule is stated in terms of the requirement of uncertainty—and this is sometimes done—it would mean that the required uncertainty refers to the state of mind of the parties and must continue until the very moment of the agreement. When applied for such a purpose, the requirement of uncertainty shifts from its role as a safeguard against parol conveyances and serves to insure that boundary agreements are supported by consideration.

It may be pertinent to inquire whether the mistake rule, explained in terms of a consideration requirement, is sound in the light of what is or should be the purpose of boundary agreements and the policy that is served by them. Does this explanation of the rule, in other words, demonstrate the danger of trying to explain the real objectives of these transactions in contractual terms? Further comment on this point appears below.[65]

In attempting to administer the mistake rule as it has been interpreted herein, it will be seen that the courts are left to face a kind of Scylla-and-Charybdis operation. If a survey or preliminary investigation by the parties has convinced them of the location of the true line, they cannot deliberately disregard it and adopt another, lest they violate the requirement of uncertainty and fail for having tried to transfer land informally. But neither in such a case can they adopt such a line with binding effect if it is later proved that their conviction about its location was mistaken. One might wonder what a court would do with a case in which the parties agreed on a line other than the one which they believed was the true line, but it turned out that neither the line

[64] Comment will be made later on the justification for such a fear. See Part VI, "The Meaning of Practical Location," infra.

[65] Ibid.

they agreed on nor the one they disregarded was the true line. At any rate, where the mistake rule is applied with the meaning above indicated, the area in which parties can fix their boundaries by informal agreement is confined within very narrow bounds. The room for agreement is even more restricted if a court holds that the requirement of uncertainty is not met where the parties have not made some minimal effort to find the true line.[66] Here the parties must make some effort to find the true line or their agreement will fail for want of compliance with the requirement of uncertainty and a resulting violation of the Statute of Frauds; but if such efforts reach the point of convincing them erroneously that they have found the true line, and they agree on that basis, their agreement will fail because of mistake, which also may be explained in terms of the uncertainty requirement, but which is applied in this instance as a requirement of consideration.

In trying to appraise the effect of the mistake rule in the boundary agreement cases, some uncertainty must be attributed to the failure of some courts to make clear what they mean by mistake, and whether they would interpret it as it has been interpreted herein. So long as the requirement is undefined, room is left for a court to throw out any agreement on the ground that the agreed line was founded on a mistake of fact. Even where mistake is defined as indicated herein, it is not clear what sort of proof will be required to avoid it. Little help is to be found in the opinions. In most of the cases no question of mistake was raised. In some of these it could be inferred that the mistake test could have been passed, had it been put, because the parties agreed without a survey or to avoid a survey, from which it could have been inferred that they did not agree merely on the assumption that the true line had been found.[67] More commonly, however, agreements have been upheld, without mention of mistake, where they were made following surveys of the land, a circumstance which, in the absence of other proof, suggests that the parties agreed on the assumption that the survey had located the true

[66] See notes 14-16 supra. Cf. Olin v. Henderson, 120 Mich. 149, 79 N.W. 178 (1899).

[67] E.g., Peebles v. McDonald, 208 Ark. 834, 188 S.W. (2d) 289 (1945); Euse v. Gibbs, (Fla. 1951) 49 S. (2d) 843; Shiver v. Hill, 148 Ga. 616, 97 S.E. 676 (1918); Horn v. Thompson, 389 Ill. 176, 58 N.E. (2d) 896 (1945); Reynolds v. Hood, 209 Mo. 611, 108 S.W. 86 (1908). Cf. Hoar v. Hennessy, 29 Mont. 253, 74 P. 452 (1903), where there had been a survey, but a dispute followed whether the survey was correct, which was then followed by an agreement; Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912), where the agreement was written and expressly recognized an existing uncertainty.

line, which in turn should render such agreements vulnerable to the mistake rule.[68] Indeed in nearly every state where the mistake rule has been adopted cases are to be found in which no mention of mistake was made, and many of these are cases which fall in the category last mentioned.

Further questions remain unanswered. To what extent will the courts draw inferences from the two kinds of fact situations mentioned in the preceding paragraph? What other fact situations will form the basis for inferences as to the intention of the parties in regard to the mistake requirements? Will the parties be allowed to testify directly on the question of their precise intention at the time of the agreement? As to the last question, since the agreement itself is oral and informal, no objection may be possible to the admissibility of this kind of testimony, although its reliability will certainly diminish as the purpose of such a question becomes apparent.

It must be concluded that the uncertainties about the nature of the mistake rule and the extent of any court's commitment to it, together with the other difficulties previously noted in determining what a boundary agreement is and when and why it will be given effect, reduce the predictability of decision on the effect of such agreements almost to zero.

Cases from two states specifically reject the mistake rule,[69] although in one of them[70] the facts were such as to have passed the test of mistake as defined above if it had been applied.

II. ACQUIESCENCE

There is a large body of authority to the effect that a boundary may be given a binding practical location by what the courts call the acquiescence of adjoining landowners. It is evident that the precise meaning of this kind of practical location is as elusive as practical location by parol agreement. In fact it may be noted

[68] E.g., Bennett v. Swafford, 146 Ga. 473, 91 S.E. 553 (1917); Bloomington v. Bloomington Cemetery Assn., 126 Ill. 221, 18 N.E. 298 (1888); Kitchen v. Chantland, 130 Iowa 618, 105 N.W. 367 (1906); Steinhilber v. Holmes, 68 Kan. 607, 75 P. 1019 (1904); Carver v. Turner, 310 Ky. 99, 219 S.W. (2d) 409 (1949); Smith v. Hamilton, 20 Mich. 433 (1870); Schwartzer v. Gebhardt, 157 Mo. 99, 57 S.W. 782 (1900); Box Elder Livestock Co. v. Glynn, 58 Mont. 561, 193 P. 1117 (1920); Hitchcock v. Libby, 70 N.H. 399, 47 A. 269 (1900); Huffman v. Mills, 131 W.Va. 218, 46 S.E. (2d) 787 (1948).

[69] Lindsay v. Springer, 4 Harr. (Del. Super.) 547 (1848); Cooper v. Austin, 58 Tex. 494 (1883). Cf. Beatty v. Taylor, 187 Iowa 723, 174 N.W. 484 (1919), where there was an agreement on a line, but the court applied its rule of acquiescence.

[70] Cooper v. Austin, 58 Tex. 494 (1883).

at the outset that practical location by acquiescence and by parol agreement are not neatly separable. One reason for this is obvious: the acquiescence of the parties is often held to be a factor in the practical location of a boundary by parol agreement. Other reasons will appear. It is the position of a large number of courts that a boundary can be established by the acquiescence of the parties for the period of the statute of limitations applicable to adverse possession cases.[71] In others the stated effect of acquiescence is accepted, but the applicability of the period of the statute of limitations is left in doubt.[72] Georgia has a statute which provides for the determination of a boundary by seven years' acquiescence.[73] In other states similar effect has been given to "long acquiescence."[74] In most of the latter the acquiescence exceeded the statutory period in fact. Judging by the experience of some of the courts in the first category, some of the latter courts may in time impose the statutory period. Others may de-

[71] Brown v. Leete, (C.C. Nev. 1880) 2 F. 440; *Arizona:* Hein v. Nutt, 66 Ariz. 107, 184 P. (2d) 656 (1947); *Arkansas:* Seidenstricker v. Holtzendorff, 214 Ark. 644, 217 S.W. (2d) 836 (1949); *California:* Sneed v. Osborn, 25 Cal. 619 (1864); *Florida:* Palm Orange Groves v. Yelvington, (Fla. 1949) 41 S. (2d) 883; *Iowa:* Miller v. Mills County, 111 Iowa 654, 82 N.W. 1038 (1900); *Kentucky:* Rice v. Shoemaker, (Ky. 1956) 286 S.W. (2d) 523; *Maine:* Faught v. Holway, 50 Me. 24 (1861); *Michigan:* Johnson v. Squires, 344 Mich. 687, 75 N.W. (2d) 45 (1956); *Minnesota:* Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740 (1893); *Nebraska:* Romine v. West, 134 Neb. 274, 278 N.W. 490 (1938); *Nevada:* Adams v. Child, 28 Nev. 169, 88 P. 1087 (1905); *New York:* Baldwin v. Brown, 16 N.Y. 359 (1857); *North Dakota:* Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931); *Pennsylvania:* Miles v. Pennsylvania Coal Co., 245 Pa. 94, 91 A. 211 (1914); *Rhode Island:* Malone v. O'Connell, (R.I. 1957) 133 A. (2d) 756; *South Carolina:* Klapman v. Hook, 206 S.C. 51, 32 S.E. (2d) 882 (1945); *South Dakota:* Wood v. Bapp, 41 S.D. 195, 169 N.W. 518 (1918); *Washington:* Lindley v. Johnston, 42 Wash. 257, 84 P. 822 (1906); *West Virginia:* Gwynn v. Schwartz, 32 W.Va. 487, 9 S.E. 880 (1889); *Wyoming:* Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925). Other cases may stand for the same proposition, but the question is left in some doubt: *Illinois:* Ginther v. Duginger, 6 Ill. (2d) 474, 129 N.E. (2d) 147 (1955); *Indiana:* Curless v. State, 172 Ind. 257, 87 N.E. 129 (1909); *Vermont:* Brown v. Edson, 23 Vt. 435 (1851). Cf. Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 A. 151 (1917).

[72] *Colorado:* Prieshof v. Baum, 94 Colo. 324, 29 P. (2d) 1032 (1934); *Oklahoma:* Lake v. Crosser, 202 Okla. 582, 216 P. (2d) 583 (1950).

[73] Ga. Code Ann. (1955) §85-1602. Cf. Iowa Code Ann. (1950) §650.6, which has been construed to have a similar effect, Davis v. Curtis, 68 Iowa 66, 25 N.W. 932 (1885), but this section has been rarely relied on in recent years; Neb. Rev. Stat. (1952) §34-301.

[74] *Missouri:* Mothershead v. Milfeld, 361 Mo. 704, 236 S.W. (2d) 343 (1951); *Tennessee:* Davis v. Jones, 40 Tenn. 603 (1859); *Utah:* Provonsha v. Pitman, (Utah 1957) 305 P. (2d) 486; *Wisconsin:* Grell v. Ganser, 255 Wis. 381, 39 N.W. (2d) 397 (1949). See *Mississippi:* Hulbert v. Fayard, (Miss. 1957) 92 S. (2d) 247 at 251; *New Hampshire:* Berry v. Garland, 26 N.H. 473, 482 (1853). Others may be to the same effect, although the question is in doubt. *Kansas:* Fyler v. Hartness, 171 Kan. 49, 229 P. (2d) 751 (1951); *Montana:* Borgeson v. Tubb, 54 Mont. 557, 172 P. 326 (1918); *New Mexico:* Woodburn v. Grimes 58 N.M. 717, 275 P. (2d) 850 (1954); *Oregon:* Ogilvie v. Stackland, 92 Ore. 352, 179 P. 669 (1919).

liberately leave the period flexible. In Missouri, for example, the court said that the period must be long enough to show mutual acceptance of the boundary or that the parties were conscious of it.[75] Some reference should be made to decisions determining boundaries on the basis of long general recognition thereof in urban areas as shown by lot lines on the ground, sidewalks, and streets. It has been so held in Massachusetts, which does not otherwise recognize the doctrine of practical location by parol agreement or acquiescence.[76] But in none of these cases is any explanation offered for the results reached.

The Requirements and Theory of Acquiescence

The largest proportion of the courts which have accepted practical location in terms of acquiescence alone have nevertheless explained their position on the basis that acquiescence is evidence of an agreement between the parties, as conclusive evidence of such an agreement, or as a basis for inferring an agreement.[77] It may be that some courts regard long acquiescence in a line on the ground as raising a presumption that an express boundary agreement was made in the past.[78] If this presumption is conclusive, one is reminded of the lost-grant theory of prescription. The rule becomes one of policy, not of evidence. For the most part, however, the courts seem to be proceeding on the basis that acquiescence, rather than raising a presumption of an unproved agreement, is evidence of an agreement implied in fact from such acquiescence. In other words, a boundary agreement may be expressly made, or implied from conduct, acquiescence for the required period being a specifically designated category of the

[75] Tillman v. Hutcherson, 348 Mo. 473, 154 S.W. (2d) 104 (1941); Diers v. Peterson, 290 Mo. 249, 234 S.W. 792 (1921).

[76] Hathaway v. Evans, 108 Mass. 267 (1871); Chenery v. Inhabitants of Waltham, 62 Mass. 327 (1851); Kellogg v. Smith, 61 Mass. 375 (1851). See also Butler v. Vicksburg, (Miss. 1895) 17 S. 605; Crandall v. Mary, 67 Ore. 18, 135 P. 188 (1913).

[77] Brown v. Leete, (C.C. Nev. 1880) 2 F. 440; Seidenstricker v. Holtzendorff, 214 Ark. 644, 217 S.W. (2d) 836 (1949); Sneed v. Osborn, 25 Cal. 619 (1864); Axmear v. Richards, 112 Iowa 657, 84 N.W. 686 (1900); Fyler v. Hartness, 171 Kan. 49, 229 P. (2d) 751 (1951); Garvin v. Threlkeld, 173 Ky. 262, 190 S.W. 1092 (1917); Mothershead v. Milfeld, 361 Mo. 704, 236 S.W. (2d) 343 (1951); Malone v. O'Connell, (R.I. 1957) 133 A. (2d) 756; Hummel v. Young, 1 Utah (2d) 237, 265 P. (2d) 410 (1953); Gwynn v. Schwartz, 32 W.Va. 487, 9 S.E. 880 (1889); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925).

[78] Roberts v. Brae, 5 Cal. (2d) 356, 54 P. (2d) 698 (1936); Board of Public Instruction v. Boehm, 138 Fla. 548, 189 S. 663 (1939); Mitchell Willis Coal Co. v. Liberty Coal Co., 220 Ky. 661, 295 S.W. 987 (1927); Stumpe v. Kopp, 201 Mo. 412, 99 S.W. 1073 (1907); Dragos v. Russell, 120 Utah 626, 237 P. (2d) 831 (1951).

latter. Under this view, when a court says that acquiescence is conclusive evidence of an agreement, presumably all that is meant is that the required proof of acquiescence is alone sufficient proof of an agreement.

Not all courts, however, have been consistent in this regard. The Arkansas court, after previously determining a boundary on the basis of acquiescence alone for the statutory period,[79] held that evidence of acquiescence in a fence for fifty years was not enough without other evidence of an agreement between the adjoining owners.[80] Similarly, the Utah court, after some vacillation,[81] expressly left open the question whether proof that no express agreement in fact was ever entered would prevent a boundary from being determined by acquiescence.[82] The California court held on one occasion that acquiescence in a fence was not sufficient in the absence of other evidence of an agreement,[83] although in a later case the court held to the contrary.[84] Such views as these are directly contrary to any proposition that acquiescence is alone sufficient proof of an agreement. If the courts were thinking of acquiescence as raising a presumption of an express agreement, it is clear that they do not regard the presumption as conclusive. It is possible that these courts were thinking of acquiescence solely as a post-agreement requirement, in which case it could not serve this function unless an agreement had by other means first been made. At any rate the views mentioned in this paragraph have not received general acceptance.

It is easy to foresee the prospect of confusion where boundary agreements must be supported by acquiescence and where acquiescence also is given separate significance, but only in terms of implying an agreement. It is necessary to inquire what the courts mean by acquiescence.

The term connotes passivity. But it also implies the existence of something in which to acquiesce. In the present context the primary condition of acquiescence is the physical designation in some manner of a line on the ground. Must acquiescence in that

79 Seidenstricker v. Holtzendorff, 214 Ark. 644, 217 S.W. (2d) 836 (1949).

80 Brown Paper Mill Co. v. Warnix, 222 Ark. 417, 259 S.W. (2d) 495 (1953). It should be added that there was some evidence here that the fence was not intended to mark the boundary.

81 Hummel v. Young, 1 Utah (2d) 237, 265 P. (2d) 410 (1953).

82 Ringwood v. Bradford, 2 Utah (2d) 119, 269 P. (2d) 1053 (1954).

83 Dauberman v. Grant, 198 Cal. 586, 246 P. 319 (1926). Cf. Thomas v. Harlan, 27 Wash. (2d) 512, 178 P. (2d) 965 (1947).

84 Hannah v. Pogue, 23 Cal. (2d) 849, 147 P. (2d) 572 (1944).

line mean something more than conduct consistent with its continued existence? It obviously must mean conduct which signifies assent to that line as a boundary. What sort of conduct supplies evidence of such assent? It is easy to think of words and acts, short of an express boundary agreement, which would serve such a purpose. Must some such affirmative conduct always be present? Under what circumstances will mere inaction or silence be significant? The word "recognition" is frequently used instead of or together with "acquiescence." This word connotes an active ingredient. But recognition may be only momentary, while acquiescence connotes the continuity of circumstances that is required. One of the requirements insisted upon by the courts is that acquiescence be mutual.[85] This too suggests conduct that is not wholly passive. An active-passive essence is indicated by one court's statement that "to acquiesce means to rest satisfied without opposition, to submit without opposition or question, to yield assent. . . . It must be done by acts or declarations on the part of those who are claimed to have acquiesced. . . ."[86] Another court explained in this way, "It must be kept in mind that the acquiescence required is not merely passive consent to the existence of a fence, . . . but rather is conduct or lack thereof from which assent to the fence . . . as a boundary line may be reasonably inferred."[87] May we conclude tentatively that acquiescence means mutual recognition over a period of time of a line on the ground as a boundary? If so, the notion that acquiescence also raises a presumption of an agreement made in the past is unnecessary and misleading. If it is to be explained, on the other hand, as a way of manifesting the necessary assent, or as constituting an agreement implied from conduct, we are still left to inquire what sort of conduct is sufficient for this purpose, to what extent passivity must be supported by activity, and whether acquiescence means the same thing in all cases.

Where there has been an express boundary agreement, any supporting acquiescence may be wholly passive. It would be assumed that the parties have acquiesced unless by later words or acts they manifest a change of mind. So it would be where ac-

[85] De Viney v. Hughes, 243 Iowa 1388, 55 N.W. (2d) 478 (1952); Hakanson v. Manders, 158 Neb. 392, 63 N.W. (2d) 436 (1954); Ward v. Rodriguez, 43 N.M. 191, 88 P. (2d) 277 (1939); Nelson v. Da Rouch, 87 Utah 457, 50 P. (2d) 273 (1935); State v. Vanderkoppel, 45 Wyo. 432, 19 P. (2d) 955 (1933).

[86] Thompson v. Simmons, 143 Ga. 95, 84 S.E. 370 (1914).

[87] Engquist v. Wirtjes, 243 Minn. 502 at 507, 63 N.W. (2d) 412 (1955).

quiescence is merely a post-agreement requirement. Where there is an initial agreement, a court may still speak solely in terms of acquiescence, treating the agreement not as having independent significance, but merely as supplying the active ingredient of acquiescence.[88] The same analysis may be made where the initial manifestation of assent to a line as a boundary is not an express agreement but one implied from the parties' conduct.[89]

There are many cases, however, in which there were no express boundary agreements nor facts which would justify the inference that at any particular point of time an agreement had been manifested by the conduct of the parties. There are cases, for example, in which the conduct of the parties is equivocal, such as the erection or maintenance of a fence or possession to a fence or other line established some time in the past. In such a case the time element may assume controlling importance and serve to characterize their equivocal conduct. Such conduct is at least consistent with an intention to accept the line as a boundary or a belief that it marked the true line, and where the required period of time has passed without any manifestation of a contrary purpose, it may be permissible to infer that their assent has been given.[90] Or even more clearly, subsequent words or acts may give color to their equivocal conduct. It would still be appropriate to speak in terms of an implied agreement, but this would be an agreement in a special sense, meaningful only in relation to the special requirements of acquiescence. Here again, both the active and passive ingredients of acquiescence are present, but with the passive element assuming a rather special significance. We should realize that in such a case the parties are always allowed to prove if they can that a fence or hedge was erected only for convenience or as a barrier,[91] or subject to the future determination of the

88 McGill v. Dowman, 195 Ga. 357, 24 S.E. (2d) 195 (1943); Lannigan v. Andre, 241 Iowa 1027, 44 N.W. (2d) 354 (1950); Beatty v. Taylor, 187 Iowa 723, 174 N.W. 484 (1919); Miskotten v. Drenten, 318 Mich. 538, 29 N.W. (2d) 91 (1947); Di Santo v. De Bellis, 55 R.I. 433, 182 A. 488 (1935); Harman v. Alt, 69 W.Va. 287, 71 S.E. 709 (1911). Cf. Clark v. Tabor, 28 Vt. 222 (1856); Wollman v. Ruehle, 100 Wis. 31, 75 N.W. 425 (1898).

89 Rogers v. Moore, 207 Ga. 182, 60 S.E. (2d) 359 (1950); Helberg v. Kepler, 178 Iowa 354, 159 N.W. 972 (1916); Griffin v. Brown, 167 Iowa 599, 149 N.W. 833 (1914); Gregory v. Thorrez, 277 Mich. 197, 269 N.W. 142 (1936); Ekberg v. Bates, 121 Utah 123, 239 P. (2d) 205 (1951).

90 See especially Dake v. Ward, 168 Iowa 118, 150 N.W. 50 (1914).

91 Grants Pass Land and Water Co. v. Brown, 168 Cal. 456, 143 P. 754 (1914); Shaw v. Williams, (Fla. 1951) 50 S. (2d) 125; O'Dell v. Hanson, 241 Iowa 657, 42 N.W. (2d) 86 (1950); Jones v. Smith, 64 N.Y. 180 (1876); Ungaro v. Mete, 68 R.I. 419, 27 A. (2d) 826 (1942); Harrison v. Lanoway, 214 S.C. 294, 52 S.E. (2d) 264 (1949); Ringwood v.

boundary.[92] Where there is proof merely of the long existence of a fence, some courts have indicated that no presumptions are available and that a claim of acquiescence will fail without other proof.[93] But in other cases, where there is evidence of possession or other acts in conformity to the alleged line, the impression is left that the courts have tacitly assumed that long-existing fences were intended or believed to mark boundaries,[94] if in fact a court has not raised an inference or presumption to that effect.[95] The inference of an acceptance of a fence as a boundary may be stronger where the fence was erected following a survey.[96] It is not indicated whether the purpose of equivocal conduct can be supplied solely by the testimony of the parties, but no basis for the exclusion of such testimony is evident other than its questionable reliability.[97] The question of proof of acquiescence will in the first instance normally be submitted to a jury. This explains why in so many cases the facts of acquiescence are not fully reported. The instructions to a jury also are seldom reported, but it may be doubted that juries are always adequately instructed. Whether instructions are put merely in general terms, or with some explanation of the meaning of acquiescence, it is probable that juries have based their findings of acquiescence both on proof of express and implied agreements with passive acquiescence therein and on inferences from equivocal acts or silence or appraisals of conflicting testimony.

Bradford, 2 Utah (2d) 119, 269 P. (2d) 1053 (1954); Thomas v. Harlan, 27 Wash. (2d) 512, 178 P. (2d) 965 (1947); Johnson v. Szumowicz, 63 Wyo. 211, 179 P. (2d) 1012 (1947).

92 Brown v. Brown, 18 Idaho 345, 110 P. 269 (1910).

93 Hill v. Schumacher, 45 Cal. App. 362, 187 P. 437 (1919); Benjamin v. O'Rourke, 197 Iowa 1338, 199 N.W. 488 (1924); Ennis v. Stanley, 346 Mich. 296, 78 N.W. (2d) 114 (1956); Reel v. Walter, (Mont. 1957) 309 P. (2d) 1027; Ward v. Rodriguez, 43 N.M. 191, 88 P. (2d) 277 (1939); Harrison v. Lanoway, 214 S.C. 294, 52 S.E. (2d) 264 (1949).

94 Seidenstricker v. Holtzendorff, 214 Ark. 644, 217 S.W. (2d) 836 (1949); Dye v. Dotson, 201 Ga. 1, 39 S.E. (2d) 8 (1946); Mitchell Willis Coal Co. v. Liberty Coal Co., 220 Ky. 661, 295 S.W. 987 (1927); F.H. Wolf Brick Co. v. Lonyo, 132 Mich. 162, 93 N.W. 251 (1903); McCoy v. Hance, 28 Pa. 149 (1857). See Missouri cases cited note 140 infra. Of particular interest are the cases in Iowa, where the court has had more occasion than in any other state to consider the requirements of acquiescence. Concannon v. Blackman, 232 Iowa 722, 6 N.W. (2d) 116 (1942); Brown v. Bergman, 204 Iowa 1006, 216 N.W. 731 (1927); Chandler v. Hopson, 188 Iowa 281, 175 N.W. 62 (1919); Tice v. Shangle, 182 Iowa 601, 164 N.W. 246 (1917).

95 Dake v. Ward, 168 Iowa 118, 150 N.W. 50 (1914); Woodburn v. Grimes, 58 N.M. 717, 275 P. (2d) 850 (1954); Lewis v. Smith, 187 Okla. 404, 103 P. (2d) 512 (1940); Provonsha v. Pitman, (Utah 1957) 305 P. (2d) 486; Lindley v. Johnston, 42 Wash. 257, 84 P. 822 (1906).

96 Sneed v. Osborn, 25 Cal. 619 (1864).

97 Cf. Dake v. Ward, 168 Iowa 118, 150 N.W. 50 (1914).

From the confusing blend of agreement and acquiescence concepts of practical location we must conclude that the results in some cases can be explained either in terms of an agreement with subsequent acquiescence or of acquiescence alone but that there are other cases which can be adequately explained only in terms of acquiescence in a somewhat different sense. To speak of the latter cases also as constituting agreements is to use that term in a looser sense even than is found in cases where boundaries are established by agreement without acquiescence. All this means that the term "acquiescence" may be used with at least three varying meanings. In one case it may be wholly passive, referring to a post-agreement requirement. In another case with the same facts it may refer both to the initial "agreement," express or implied, and to the passive conduct which follows. In a third case it may also refer to both active and passive conduct, but which are blended and often concurrent and perhaps inseparable.

Not all courts, however, have chosen to explain their rule of acquiescence in terms of boundary agreements. A different theory was first announced by the New York court in *Baldwin v. Brown*.[98] The requisite acquiescence is evidence of the true line so conclusive that the parties are precluded from offering evidence to the contrary. The rule is identified as a "rule of repose," which is supported by the same reason as supports the doctrine of adverse possession. Other courts have adopted the same rationale for their decisions.[99] There are two thoughts here. The latter is prescriptive. But calling acquiescence conclusive evidence of the true line is something else. Prescription carries no respect for the true line. And it is not easy to see how proof of acquiescence is necessarily proof of the location of the true line. This theory may rather reflect a realization of the basic problem of practical location: the bridging of the gap between a description and a boundary on the ground, and a revulsion against the notion of a boundary which shifts with every new survey. If a boundary is to be locat-

[98] 16 N.Y. 359 (1857).

[99] Biggins v. Champlin, 59 Cal. 113 (1881); Miller v. Mills County, 111 Iowa 654, 82 N.W. 1038 (1900); Hotze v. Ring, 273 Ky. 48, 115 S.W. (2d) 311 (1938); Bartlett v. Brown, 121 Mo. 353, 25 S.W. 1108 (1894); O'Donnell v. Penney, 17 R.I. 164, 20 A. 305 (1890); Klapman v. Hook, 206 S.C. 51, 32 S.E. (2d) 882 (1944); Hummel v. Young, 1 Utah (2d) 237, 265 P. (2d) 410 (1953). Chew v. Morton, 10 Watts (50 Pa.) 321 (1840), expresses the same policy without the use of the evidentiary terminology. Rosen v. Ihler, 267 Wis. 220, 64 N.W. (2d) 845 (1954), declares that long acquiescence raises a presumption of the true line which cannot be overcome by recent surveys. Cf. Diehl v. Zanger, 39 Mich. 601 (1878).

ed short of litigation, a point must be recognized where the location becomes binding. After the requisite period of acquiescence the line acquiesced in becomes conclusive in the sense that it has been given an adequate location on the ground, not because there is no other place where a surveyor, applying the documents of title, might locate it. The same thought may lie behind the statement that a line long acquiesced in, especially if it is marked by a fence, is better evidence of the "true line" than later surveys after the original monuments have disappeared.[100] It is better evidence only because the court says it is, and the court says it is because it is at least an acceptable basis for getting the question settled once and for all. Such a rationale is not essentially different from the explanation of acquiescence in terms of an agreement.

The thought of acquiescence as prescriptive, nevertheless, is pervasive. This in turn leaves doubt about its relation to the doctrine of adverse possession. It is startling how often courts, although speaking in terms of acquiescence, have not made it clear which doctrine they were applying or even whether they recognize any difference between them.[101] In other cases, some of which have come from the same courts that on other occasions have confused the doctrines, the separate existence or varying requirements of the two doctrines have been expressly declared.[102] Numerous other cases could be cited which are to the same effect because of the separate application or consideration in each of them of both doctrines. There are clear indications in several states of the acceptance of a more liberal acquiescence rule as an escape from the controversial proposition that possession to a

100 See Rosen v. Ihler, 267 Wis. 220 at 226, 64 N.W. (2d) 845 (1954). See also "The Cooley Dictum," p. 526 infra.

101 Shaw v. Williams, (Fla. 1951) 50 S. (2d) 125; Ginther v. Duginger, 6 Ill. (2d) 474, 129 N.W. (2d) 147 (1955); Palmer v. Dosch, 148 Ind. 10, 47 N.E. 176 (1897); Klinkner v. Schmidt, 114 Iowa 695, 87 N.W. 661 (1901); Rice v. Shoemaker, (Ky. 1956) 286 S.W. (2d) 523; Vogel v. Gruenhagen, 238 Minn. 247, 56 N.W. (2d) 427 (1953); Bernier v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931); Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 A. 151 (1917); Lindley v. Johnston, 42 Wash. 257, 84 P. 822 (1906). Cf. Marek v. Jelinek, 121 Minn. 468, 141 N.W. 788 (1913).

102 Dierssen v. Nelson, 138 Cal. 394, 71 P. 456 (1903); Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930); Schlender v. Maretoli, 140 Kan. 533, 37 P. (2d) 933 (1934); Stacy v. Alexander, 143 Ky. 152, 136 S.W. 150 (1911); Faught v. Holway, 50 Me. 24 (1861); Warner v. Noble, 286 Mich. 654, 282 N.W. 855 (1938); Lewis v. Smith, 187 Okla. 404, 103 P. (2d) 512 (1940); Miles v. Pennsylvania Coal Co., 245 Pa. 94, 91 A. 211 (1914); Klapman v. Hook, 206 S.C. 51, 32 S.E. (2d) 882 (1944); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925). Cf. Lamm v. Hardigree, 188 Okla. 378, 109 P. (2d) 225 (1941), where the two rules were confused.

boundary line in the mistaken belief that such line is the true line may prevent such possession from being adverse;[103] or as an escape from an unduly restrictive privity requirement.[104]

It has been said that mutuality of acquiescence is required. But this does not mean that the parties must be equally active in its manifestation. Sometimes the claim of one owner to a line on the ground or his assent to it as a boundary will be obvious, and the problem will center on the role of his neighbor. Courts have insisted that mutuality requires certain knowledge by the latter of the former's conduct. A case cannot be made against him if he did not know of the existence of a line or the occupation of his neighbor according to it,[105] or even if he did not know of his neighbor's claim or purpose.[106] It has been indicated that the circumstances may be such as to impute knowledge to him.[107] The implication is clear that where knowledge is present, acquiescence by one of the parties may consist only of his silence for the required period.[108] The latter conclusion may be acceptable if it means that the inactivity of one party with knowledge of his neighbor's activity raises an inference or a presumption of assent to or recognition of the line established by his neighbor. But if it is carried to the extent of precluding any rebuttal of such a pre-

103 Handorf v. Hoes, 121 Iowa 79, 95 N.W. 226 (1903); Warner v. Noble, 286 Mich. 654, 282 N.W. 855 (1938); Klapman v. Hook, 206 S.C. 51, 32 S.E. (2d) 882 (1944); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925).

104 Hanlon v. Ten Hove, 235 Mich. 227, 209 N.W. 169 (1926). A remarkable use of the acquiescence doctrine has been made in California. There payment of taxes is required on land adversely possessed. Cal. Code Civ. Proc. (Deering, 1953) §325. A problem arises in boundary cases in proving that a particular tract on which taxes have been paid included all land embraced within the alleged boundary, since the definition of the land assessed is of course in terms of written descriptions. The acquiescence doctrine is used to modify a description according to a boundary established by acquiescence, but of course without changing the written description in fact. Taxes are therefore to be regarded as paid on all land lying within the boundaries so established, and title to such land can ripen by adverse possession. Dierssen v. Nelson, 138 Cal. 394, 71 P. 456 (1903); Price v. De Reyes, 161 Cal. 484, 119 P. 893 (1911). See also Edgeller v. Johnston, 74 Idaho 359, 262 P. (2d) 1006 (1953). This does not mean that acquiescence can serve only this limited purpose in California, for there are many cases, including those just cited, which recognized acquiescence as a separate ground for the determination of boundaries.

105 Maes v. Olmstead, 247 Mich. 180, 225 N.W. 583 (1929); Hakanson v. Manders, 158 Neb. 392, 63 N.W. (2d) 436 (1954); Ward v. Rodriguez, 43 N.M. 191, 88 P. (2d) 277 (1939); Silsby and Co. v. Kinsley, 89 Vt. 263, 95 A. 634 (1915).

106 Connell v. Clifford, 39 Colo. 121, 88 P. 850 (1907); De Viney v. Hughes, 243 Iowa 1388, 55 N.W. (2d) 478 (1952); Nelson v. DaRouch, 87 Utah 457, 50 P. (2d) 273 (1935); State v. Vanderkoppel, 45 Wyo. 432, 19 P. (2d) 955 (1933).

107 Silsby and Co. v. Kinsley, 89 Vt. 263, 95 A. 634 (1915). Cf. Atkins v. Reagan, 244 Iowa 1387, 60 N.W. (2d) 790 (1953).

108 Hakanson v. Manders, 158 Neb. 392, 63 N.W. (2d) 436 (1954), where the court so stated; Messer v. Oestreich, 52 Wis. 684, 10 N.W. 6 (1881).

sumption, the result can hardly be accepted in vindication of a requirement of mutuality of acquiescence. To the extent that mutuality is insisted upon, any prescriptive theory of acquiescence is inappropriate. At least there is normally no requirement of knowledge by one party of the adverse possession of the other.

Noting further the contrast between acquiescence and adverse possession, although possession by one or both parties is frequently present, and may be regarded as evidence of acquiescence,[109] it has been held not to be required of either party,[110] or if present it need not be continuous. But since a boundary by acquiescence may be regarded as one kind of practical location on the ground, it is essential that its precise location be apparent.[111] If this is not shown by the possessory acts of the parties, the line must somehow be marked by monuments.[112] This does not require artificial monuments, however, and a road,[113] river,[114] trees and shrubbery,[115] an encroaching building,[116] or even a ditch,[117] may suffice.[118] There are indications that some courts will allow possession by the parties to serve this purpose in the absence of monuments, even though possession is not otherwise necessary.[119] Alleged boundaries have been marked by fences or the like in the great majority of cases, but some liberality has been shown in regard to the manner of marking, and lines have been approved which were marked by a single monument[120] or by monuments at their termini.[121]

109 Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1929).

110 Watt v. Ganahl, 34 Ga. 290 (1866); Stacy v. Alexander, 143 Ky. 152, 136 S.W. 150 (1911); Brown v. Edson, 23 Vt. 435 (1851); Gwynn v. Schwartz, 32 W.Va. 487, 9 S.E. 880 (1889).

111 Scott v. Slater, 42 Wash. (2d) 366, 255 P. (2d) 377 (1953).

112 Trimpl v. Meyer, 246 Iowa 1245, 71 N.W. (2d) 437 (1955); Beckman v. Metzger, (Okla. 1956) 299 P. (2d) 152; Miles v. Pennsylvania Coal Co., 245 Pa. 94, 91 A. 211 (1914).

113 Quade v. Pillard, 135 Iowa 359, 112 N.W. 646 (1907).

114 Griffith v. Murray, 166 Iowa 380, 147 N.W. 855 (1914).

115 Renwick v. Noggle, 247 Mich. 150, 225 N.W. 535 (1929).

116 Atkins v. Reagan, 244 Iowa 1387, 60 N.W. (2d) 790 (1953).

117 Vander Zyl v. Muilenberg, 239 Iowa 73, 29 N.W. (2d) 412 (1948).

118 Tarver v. Naman, (Tex. Civ. App. 1954) 265 S.W. (2d) 852, permitted an unmarked projection of a fence. *Contra:* Lane v. Jacobs, 166 App. Div. 182, 152 N.Y.S. 605 (1915); Grants Pass Land and Water Co. v. Brown, 168 Cal. 456, 143 P. 754 (1914).

119 Muchenberger v. Santa Monica, 206 Cal. 635, 275 P. 803 (1929); Gildea v. Warren, 173 Mich. 28, 138 N.W. 232 (1912). Cf. Beckman v. Metzger, (Okla. 1956) 299 P. (2d) 152.

120 Havlik v. Freeman, 214 Ark. 761, 218 S.W. (2d) 364 (1949); Carr v. Schomberg, 104 Cal. App. (2d) 850, 232 P. (2d) 597 (1951); Breakey v. Woolsey, 149 Mich. 86, 112 N.W. 719 (1907).

121 Frericks v. Sorensen, 113 Cal. App. (2d) 759, 248 P. (2d) 949 (1952); Needham v. Collamer, 94 Cal. App. (2d) 609, 211 P. (2d) 308 (1949). Cf. Truett v. Adams, 66 Cal. 218, 5 P. 96 (1884), in which it does not appear what or where the landmarks were.

If acquiescence is regarded as evidence from which an agreement may be inferred, it must be decided whether the special requirements for boundary agreements, such as uncertainty about the true boundary and absence of mistake, are applicable. The force of the mistake rule in the acquiescence cases is separately considered below. In regard to uncertainty, the most notable fact is that this requirement is seldom mentioned. Obviously, many courts which presume or infer an agreement also presume the uncertainty upon which an agreement must be founded.[122] This presumption is a necessary corollary of a fictional presumption of an initial agreement, but not of acquiescence as itself constituting an agreement implied from conduct. In any event, in many cases the circumstances existing when the acquiescence began are unknown, and no point is made of this fact. It has been held in fact that neither a dispute nor uncertainty is required in acquiescence cases.[123] In several cases, however, courts have held that uncertainty cannot be inferred where there is proof to the contrary,[124] or seemed to say that lack of proof of uncertainty is fatal to the proof of acquiescence.[125] Similarly, the courts are divided on the effect of knowledge by the parties that the line acquiesced in was not the true line.[126] The courts holding that such knowledge precludes a line by acquiescence are undoubtedly concerned about the same policy which gave rise to the requirement of uncertainty in the boundary-agreement cases; that is, that the parties cannot transfer title to land informally. Holdings to the contrary, as well as holdings that there is no requirement of uncertainty, probably further reflect

122 The California court expressly so stated. Hannah v. Pogue, 23 Cal. (2d) 849, 147 P. (2d) 572 (1944); Board of Trustees v. Miller, 54 Cal. App. 102, 201 P. 952 (1921).

123 Tritt v. Hoover, 116 Mich. 4, 74 N.W. 177 (1898); Sherman v. Kane, 86 N.Y. 57 (1881); Lewis v. Smith, 187 Okla. 404, 103 P. (2d) 512 (1940).

124 Clapp v. Churchill, 164 Cal. 741, 130 P. 1061 (1913). Cf. Silva v. Azevedo, 178 Cal. 495, 173 P. 929 (1918), where the court distinguished Clapp v. Churchill.

125 Warwick v. Ocean Pond Fishing Club, 206 Ga. 680, 58 S.E. (2d) 383 (1950), which is especially surprising since the acquiescence rule in that state is based on a statute [Ga. Code Ann. (1955) §85-1602]; Home Owners' Loan Corp. v. Dudley, 105 Utah 208, 141 P. (2d) 160 (1943), where there was also some question about whether the parties recognized the alleged line as the true line; Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925).

126 Holding that this precludes a line by acquiescence: Nathan v. Dierssen, 134 Cal. 282, 66 P. 485 (1901); McRae Land & Timber Co. v. Zeigler, (Fla. 1953) 65 S. (2d) 876; Tripp v. Bagley, 74 Utah 57, 276 P. 912 (1928). Cf. Lind v. Hustad, 147 Wis. 56, 132 N.W. 753 (1911). Holding that such knowledge makes no difference: McAvoy v. Saunders, 161 Iowa 651, 143 N.W. 548 (1913); Di Santo v. De Bellis, 55 R.I. 433, 182 A. 488 (1935). Cf. Adams v. Child, 28 Nev. 169, 88 P. 1087 (1905); McCoy v. Hance, 28 Pa. 149 (1857).

the influence of prescriptive notions, under which the location of any true line is immaterial.

We should not be surprised to find that some courts have characterized the practical location of boundaries by acquiescence by simple and casual references to estoppel.[127] All of these courts have on other occasions offered one or the other or both of the rationales mentioned above. It is obvious that estoppel is used here in its loosest sense and probably again signifies the failure to discover or articulate the real interests or policy to be served. The same inference is suggested by the random use by a single court of more than one of the three alternative theories. These references to estoppel do not mean that the typical requirements of that doctrine will be imposed nor that the results are merely equitable. It is assumed that the legal title is affected, but only one of these courts has expressly declared this to be so.[128]

Here finally are several miscellaneous requirements which have been imposed in one or more cases. It has been held that the doctrine is not available against the state or its instrumentalities,[129] although in another case in the same state a city was held bound by acquiescence;[130] that one cannot acquiesce who is *non compos mentis;*[131] that a land contract purchaser in possession is competent to acquiesce so as to bind the successors to the legal title;[132] and obviously that there can be no practical location of a boundary where the lands of the parties are not contiguous.[133]

No attempt will be made here to recite the limitless variety of evidence, mostly circumstantial, which has been found relevant in proving recognition of or acquiescence in a line as a boundary. As previously noted, in many cases the reports do not reveal all of the facts which produced a judgment in the court below.

127 Brown v. Leete, (C.C.Nev. 1880) 2 F. 440; Columbet v. Pacheco, 48 Cal. 395 (1874); Henderson v. Dennis, 177 Ill. 547, 53 N.E. 65 (1898); Curless v. State, 172 Ind. 257, 87 N.E. 129 (1909); Turner v. Baker, 64 Mo. 218 (1876); Hakanson v. Manders, 158 Neb. 392, 63 N.W. (2d) 436 (1954); Wood v. Bapp, 41 S.D. 195, 169 N.W. 518 (1918); Eubanks v. Buckley, 16 Wash. (2d) 24, 132 P. (2d) 353 (1942).

128 Turner v. Baker, 64 Mo. 218 (1876), where the court said that this was a special sort of estoppel confined to cases of this kind.

129 Herrick v. Moore, 185 Iowa 828, 169 N.W. 741 (1918).

130 Corey v. Fort Dodge, 118 Iowa 742, 92 N.W. 704 (1902).

131 Santee v. Uhlenhopp, 184 Iowa 1131, 169 N.W. 321 (1918).

132 Sheldon v. Perkins, 37 Vt. 550 (1865).

133 Cavanaugh v. Jackson, 91 Cal. 580, 27 P. 931 (1891).

Obviously the courts need to think out more carefully what they mean to make of acquiescence. Especially they need to decide whether it is to be worked into the pattern of practical location or whether it is some sort of prescription. The specific requirements of acquiescence are not all consistent with either view. Obviously a court cannot decide what acquiescence is before deciding what it is for. Nor can the courts work with acquiescence as a kind of practical location without forming a clearer idea of what practical location is all about. This may require the discarding of some prevailing concepts, analogies, and terminology.

A striking example of the helplessness of a court in the face of its own and other diverse precedents and dicta is to be found in the latest Illinois case.[134] The court there does not make clear the relation of acquiescence either to parol agreements or to adverse possession. Where one in that state relies on acquiescence for less than the statutory period, he may have to meet the requirements for express boundary agreements, including proof of uncertainty and absence of mistake. Where acquiescence exceeds the statutory period, it is not clear whether this has any significance except as proof of adverse possession.

Effect of Mistake

The problem of mistake is seldom raised where acquiescence alone is relied on. It can enter these cases, however, through a court's attempt to adapt them to the parol agreement doctrine; and it can also enter from another quarter where a court has not yet defined an acquiescence doctrine separable from adverse possession. Where a court is thinking in an adverse possession context, the question may be put in terms of whether the parties, during their acquiescence, were claiming only to the true line as defined in their deeds, wherever that might be. But in either case the meaning of mistake must be essentially the same; that is, the question is over the effect of an allegation and proof that the parties' acquiescence in a line was founded on a mistaken belief that the line was the true line. Objection may be taken to this statement of the question because it fails to take account of the subtle distinction which has appeared in the application of the mistake rule in the parol agreement cases. But such a dis-

[134] Ginther v. Duginger, 6 Ill. (2d) 474, 129 N.E. (2d) 147 (1955).

tinction may seem unrealistic and especially difficult to apply where the ground for determining a boundary is in terms of acquiescence alone. The only way the distinction could be meaningfully drawn would be in some such terms as these: Did the parties acquiesce in a line solely because of their belief, based on such facts as were available regarding their boundary, that such line was the true line, or were they in dispute or in doubt about the true line at the beginning of their acquiescence and perhaps throughout its continuance? At any rate there is no sign that such a distinction has been recognized in the few cases in which the question of mistake was raised. In several cases the courts have simply stated that mistake is immaterial.[135] Several other courts, however, have indicated without explanation that the effect of acquiescence is vitiated by mistake.[136] The position of the Texas court to this effect is surprising in view of the fact that it is one of the few courts which have expressly rejected the mistake rule in cases of express boundary agreements.[137] The Missouri court has held that there can be no inference of an agreement from an occupation to a line on the supposition that it was the true line,[138] the presumption being that the party in possession intended to claim only to the true line;[139] but if acquiescence in the line continues for the statutory period, the presumption is reversed and the parties will be bound.[140] The position of the

135 Sneed v. Osborn, 25 Cal. 619 (1864); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 200 P. 651 (1921); Miller v. Mills County, 111 Iowa 654, 82 N.W. 1038 (1900); Leeka v. Chambers, 232 Iowa 1043, 6 N.W. (2d) 837 (1942); Chew v. Morton, 10 Watts (50 Pa.) 321 (1840); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925). In Anderson v. Buchanan, 139 Iowa 676, 116 N.W. 694 (1908), and Bradley v. Burkhart, 139 Iowa 323, 115 N.W. 597 (1908), the Iowa court also stated that it did not matter that the parties claimed no more than the land given them by their deeds.

136 Gulf Oil Corp. v. Marathon Oil Co., 137 Tex. 59, 152 S.W. (2d) 711 (1941); White v. Ward, 35 W.Va. 418, 14 S.E. 22 (1891). Cf. Glenn v. Whitney, 116 Utah 267, 209 P. (2d) 257 (1949); Ginther v. Duginger, 6 Ill. (2d) 474, 129 N.E. (2d) 147 (1955), where it is not clear that the court was considering acquiescence separately from a parol agreement; Wood v. Bapp, 41 S.D. 195, 169 N.W. 518 (1918), where the court said that mistake would defeat an express agreement, but that if the parties discovered the mistake and thereafter continued to acquiesce for the statutory period in the line agreed on, they would be bound, with some doubt left whether this was founded on the acquiescence doctrine or on adverse possession. In White v. Ward, supra, acquiescence was pleaded as a basis for estoppel, and the court responded that estoppel could not be founded on a bona fide mistake.

137 Cooper v. Austin, 58 Tex. 494 (1883), cited note 69 supra.

138 Schad v. Sharp, 95 Mo. 573, 8 S.W. 549 (1888); Jacobs v. Moseley, 91 Mo. 457, 4 S.W. 135 (1886).

139 Three Way Land Co. v. Wells, (Mo. 1945) 185 S.W. (2d) 795; Tillman v. Hutcherson, 348 Mo. 473, 154 S.W. (2d) 104 (1941).

140 Mothershead v. Milfeld, 361 Mo. 704, 236 S.W. (2d) 343 (1951); Tillman v. Hutcher-

Missouri court is in contrast to those which have used the doctrine of acquiescence as an escape from the mistake requirements of adverse possession.[141]

If a court accepts the mistake rule when talking about boundary agreements, but not when talking about acquiescence, and so long as we cannot know how a court will choose between these overlapping concepts, further doubts are raised about whether a decision can be predicted in any case.

III. ESTOPPEL

In approaching the cases in which courts have resolved the problem of practical location in terms of estoppel, one may wonder whether there is any benefit to be gained by an inquiry into the meaning and requirements of estoppel in other contexts. It is only natural to assume that such an inquiry would aid in the analysis of estoppel in the present context by providing a standard for judgment or at least a basis for comparison. But in looking at estoppel generally one may come to doubt whether any standard is to be found. Attempts have been made to define or to state the requirements for one major area of the doctrine, estoppel in pais, of equitable origin.[142] There must be a representation of fact, by one who knows the true facts, to one who does not know, and a substantial change of position by the latter in reliance thereon. But to what extent have these requirements in application been redefined, distorted, or ignored? And what is to be said about estoppel by deed, estoppel of a tenant to deny his landlord's title, or of a bailee to deny his bailor's title, to mention but several of the miscellany to be found under the general head? There can be no further pursuit here of a common thread, other than to state the impression that estoppel will be invoked in diverse situations where a court finds it inequitable or contrary to some policy to allow one who has taken a position of some legal significance later to change that position. Yet an adequate study of estoppel in the boundary cases cannot be made

son, 348 Mo. 473, 154 S.W. (2d) 104 (1941). This analysis can be significant only on the assumption that the Missouri court would give some effect to acquiescence for less than the statutory period. If acquiescence must be for the statutory period in any case, mistake under this view becomes immaterial. In the Mothershead case the court referred only to long acquiescence.

141 See note 103 supra.

142 3 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §805 (1941); BIGELOW, ESTOPPEL, 6th ed., 602 et seq. (1913).

entirely out of context. References to other applications of the doctrine, particularly to the typical estoppel in pais, will be made where this seems helpful in discovering the courts' objectives in the boundary cases.

Attention should be directed first to cases in which the principles of estoppel in pais can be easily invoked. These are cases in which a landowner makes positive representations to his neighbor about the location of their common boundary. Such cases stand somewhat apart from the objectives of this study, but they should not be passed without some comment. Where there has been a change of position in reliance on such representation, estoppel has almost invariably been applied.[143] The change of position usually consists of erecting valuable improvements, but in a number of cases the mere purchase of land affected by the boundary was sufficient.[144] It may be clear in the latter cases that the purchaser acquired his land believing that the boundary was as it was represented; but it is doubtful whether the proof shows that he would not have purchased but for the representations. No point has been made of this, however. The stated requirements of estoppel in pais include the requirement that the party making the representation shall have knowledge of the true facts or that the circumstances are sufficient to impute such knowledge. But it seems that this requirement is not always adhered to even in cases not involving boundaries.[145] At any rate, in the boundary cases, although several courts have refused to estop a defendant who asserted a line with a good faith belief that it was the true boundary,[146] the scienter requirement has more frequently been

143 Allyn v. Schultz, 5 Ariz. 152, 48 P. 960 (1897); Grants Pass Land and Water Co. v. Brown, 168 Cal. 456, 143 P. 754 (1914); Pitcher v. Dove, 99 Ind. 175 (1884); Ross v. Ferree, 95 Iowa 604, 64 N.W. 683 (1895); Martin v. Hampton Grocery Co., 256 Ky. 401, 76 S.W. (2d) 32 (1934); Liederbach v. Pickett, 199 Minn. 554, 273 N.W. 77 (1937); Small v. Robbins, 33 Nev. 288, 110 P. 1128 (1910); Clark v. Hindman, 46 Ore. 67, 79 P. 56 (1905); Merriwether v. Larmon, 35 Tenn. 447 (1856); Spiller v. Scribner, 36 Vt. 245 (1863); Rippey v. Harrison, 66 Wash. 109, 119 P. 178 (1911); Haag v. Gorman, 203 Wis. 346, 234 N.W. 337 (1931). Cf. Howell v. Kelly, 129 Kan. 543, 283 P. 500 (1930); Mowers v. Evers, 117 Mich. 93, 75 N.W. 290 (1898).

144 Allyn v. Schultz, 5 Ariz. 152, 48 P. 960 (1897); Grants Pass Land and Water Co. v. Brown, 168 Cal. 456, 143 P. 754 (1914); Rowell v. Weinemann, 119 Iowa 256, 93 N.W. 279 (1903); Merriwether v. Larmon, 35 Tenn. 447 (1856); Spiller v. Scribner, 36 Vt. 245 (1863); Rippey v. Harrison, 66 Wash. 109, 119 P. 178 (1911). Cf. Mowers v. Evers, 117 Mich. 93, 75 N.W. 290 (1898).

145 BIGELOW, ESTOPPEL, 6th ed., 663 et seq. (1913); 3 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §809 (1941). Pomeroy says that such a requirement is less likely to be imposed where estoppel is founded on affirmative conduct rather than mere acquiescence or silence, and that the result is an application of the two-innocent-persons doctrine.

146 Cheeney v. Nebraska and C. Stone Co., (C.C. Colo. 1890) 41 F. 740; Quick v.

ignored.[147] Of course where a plaintiff's change of position has not been in reliance on anything done or omitted by the defendant, there is no room for estoppel.[148]

A striking application of the doctrine has been made in cases involving only silence on the part of one landowner in the face of expenditures by his neighbor, which were made on certain assumptions by the latter as to the correct boundary.[149] These cases are all the more striking because in most of them the estopped party shared the belief of his neighbor as to the proper location of their boundary.[150]

The cases last considered may suggest that the courts in applying estoppel in boundary disputes are concerned with something more than the prevention of inequitable results in particular cases. They may serve as a transition into a larger mass of cases which are fully meaningful only in relation to the practical location of boundaries by parol agreement or acquiescence.

Mention has been made of some courts' use of estoppel to explain decisions on facts which show nothing more than typical practical locations by other accepted methods.[151] There may be objection to such a practice on the ground that it distorts the meaning of estoppel. But certainly these are cases in which parties

Nitschelm, 139 Ill. 251, 28 N.E. 926 (1891); Faulkner v. Lloyd, (Ky. 1952) 253 S.W. (2d) 972. Cf. Pitcher v. Dove, 99 Ind. 175 (1884); Spiller v. Scribner, 36 Vt. 245 (1863).

147 Harper v. Learned, 199 La. 398, 6 S. (2d) 326 (1942); Benz v. St. Paul, 89 Minn. 31, 93 N.W. 1038 (1903); Small v. Robbins, 33 Nev. 288, 110 P. 1128 (1910); Clark v. Hindman, 46 Ore. 67, 79 P. 56 (1905); Louks v. Kenniston, 50 Vt. 116 (1877); Rippey v. Harrison, 66 Wash. 109, 119 P. 178 (1911).

148 Keel v. Covey, 206 Okla. 128, 241 P. (2d) 954 (1952); Thomas v. Harlan, 27 Wash. (2d) 512, 178 P. (2d) 965 (1947). Cf. Corning v. Troy Iron & Nail Factory, 44 N.Y. 577 (1871), in which recovery of land was allowed on the finding that it would not interfere with the defendant's valuable improvements. There will be no estoppel if the defendant did not know of the expenditures until after they were completed. Trimpl v. Meyer, 246 Iowa 1245, 71 N.W. (2d) 437 (1955).

149 Deidrich v. Simmons, 75 Ark. 400, 87 S.W. 649 (1905); Kerr v. Hitt, 75 Ill. 51 (1874); Minear v. Keith Furnace Co., 213 Iowa 663, 239 N.W. 584 (1931); Corey v. Fort Dodge, 118 Iowa 742, 92 N.W. 704 (1902); McClintic v. Davis, 228 S.C. 378, 90 S.E. (2d) 364 (1955). Cf. Roetzel v. Rusch, 172 Okla. 465, 45 P. (2d) 518 (1935); Tyree v. Gosa, 11 Wash. (2d) 572, 119 P. (2d) 926 (1941), where such a result was not reached because the plaintiff verbally protested against the defendant's activities. *Contra:* Cottrell v. Pickering, 32 Utah 62, 88 P. 696 (1907), where the court insisted on the strict requirements of estoppel in pais. Cf. Mullaney v. Duffy, 145 Ill. 559, 33 N.E. 750 (1893); Hass v. Plautz, 56 Wis. 105, 14 N.W. 65 (1882); Warner v. Fountain, 28 Wis. 405 (1871).

150 Cf. Dorfman v. Lieb, 102 N.J. Eq. 492, 141 A. 581 (1928), where the court said that equity will not relieve against a mutual mistake, but nevertheless ordered the defendant to convey to the plaintiff the land claimed by him upon payment by the latter of its value.

151 See text at notes 47 and 127 supra.

who have taken a position are prevented from changing it; and reference can be made again to other applications of estoppel which do not meet the more precise requirements of estoppel in pais. The main objection to such a practice, however, is that it serves merely to cover a court's failure to bring to light the real ground for decision. A primary purpose of this whole study is to discover a rationale for practical location. If the concepts of parol agreements and acquiescence are not wholly adequate for this purpose, a resort to estoppel gets us no further. Particular reference should be made to an Alabama case in which there was an informal boundary agreement and the erection of a fence and acquiescence and possession in accordance with it for thirty years.[152] The court invoked estoppel to prevent a denial of the validity of this boundary. This is of special significance because that court had not previously recognized boundaries by agreement or acquiescence. If this case is followed, it may be possible to determine boundaries by either means in the guise of estoppel.[153]

Courts have invoked estoppel in favor of a landowner who changed his position in reliance on conduct by an adjoining owner, such as erecting a fence, indicating the latter's position in regard to their boundary.[154] No representations were expressly made, but could be said to have been implied by conduct. These cases are referred to here, rather than in relation to the situation mentioned three paragraphs above, because of the difficulty in distinguishing them from other cases involving long mutual acquiescence in a boundary, but which also had the additional feature that one of the parties in each dispute made valuable improvements in reliance on the boundary acquiesced in, a fact

[152] Turner v. De Priest, 205 Ala. 313, 87 S. 370 (1921).

[153] In a group of early Tennessee cases it was held that where one takes a grant of unsurveyed land from the state and then marks out boundaries, these will be binding on the state and also by estoppel on the grantee in favor of his later grantees. Yarborough v. Abernathy, 19 Tenn. 413 (1838); Singleton v. Whiteside, 13 Tenn. 18 (1833); Davis' Lessee v. Smith & Tapley, 9 Tenn. 496 (1831). This has been designated as the "remarking doctrine." Failure to meet even the minimum estoppel requirement of a change in position in reliance on the marked boundary leaves such a rule as essentially no more than a special kind of practical location. A similar rule has been applied in North Carolina against a grantor who, at the time or after his conveyance, marks the boundaries of the land conveyed. Watford v. Pierce, 188 N.C. 430, 124 S.E. 838 (1924); Barker v. Southern Ry. Co., 125 N.C. 596, 34 S.E. 701 (1899).

[154] Hart v. Worthington, 238 Iowa 1205, 30 N.W. (2d) 306 (1947); Harper v. Learned, 199 La. 398, 6 S. (2d) 326 (1942); Colby v. Norton, 19 Me. 412 (1841); Fitch v. Walsh, 94 Neb. 32, 142 N.W. 293 (1913); Noble Gold Mines Co. v. Olsen, 57 Nev. 448, 66 P. (2d) 1005 (1937); Morrison v. Howell, 37 Pa. 58 (1860); Hefner v. Downing, 57 Tex. 576 (1882).

which the courts regarded as bearing on the outcome.[155] Of special interest are several New Jersey cases where the practical location of streets and lot lines consistent therewith, after long acquiescence and the making of improvements, became binding on the parties affected.[156] The court said that acquiescence for the statutory period was not required, but initially did not apply the label of estoppel. At length the court indicated that this rule was not confined to cases involving streets and was indeed one of estoppel,[157] but reference was also made to the leading New York case on boundaries by acquiescence.[158] New Jersey also has not otherwise recognized boundaries by agreement or acquiescence.

The largest group of cases invoking estoppel are those which show practical locations by express or implied oral agreements, but with the added feature that one of the parties made valuable improvements in reliance on the line agreed on.[159] In some of these cases there was also acquiescence for the statutory period;[160] but in others it is clear that a post-agreement period of acquiescence is not required.[161] The Washington court has expressly stated that an agreed line becomes binding either upon long acquiescence or the making of improvements in reliance on it.[162] The Wisconsin court in fact seems to recognize agreed boundaries only in terms of estoppel, with the making of improvements as

155 Bayhouse v. Urquides, 17 Idaho 286, 105 P. 1066 (1909); Midland Valley Railroad v. Imler, 130 Okla. 79, 262 P. 1067 (1927); Kier v. Fahrenthold, (Tex.Civ.App. 1957) 299 S.W. (2d) 744. In the first two of these cases the courts did not use the word estoppel to characterize the result.

156 Jackson v. Perrine, 35 N.J.L. 137 (1871); Smith v. The State, 23 N.J.L. 130 (1851); Den d. Haring v. Van Houten, 22 N.J.L. 61 (1849).

157 Baldwin v. Shannon, 43 N.J.L. 596 (1881).

158 Baldwin v. Brown, 16 N.Y. 359 (1857).

159 Needham v. Collamer, 94 Cal.App. (2d) 609, 211 P. (2d) 308 (1949); Acosta v. Gingles, 70 Fla. 13, 69 S. 717 (1915); Steidl v. Link, 246 Ill. 345, 92 N.E. 874 (1910); Bubacz v. Kirk, 91 Ind. App. 479, 171 N.E. 492 (1930); Cheshire v. McCoy, 205 Iowa 474, 218 N.W. 329 (1928); Evans v. Kunze, 128 Mo. 670, 31 S.W. 123 (1895); Trussel v. Lewis, 13 Neb. 415, 14 N.W. 155 (1882); Jackson ex dem. Goodrich v. Ogden, 7 Johns. (N.Y.) 238 (1810); Burt v. Creppel, 5 Ohio Dec. Repr. 330 (1875); Glasscock v. Bradley, (Tex.Civ.App. 1941) 152 S.W. (2d) 439; Blackham v. Olsen, 51 Utah 124, 169 P. 156 (1917); Windsor v. Sarsfield, 66 Wash. 576, 119 P. 1112 (1912); Pickett v. Nelson, 71 Wis. 542, 37 N.W. 836 (1888). Cf. Taylor v. Reising, 13 Idaho 226, 89 P. 943 (1907); Fisler v. Van Deusen, 158 App. Div. 322, 143 N.Y.S. 386 (1913).

160 Bubacz v. Kirk, 91 Ind. App. 479, 171 N.E. 492 (1930); Trussel v. Lewis, 13 Neb. 415, 14 N.W. 155 (1882).

161 Needham v. Collamer, 94 Cal.App. (2d) 609, 211 P. (2d) 308 (1949); German v. Wilkin, 377 Ill. 515, 37 N.E. (2d) 155 (1941); Johnston v. McFerren, 232 Iowa 305, 3 N.W. (2d) 136 (1942); Diggs v. Kurtz, 132 Mo. 250, 33 S.W. 815 (1896); Burt v. Creppel, 5 Ohio Dec. Repr. 330 (1875); Blackham v. Olsen, 51 Utah 124, 169 P. 156 (1917).

162 Windsor v. Sarsfield, 66 Wash. 576, 119 P. 1112 (1912).

a necessary requirement.[163] A few courts have denied estoppel in this situation because of the good faith, mistake, or lack of deception on the part of the party against whom estoppel was asserted.[164] The Wisconsin court ruled to the same effect, but in terms of the requirement of a dispute or uncertainty and the mistake rule in boundary agreements.[165] But this restriction is not imposed by most of the courts which have applied estoppel either in the setting of parol boundary agreements or of acquiescence. It may be inferred that where the circumstances are such as to call for estoppel, most courts are thereby also freed from the strictures of the mistake rule in boundary agreements.

It will be seen that most of the estoppel cases require at least a substantial change of position by the party alleging estoppel. The presence in the facts of such a change of position adds an equitable ground for decision to whatever general policy may also be available and applicable in support of the practical location of boundaries. The designation as estoppel of the principle involved may serve as a useful mark for classifying these cases on the basis of that special feature in them that is different from the common run of practical location cases. In this view, there is little point in inquiring whether estoppel in these cases is altogether consistent with the ordinary principles of estoppel in pais. Objection to this use of the doctrine would have to center on the small emphasis which many courts place on the role of the party estopped. But the term "estoppel" may serve for lack of some other term which better conveys the meaning of what has been done. The decisions themselves are not objectionable, at least where the element of a changed position appears in addition to facts indicating a practical location by agreement or acquiescence, for the latter facts alone would justify the decisions. Where there is a changed position in reliance on a line believed to be the true line, but without any other features of practical

163 Peters v. Reichenbach, 114 Wis. 209, 90 N.W. 184 (1902); Hass v. Plautz, 56 Wis. 105, 14 N.W. 65 (1882); Cove v. White, 20 Wis. 425 (1866), 23 Wis. 282 (1868).

164 Proctor v. Putnam Machine Co., 137 Mass. 159 (1884); Brewer v. Boston & Worcester R.R., 46 Mass. 478 (1843); Ward v. Dean, 69 Minn. 466, 72 N.W. 710 (1897); Carstensen v. Brown, 32 Wyo. 491, 236 P. 517 (1925). In Cronin v. Gore, 38 Mich. 381 (1878), the Michigan court said that good faith was a defense when reliance was on the silence, rather than the representations, of a landowner. In Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740 (1893), the Minnesota court stated its three-fold doctrine of practical location, one ground of which is estoppel, stated in terms requiring knowledge of the true line by the party estopped.

165 Hass v. Plautz, 56 Wis. 105, 14 N.W. 65 (1882). See also Proprietors of Liverpool Wharf v. Prescott, 89 Mass. 494 (1863).

location, the decision will be justified in some cases by the presence of a representation, by words or conduct, by the party estopped. This is pretty close to orthodox estoppel in pais. There remain those few cases in which there is nothing to induce one party's change of position except knowledge by the other party that such change is taking place and then silence. Such decisions may be debatable. The willingness of some courts to reach them may reflect these courts' susceptibility to any available device for the expeditious determination of boundaries. If there were some simple, or at least clear, answer to the simple question, "Where is my boundary?" the courts might not feel the need to be so liberal with estoppel. At least the role of the party estopped has not been ignored altogether. Here, as in other areas of practical location, there must be some semblance of mutuality. The courts have yet to say that one can make out a case of practical location merely by proving that he unilaterally procured a survey and built a house accordingly.

IV. OTHER RULES

Description v. Survey

In an earlier article[166] an attempt was made to run down authority for a proposition I had at times encountered to the effect that lines surveyed on the ground prior to a conveyance would control an inconsistent description in the deed based on such survey. There is no need to go into all this again, but since it savors of practical location, the rules encountered are here briefly stated.

(1) One rule followed by a large number of courts concerns a description which incorporates a plat, and requires that, if the plat and the survey on which it was based conflict, the survey must control. There is no requirement that the survey be marked on the ground or that the parties know anything about it. Many of the cases, however, show such knowledge, and show that the survey in fact was marked, or other significant facts, such as reliance on it or acquiescence in it. Where these facts appear, the same decisions might have been reached by application of one or the other of the doctrines of practical location already considered.

(2) Several courts at an early date announced another rule like the first, but broader in scope. If a survey is made prior to a

166 Browder, "Boundaries: Description v. Survey," 53 MICH. L. REV. 647 (1955).

conveyance, or the land intended for conveyance is otherwise designated on the ground, the lines so designated will control inconsistent calls in the deed. Here too it is not clear that the surveyed lines must be visibly marked, that the parties to the deed must have participated in the survey, or even that they both must know of it. Nor is certain protection provided for subsequent purchasers who take without knowledge of the controlling facts. In some of its applications the rule seems to accomplish a reformation for mutual mistake in the guise of construction. This rule is not generally followed, and its status is not clear in those states which at one time approved it.

(3) *Practical location by common grantor.* This is a designation of a variant of the rule stated immediately above. It has crept into the decisions in several states. If, where a grantor seeks to divide his land into one or more parcels, he marks the dividing lines on the ground, such lines will control any inconsistent calls in the deed or deeds. Here too there is no clearly imposed requirement that a grantee participate in or know what the grantor has done. But in all of the cases the grantees either knew of the line at the time of the conveyance or there was such acquiescence in the line as to have constituted a practical location on the ground.

In addition to the cases cited in the earlier article as opposed to these three rules, reference is also made to several cases which have approached the question on the basis of practical location by oral agreement, and which in effect are also opposed to the rules stated either on the ground that the survey was unilateral and not agreed to or acquiesced in;[167] that, since the survey took place prior to the conveyance, the requirement of a dispute or uncertainty as the basis for agreement could not be satisfied;[168] or that an agreement prior to a conveyance merges in the deed.[169]

Further comment on these rules appears below under the heading "VI. The Meaning of Practical Location."

The Cooley Dictum

In two early Michigan cases[170] Justice Cooley asserted a principle of practical location the exact basis for which was not made

167 Ross v. Severance, 198 Wis. 489, 224 N.W. 711 (1929).

168 Taylor v. Board of Trustees, 185 Ga. 61, 194 S.E. 169 (1937); Lake Geneva Beach Assn. v. Anderson, 246 Wis. 596, 18 N.W. (2d) 493 (1945).

169 Hicks v. Smith, 205 Ga. 614, 54 S.E. (2d) 407 (1949).

170 Diehl v. Zanger, 39 Mich. 601 at 605 (1878) (concurring opinion); Flynn v. Glenny, 51 Mich. 580 at 584, 17 N.W. 65 (1883).

clear. He said that the principle applicable to conveyances by government survey should be applied generally; that is, the controlling question is where the original landmarks were located, notwithstanding an inconsistent plat or any claim that they were located erroneously. Further, the best evidence of where they were located is the practical location made at the time the original monuments were presumably in place. For this reason old boundary fences are the best evidence of lot lines. He said further:

> "It is also pure assumption that the original survey was mathematically correct. . . . Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines. The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case they must govern, notwithstanding any errors in locating them."[171]

It is not clear from these statements how conclusive are lot lines which "were planted by authority," unless the lots also "were purchased and taken possession of in reliance on them." The first of these thoughts, the planting of lines by authority, comes close to the essence of practical location. It is a recognition of the unreliability of paper boundaries and the necessity for a practical location which, when made, becomes binding. If so, it is noteworthy that Justice Cooley was able to see the practical location problem in terms other than those of parol agreements. The thought about purchasing and taking possession in reliance, however, smacks of estoppel, or perhaps acquiescence. In fact the doctrine of acquiescence was expressly asserted in both of the cases in which this dictum appears. And it is that doctrine which seems to have predominated in later Michigan cases in which the Cooley dictum has been cited.[172] The present significance of this dictum apart from the acquiescence doctrine is doubtful. The

[171] Flynn v. Glenny, 51 Mich. 580 at 584, 17 N.W. 65 (1883).

[172] E.g., Escher v. Bender, 338 Mich. 1, 61 N.W. (2d) 143 (1953); Marion v. Balsley, 195 Mich. 51, 161 N.W. 820 (1917); Veltmans v. Kurtz, 167 Mich. 412, 132 N.W. 1009 (1911); Breakey v. Woolsey, 149 Mich. 86, 112 N.W. 719 (1907); Husted v. Willoughby, 117 Mich. 56, 75 N.W. 279 (1898); White v. Peabody, 106 Mich. 144, 64 N.W. 41 (1895).

original Michigan cases have been cited by other courts, but not in support of the full import of the Cooley dictum.[173]

The Rule of Lerned v. Morrill[174]

Several early New England cases held that if a deed calls for monuments which have not been placed on the land at the time of the conveyance, but which are later so placed by the parties, the latter will be bound thereby, as if the monuments existed at the time of the conveyance.[175]

An Omnibus Rule

The Washington court on occasion has stated the requirements of practical location in terms of a combination of all the usual bases therefor, that is, if parties agree on a line and acquiesce in it for a long period and improvements are made with reference to it, they will be bound.[176] The impression may be left that all these elements are required in any case, but other cases in that state show that an agreement acquiesced in,[177] or acquiescence alone,[178] or estoppel[179] are separate and sufficient grounds for decision.

No Practical Location

It may be interesting to note that, apart from arbitration agreements or the use of acquiescence as evidence of a boundary, courts in the following states have not recognized, either by decision or dicta, the practical location of boundaries by agreement or acquiescence: Alabama,[180] Maryland, Massachusetts,[181] New Jersey, North Carolina, and Virginia. Several of these courts,

173 E.g., Flynn v. Glenny was cited in Turner v. Creech, 58 Wash. 439 at 443, 108 P. 1084 (1910), in support of the practical location of boundaries by a common grantor, and in Richwine v. The Presbyterian Church, 135 Ind. 80 at 91, 34 N.E. 737 (1892), for the doctrine of boundaries by acquiescence.

174 2 N.H. 197 (1820).

175 Knowles v. Toothaker, 58 Me. 172 (1870); Cleaveland v. Flagg, 58 Mass. 76 (1849). Cf. Oliver v. Muncy, 262 Ky. 164, 89 S.W. (2d) 617 (1936). *Contra:* Cripe v. Coates, 124 Ind. App. 246, 116 N.E. (2d) 642 (1954).

176 Scott v. Slater, 42 Wash. (2d) 366, 255 P. (2d) 377 (1953); Mullally v. Parks, 29 Wash. (2d) 899, 190 P. (2d) 107 (1948).

177 Farrow v. Plancich, 134 Wash. 690, 236 P. 288 (1925).

178 Denny v. Northern Pacific Ry., 19 Wash. 298, 53 P. 341 (1898).

179 Rippey v. Harrison, 66 Wash. 109, 119 P. 178 (1911).

180 Cf. Turner v. De Priest, 205 Ala. 313, 87 S. 370 (1921).

181 Cf. the cases cited note 76 supra.

however, have recognized estoppel as a basis for the determination of boundaries.[182]

V. STATUS OF SUBSEQUENT PURCHASERS

Relatively little has been said by the courts about the effect of practical location by agreement, acquiescence, or estoppel, upon the successors in interest of the original parties. Large numbers of cases in effect bind subsequent purchasers, but without mention of the question. One reason for this may be the inability of such purchasers to make out a case on the usual facts for relief against the actions of their predecessors. That a practical location will bind the parties thereto and their privies is the usual assumption, and the only ground indicated for relieving the privies is their qualification as bona fide purchasers for value without notice of the located line. Accordingly it has been held that they will be bound if they had knowledge of the line;[183] and they will also be bound by constructive or inquiry notice, which can be furnished by possession conforming to the line,[184] by monuments marking the line,[185] or by improvements consistent with the line.[186] One court held that a difference in the grade of land and in the appearance of a sidewalk which crossed the line were sufficient.[187] Cases without some such facts as these are not common; and if visible marking were required for practical location even as between the original parties, as it probably should be, the present problem would disappear.

Some courts have decided that successors in interest are bound

182 Cox v. Heuseman, 124 Va. 159, 97 S.E. 778 (1919). Cf. Turner v. De Priest, 205 Ala. 313, 87 S. 370 (1921); New Jersey cases cited notes 156, 157 supra.

183 Furlow v. Dunn, 201 Ark. 23, 144 S.W. (2d) 31 (1940); Kandlick v. Hudek, 365 Ill. 292, 6 N.E. (2d) 196 (1937).

184 Price v. De Reyes, 161 Cal. 484, 119 P. 893 (1911); Sheldon v. Atkinson, 38 Kan. 14, 16 P. 68 (1887); Kentucky Harlan Coal Co. v. Harlan Gas Coal Co., 245 Ky. 234, 53 S.W. (2d) 538 (1932); Thompson v. Borg, 90 Minn. 209, 95 N.W. 896 (1903); Box Elder Livestock Co. v. Glynn, 58 Mont. 561, 193 P. 1117 (1920); Bartlett v. Young, 63 N.H. 265 (1884).

185 Paurley v. Harris, 75 Idaho 112, 268 P. (2d) 351 (1954); Kinsey v. Satterthwaite, 88 Ind. 342 (1882); Seberg v. Iowa Trust & Savings Bank, 141 Iowa 99, 119 N.W. 378 (1909); Carver v. Turner, 310 Ky. 99, 219 S.W. (2d) 409 (1949); Lynch v. Egan, 67 Neb. 541, 93 N.W. 775 (1903); Thiessen v. Worthington, 41 Ore. 145, 68 P. 424 (1902); Hagey v. Detweiler, 35 Pa. 409 (1860).

186 Miller v. Farmers' Bank and Trust Co., 104 Ark. 99, 148 S.W. 513 (1912); Campbell v. Weisbrod, 73 Idaho 82, 245 P. (2d) 1052 (1952); Houston v. Sneed, 15 Tex. 307 (1855); Roe v. Walsh, 76 Wash. 148, 135 P. 1031 (1913).

187 Concannon v. Blackman, 232 Iowa 722, 6 N.W. (2d) 116 (1942). Cf. Nitterauer v. Pulley, 401 Ill. 494, 82 N.E. (2d) 643 (1948).

without notice.[188] Where the view is held that practical location is not a conveyance, but only the application of a description to the ground, a sort of construction of the deed,[189] such a conclusion is at least understandable. One court simply said that otherwise the doctrine could not be effective.[190] Where, after a boundary agreement, title to the parcels affected become united, it has been held that a subsequent grantee of one of the parcels takes according to the terms of his deed unaffected by the agreement.[191]

It is an assumed and unquestioned corollary to the practical location doctrine, or at least to any rule binding successors in interest, that the benefit of any such location also runs to successors in interest.[192] Such is the import of the frequent statement that when such a location has been effectively made, it attaches in legal effect to the deeds of the parties as though expressly described therein.[193] It has been held that a party to a boundary agreement is estopped to deny it against a subsequent purchaser from him of his lot.[194]

The similarity between the doctrine of acquiescence and adverse possession suggests the existence of a comparable tacking problem. It has not been regarded as a problem in the acquiescence cases, however, for it is scarcely ever mentioned, and quite generally it is tacitly allowed. One case has been found in which the question was mentioned, and the court there held that a successor in interest can tack his period of acquiescence to that of his predecessor.[195]

VI. THE MEANING OF PRACTICAL LOCATION

This dismal story of the courts' struggle to adapt inadequate doctrines to reach a laudable objective falls short of revealing the enormity of the confusion which has been left in the wake of that

188 Needham v. Collamer, 94 Cal. App. (2d) 609, 211 P. (2d) 308 (1949); McGill v. Dowman, 195 Ga. 357, 24 S.E. (2d) 195 (1943) (applying statutory rule of acquiescence); Osteen v. Wynn, 131 Ga. 209, 62 S.E. 37 (1908); Kesler v. Ellis, 47 Idaho 740, 278 P. 366 (1929) (although there was in fact a fence erected); Fisher v. Bennehoff, 121 Ill. 426, 13 N.E. 150 (1887); Joyce v. Williams, 26 Mich. 331 (1873); Kincaid v. Dormey, 47 Mo. 337 (1871); Welch v. Carter, 151 S.C. 145, 148 S.E. 697 (1929).

189 Needham v. Collamer, 94 Cal. App. (2d) 609, 211 P. (2d) 308 (1949).

190 Osteen v. Wynn, 131 Ga. 209, 62 S.E. 37 (1908).

191 Patton v. Smith, 171 Mo. 231, 71 S.W. 187 (1902).

192 Young v. Blakeman, 153 Cal. 477, 95 P. 888 (1908).

193 Hoyer v. Edwards, 182 Ark. 624, 32 S.W. (2d) 812 (1930); Edgeller v. Johnston, 74 Idaho 359, 262 P. (2d) 1006 (1953); Kandlick v. Hudek, 365 Ill. 292, 6 N.E. (2d) 824 (1937).

194 Marchant v. Felder, 107 S.C. 516, 93 S.E. 179 (1917).

195 Renwick v. Noggle, 247 Mich. 150, 225 N.W. 535 (1929).

process. Other stories could be told which would carry you to the outer reaches of limbo. Such would be the record of the efforts of individual courts to thread through the maze of available precedents, compounding the confusion as they went. The trouble is that the courts have not been fully aware of what they are trying to accomplish, although they have often been aware of the problem in our conveyancing practice which makes the search for a solution imperative. We have seen the courts toil with agreements that are not essentially promissory, with a vague and variable concept of acquiescence, and with an uneasy kind of estoppel that at best copes with only a fringe of the problem.

What then is the problem? It has been mentioned before. It is the gulf in our conveyancing between descriptions in deeds and boundaries on the ground. It is the impossibility by existing methods of so describing land that competent persons can, by using that description, be reasonably certain of locating its exact boundaries. This much has been understood. The California court has put it this way:

> "If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable."[196]

In an early Kentucky case the court answered an argument that proof of marked lines would amount to varying the record by parol proof, saying:

> "This would be true, if where a line is described by its course only, a mathematical line . . . either according to the true meridian or the magnetic variation were intended; but it is apprehended that this is a misconception of the true meaning of such a description of boundary. Such a line was never run in making any survey, and is impossible to be ascertained with perfect precision and certainty by any human means."[197]

What then is to be done? It would be best simply to prevent the problem from arising by so conveying land that no hiatus would occur between the execution of a deed and the application of the boundaries described to the ground. The feasibility of such an expedient is considered in the succeeding section. How can

[196] Young v. Blakeman, 153 Cal. 477 at 481, 95 P. 888 (1908).
[197] Cowen v. Fauntleroy, 2 Bibb (Ky.) 261 (1810).

the gap be bridged in the case of existing titles? If there is no certain application of a description to the ground, the much-sought "true" line is a myth. If a court rules in favor of a line on the ground, it becomes the boundary, not because the true line has necessarily been found, but because the parties are left no other choice. Controversy here, as elsewhere, must come to an end. Our objective, therefore, should not be to discover better means of locating the true line, but to discover a process for running a line by one so authorized that his action will be conclusive. Boundary litigation of course is such a process. But the rules discussed herein have been evolved largely for the purpose of avoiding litigation of every boundary question. Except where conflicting titles are involved, the problem is not adversary in nature, and the process of solving it should not be forced into an adversary form. The process is essentially administrative or ministerial. Someone should simply be authorized to apply the description to the ground. Call it a determination of fact if you wish. Justice Cooley must have had some such idea in mind when he uttered his dictum on this problem, which was quoted above.[198]

At any rate the authority conferred to locate *some* line would not be authority to locate *any* line, but would at least require a reasonable effort to apply the description and other relevant data to the ground. This would imply the need for standards or safeguards to insure that this was done. But once done within the standards imposed, it would be conclusive, or as close to being conclusive as any administrative determination can be. At least it would not be subject to attack simply because someone else, proceeding similarly at a later date, reached a different result. It would also be necessary that a line so run be appropriately marked or monumented, for if we are left with only an imaginary line, we are no better off than we were to begin with. There are, therefore, two essential ingredients for practical location: (1) an application of a description to the ground by one competent to do so, and (2) an appropriate marking of lines so run.

A possible explanation for the failure of courts explicitly to reach the core of practical location may be the impossibility of expressing its meaning except in terms that seem paradoxical. We insist on the guiding force of the muniments of title, and yet that we must cut free of them. We say, on the one hand, that the only true guide for a practical location is in the applicable muniments

198 See note 170 et seq. supra.

of title. But once made, we say that the muniments of title have fully performed their office and must thereafter remain in the background, not to be later resurrected to impeach the operation.

If this process is administrative, it would seem to follow that it should be performed by an administrator. Whether some such procedure could be devised as to be effective upon the existing state of titles is another question reserved for discussion below. No such procedure, at any rate, is generally available today. The point to be made here is that the suggested analysis may be used to characterize much of the practical location of boundaries as this has been accomplished under the rules previously considered. When the courts apply their rules relating to boundary agreements or acquiescence, are they not really allowing the interested parties themselves to undertake the administrative process of applying their titles to the ground? In this view, practical location should not be explained in either contractual or conveyancing terms, and some meaning is supplied to the conclusion previously made that boundary agreements are essentially *sui generis*. If the courts approached the problem in this way, they might avoid the confusion which has resulted from their attempts to adapt concepts which are inadequate. It is on this basis that "practical location" has been used throughout this article as a generic term to cover the several approved methods for the determination of boundaries. It is the only term in existing usage which carries the real meaning of this process. The Minnesota court, it may be noted, has cast its rules in the framework of this terminology.[199]

Until some more satisfactory method of practical location has been provided, the courts must work with the rules they have. It is desirable, therefore, briefly to examine those rules again to determine the extent to which they may be explained in terms of the theory of practical location offered here and whether the various features of those rules are consistent with the objectives of that theory.

Parol Agreements

Except in the arbitration-type of case, where the usual principles of arbitration alone may suffice, boundary "agreements" should be regarded simply as practical locations by the mutual

[199] Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740 (1893). The court said that practical location may take three forms: (1) acquiescence for the statutory period, (2) agreement afterwards acquiesced in, and (3) estoppel.

assent of the parties affected. It should be possible to manifest such assent formally or informally, expressly or impliedly, by words or other conduct. In most of the cases the line agreed on has been marked by fences and the like or other monuments, but the courts have not often insisted on this as a requirement. Mutual possession according to the line has often been found sufficient. Physical marking of a line on the ground is of the essence of practical location, and the security of the operation calls for the requirement of some sort of physical marking. It should not be necessary that the line be marked before or concurrently with the parties' expression of assent to it. They should be able to assent to a line previously marked for some other purpose.

The cases require that parties shall not, in the guise of a boundary agreement, attempt a parol transfer of land. Although we may wish to avoid contractual or conveyancing concepts, this requirement of the Statute of Frauds, under any theory of practical location, can scarcely be avoided. If the argument is made that any practical location which departs from the "true" line is in effect a conveyance, the answer, of course, lies in the unreality of any true line which has not yet been located. A proper practical location is not essentially a conveyance, but it is obvious that a conveyance can be made in the guise of a practical location. Hence the requirement of due respect for the relevant documents of title. If a line is to be deemed located by the parties' assent to it, should they be required to act only on the basis of an acceptable survey? This would tend to insure against a deliberate attempt to disregard the line described in their deeds, as well as against a haphazard and careless operation. In many cases this procedure was followed, but the courts have shown no inclination to require it. Can the parties' interest in protecting the integrity of their respective titles when they manifest their mutual assent to a boundary be relied on as an adequate substitute for the standards which would otherwise be required in such a procedure? Perhaps it can, but only within limits that would guard against their deliberate attempt to change their boundary. It may not be possible to define a general test for this purpose, but particular criteria may be available. It could be held, for example, that the parties exceeded their authority where they located a line in the face of another obvious line, previously located, or located one which was in obvious conflict with their documents of title. Within such limits, their good faith may be the only test. Putting the requirement in terms of doubt or un-

certainty over the true line as a basis for agreement is likely to prove more confusing than helpful.

It is in connection with the reliability of the parties' conduct that the post-agreement requirements which the courts have imposed become significant. Presumably they are imposed to guard against hasty and ill-considered action. It is clear that, with but a few possible exceptions, the courts will not allow a boundary to be determined merely by a verbal manifestation of the parties' assent to it. Most courts require subsequent acquiescence in the line located or assented to, either for the period of the statute of limitations or some indefinite period which may be less than the statutory period. This surely provides a reliable safeguard, for it allows ample opportunity for the discovery of error, as well as for either party simply to change his mind. It is especially indicated where assent has been given to a line previously marked. What about the more liberal rule of some courts which requires merely that an agreement be "executed"? For a reason previously mentioned, it may not be enough to allow a practical location to be consummated merely by acts of possession, although some courts have held this sufficient. Suppose execution is held to require merely the physical marking of the line. Maybe this should be enough. While statements of parties as to their boundary may not be reliable, and are subject to misunderstanding, it may be assumed that they will not lightly erect barriers or other monuments which normally signify the limits of ownership. But a party should be free to prove that a fence was built for some other purpose than to mark a boundary. Whether the erection of a fence should raise a presumption of an intention to make a practical location is a debatable question, the answer to which may depend on how highly a court regards the policy favoring practical location. To be significant for any purpose, physical markings of a line must be mutual, which means either that both parties must participate, or that the acts must be performed by one with the provable assent of the other. It is at this point that the outcome of litigation will depend less on proper legal analysis than on a careful weighing of the variable facts of particular cases.

The assumption that a mutual manifestation of assent to a line may be a reliable substitute for an administrative location of a boundary meets its acid test in the mistake rule which has been so often asserted by the courts. We have seen in the better reasoned cases that the courts will not in every instance listen

to an argument that a mistake was made in running a line on the ground. Where a boundary is located by the judgment of a court, it is not later subject to collateral attack on such a ground. Nor presumably would it be so if it were located by an administrator acting under authority conferred by law. Nor should it be so in the arbitration-type of case where it is located under authority conferred in advance by the parties themselves. But what about the typical case in which a surveyor is authorized to run a line, but without authority to bind the parties, whose assent to the line comes after it has been run? Paraphrasing the argument sometimes made by courts, can the parties be held to have fixed a boundary when their only purpose was to find it? The answer is obvious, but the question is not fair. If all that has taken place is a survey, this is not or should not be a practical location, even if the parties thereafter verbally assent to it as showing the boundary. Practical location takes place when the parties execute their agreement upon the line as a boundary by physical markings or acquiescence or both. It may be argued that if we are to regard such action as a substitute for a practical location by an arbitrator or a court or an administrator, it should appear that they intended so to act. But such intention need not be explicit. It should be enough if they then regarded the location of their boundary as settled and not conditional upon some future determination by someone else. There is no justification for implying any such conditional attitude on the basis of a later assertion that the "true" line was somewhere else. This is especially so where their initial conduct has been followed by a required period of acquiescence. The only realistic significance that an allegation of mistake can have is that the parties would not have acted if they had known the surveyed line was erroneous. But neither would a court or an administrator acting for them in a proceeding initiated by them. In this sense, the argument rests on the illusion of the existence of some "true" line which can always and certainly be found if properly sought. The mistake rule in effect comes down to denying that the parties can do for themselves what others can do for them. Whether the parties can be relied on fully to guard their respective interests when they manifest their assent to a boundary, whether such assent is a good substitute for the safeguards that would be provided in a judicial or administrative operation, may be a debatable question. But the question should be faced in these terms. If the announced policy in favor of the informal and extra-

judicial resolution of boundary problems is strong enough to require an affirmative answer, there is no room left for any question of mistake. It is significant that mistake has not been held to be material where the parties, without a survey, or to avoid a survey, undertake to set their boundary. But such a practical location seems less reliable and less worthy of legal recognition than the more common case where the parties act only after an attempt has been made in good faith to apply their paper titles to the ground.

The mistake rule may have been derived in part from the contractual theory of practical location, with its implicit requirement of consideration, which is satisfied only by something like an express submission to arbitration. This merely demonstrates the inadequacy of contractual concepts in attaining the real objectives of practical location, for it removes from the compass of that doctrine those cases which most deserve to be included within it. Within its proper framework, any thought of a bargain or of consideration is irrelevant.

If the analysis of practical location offered herein is valid, the courts are not so wide of the mark when they say that the effect of a valid boundary agreement is not to transfer land informally, but is only to fix the location where the estate of each party is supposed to exist, so that they continue to hold the areas agreed on by their existing titles.

Acquiescence

If it can be misleading to speak of practical location in contractual terms, it can be equally misleading to speak of acquiescence merely as evidence of an agreement. But we probably have to recognize at least two kinds of practical location. In the one case the mutual manifestation of assent to a line on the ground as a boundary appears in something of the guise of a transaction, identifiable in point of time. This is the one sense in which it is like an agreement. Here we may well speak of acquiescence as the passive conduct which some courts say must follow. If, on the other hand, the required manifestation of assent does not appear in this form, but appears only in a blend of active and passive conduct over a period of time, it may not be amiss to speak of such circumstances as a practical location by acquiescence. Indeed, it would be preferable to confine the term "boundary by acquiescence" to cases of the latter type. In any event, these

two kinds of cases should be separately identified so that the differences between them can be understood.

In the absence of proof of acquiescence of the first type mentioned above, the objective facts in an acquiescence case will often be of equivocal significance. Where a fence or other barrier has existed throughout the required period of time, with perhaps no proof of the circumstances of its origin, but without proof of conduct by the parties on either side of it inconsistent with its acceptance as a boundary monument, it may be permissible to infer or presume that the erection and preservation of the fence was with assent to or in recognition of it as a boundary. Either party would have leave to rebut such a presumption, such as by evidence that the fence was intended to serve a different purpose, or that he did not believe that it marked the true line. The same result, of course, would be indicated where a fence has been erected by one party and treated by him as a boundary, but without any manifestation of the other party's position except his possession in conformity to it.

Where acquiescence merely consummates an otherwise provable practical location, the normal requirements of the latter will, of course, be applicable. Mistake should be immaterial, the line should be marked on the ground, and the parties should not be allowed to change their boundary in the guise of a practical location. No reason is seen for not imposing the same requirements where practical location is by acquiescence in the second sense mentioned above. For example, to determine a boundary by acquiescence in a fence which either party knew was not located on the true line would provide a means of altering a boundary, and so in effect of conveying land, informally. The courts in fact have not made much use of the mistake rule where they have chosen to speak of practical location in terms of acquiescence. But neither have they imposed a requirement of marking the boundary. And there is doubt about how generally they will insist upon their requirement of "doubt" or "uncertainty" about the true line. Explanation for this may again lie in some of the current notions of acquiescence as a kind of prescription. This is a rationale quite different from practical location as that term is used herein, which is keyed to the application of a written description to the ground. A prescriptive location of a boundary, on the other hand, is essentially the abrogation of a paper title. In this view, therefore, absence of certain of the requirements for practical location becomes immaterial.

We are left with the question, however, whether there is a need for a more liberal doctrine of prescription. It is clear that the courts are not content to remain within the confines of adverse possession. But it may be doubted that three doctrines are required for the adequate solution of this kind of problem. Certainly less confusion would arise if we used only two. Under this view, the courts would either require proof of adverse possession or confine the parties within the essential limits of practical location.

Use of the period of the statute of limitations as the period required for acquiescence has the advantage of simplicity. But this period varies among the states from five to twenty-one years. If the one period seems too short or the other too long, there is an alternative which has received judicial recognition: an indefinite period, the length of which can be made to depend on the nature of the proof of acquiescence in the particular case. It may be noted that most courts prefer the indefinite period for acquiescence as a post-agreement requirement and the definite period where the boundary, as we may say, is located by acquiescence alone. This is not unreasonable.

Estoppel

There is no need to resort to estoppel to explain an ordinary practical location. Most of the cases, however, involve facts to which both doctrines may be relevant. This is most obviously the case where the usual elements of practical location are present, but in addition one party has substantially changed his position in conformity to the line located. In the case where one party changes his position in reliance on representations, by word or conduct, of his neighbor, the ordinary elements of practical location are not obvious. But may not even this pattern of behavior in fact manifest the mutual assent required for practical location? The making of improvements should be the best sort of evidence of at least one party's assent. In any case, however, such a change of position raises an equity in favor of the party making it which is not present in every practical location. Whether or not this meets the typical requirements of estoppel, whether or not the opposing party, for example, labored under a bona fide but mistaken belief as to the boundary, the courts hold that this equity is controlling. It would be difficult to contend against this view. Other features of practical location then assume less importance. In this situation, any requirement that a line be marked

or that the parties cannot ignore an established boundary need not be imposed.

Where then the elements of practical location are present, but are fortified by a change of position, the result may be described in terms of either doctrine. Or the term "estoppel" might be reserved for convenience to those cases where the usual elements of practical location are absent.

Description v. Survey—An Addendum

A few further comments are in order on several rules, previously considered herein and in an earlier article, all of which in effect provide that a line established by a survey prior to a conveyance becomes, as a matter of construction, the line called for by the deed, notwithstanding a conflict between them. This is practical location in reverse. In some courts' view, it is not practical location at all, presumably because a line cannot be located which does not yet exist. But no substantial reason is seen why a line may not be located before as well as after a conveyance which purports to describe it. An ordinary practical location presupposes a good faith attempt to locate a line previously described. An application of the present rules should require a good faith attempt to describe a line previously located. Such a requirement may have been assumed in the adoption of these rules, but in stating them the courts often fail to require that the line be marked on the ground or that protection be afforded to subsequent purchasers without knowledge of the line, not to speak of the failure to specify that the location of the line be the mutual act of both the original parties. A rule so stated fails to provide even the minimal requirements of practical location. Many of the cases, however, show that such requirements were in fact met. In some of them, for example, there was acquiescence in a marked line. In all of these cases the parties to the transaction are grantor and grantee, who are left with a common boundary. Since the conveyance follows the location of the line, the grantee often accepts his deed in reliance on the line run on the ground, and sometimes follows this by making improvements. In such a case the doctrine of estoppel as it has been developed in the practical location cases may be invoked. It would be preferable, therefore, if the courts would simply adapt the principles of practical location or estoppel to these special circumstances, and cease trying to explain their decisions in terms of these inadequate and misleading rules. The existence

of these rules further reflects the failure of courts to perceive the essential nature and ingredients of practical location.

It has been recognized that where a deed fails to describe the line which was run, the remedy of reformation of the deed may be appropriate. Certainly there are cases in which this would be the best remedy. But to try to explain all of the cases in such terms is again to make the assumption that a boundary can always be described so as to indicate its exact location on the ground. This of course is the root of the problem which the principles of practical location were designed to overcome. There is some sense, therefore, in treating the problem in most circumstances as one of construction, controlled by the practical construction provided by the parties.

VII. THE LESSON OF PRACTICAL LOCATION

Although the existing rules of practical location can probably be brought into such order that they can alleviate the deficiencies of our conveyancing practices, they still will leave much to be desired in providing for landowners who seek to know with certainty their boundaries. This article has been pointing to the discovery of some better means of reaching this objective.

I should say to begin with that I know of no panacea. But I am prepared to suggest a few remedies, the effectiveness of which will depend on the extent to which they overcome the inertia of existing practices and procedures.

The ideal solution would be to preclude discrepancies between descriptions in deeds and boundaries on the ground by appropriate conveyancing practices. It may seem to some that this could be accomplished by devising better methods of describing land. Some specific suggestions of this sort have been made.[200] There is another alternative: do not try to describe land at all. Or rather, use a description to identify land in a general way, and fix the boundaries by specific reference in the description to lines marked on the ground. This is not a novel idea. It is the established practice in conveying government-survey land. The trouble with that method is that the government survey was not marked beyond sections and major fractions thereof, and many of the monuments have long since disappeared. Authority should

200 Keith, "Government Land Surveys and Related Problems," 38 IOWA L. REV. 86 (1952).

be conferred by statute to survey and adequately mark any parcel, however small. Indeed the smaller the parcel the more practicable such a method becomes.[201] An official surveyor could be provided for this purpose, or authority could be conferred on any competent surveyor chosen by a grantor. In either case the surveyor would be required to mark the land intended for conveyance by placing at designated intervals distinctive, official monuments. He might be required to file in an appropriate office any maps or field notes prepared by him. But the deed of such land would conclude with the words, "according to official survey thereof," or the like. It could be made a misdemeanor for anyone to disturb monuments so planted.

Such a procedure would bind grantor and grantee and their privies, but it could not determine boundaries against the claims of their non-participating neighbors. This is the principal limitation on the usefulness of such a device. But the present proposal could be given effect without this difficulty in respect to the internal boundaries of divided land holdings. It would be most appropriate where land is platted and subdivided, and where much of the proposed procedure is now followed. Those courts which hold, in the case of platted land, that the survey controls the plat, but without the safeguards suggested here, are making an abortive effort to reach the proposed objective.

There is some question about the extent to which this procedure could be made compulsory. There would be no little difficulty in getting it adopted as a requirement for all conveyances by which land is divided or subdivided. It might most hopefully be proposed as an addition to the usual administrative requirements for platting land. Anyone at all familiar with the cases on practical location by the parties will be inclined to favor a considerable degree of compulsion in the institution of a less haphazard procedure. But even if its use were left entirely voluntary, some improvement in the condition of boundaries might be noted in time.

The practical location of existing boundaries presents a larger and more difficult problem. But it could be approached in much the same way. Any landowner should be able to locate his boundaries by some simple, inexpensive, and expeditious means, and to know that the boundaries so located cannot thereafter be im-

201 By the same token, the larger the tract, the more difficult become the problems in using such a method. But we are not dealing with panaceas, and the small tracts outnumber the large.

peached. He should be able to call upon a surveyor who is authorized to perform this task on the basis of the appropriate muniments of title and to mark the boundaries so located by official monuments. Provision for notice to other landowners affected by this process would have to be made unless they participated in initiating it. The surveyor probably would have to certify to what he had done and file his records of the operation. The location of a boundary could become conclusive upon the filing of the certificate if the interested parties joined in executing it, or it could become conclusive after the lapse of a specified period if no objections were filed within that period. If any objections were properly registered, this could have the effect simply of abrogating the results, but preferably would be the foundation for judicial review, in which presumably the survey would at least be prima facie evidence of the boundaries sought. In the event a conflict of titles developed, a judicial proceeding, of course, would be the only solution. Once the boundaries of a parcel were established, and in the absence of a conflict of titles, the owner could convey it by its existing description. It would be preferable, however, as in the case where a grantor and grantee are the only parties interested, that a later description be couched in terms of the official survey. It would be even more preferable to require that this be done.

This proposal too is not novel. There are statutes in several states which, in varying degrees, provide such an administrative procedure.[202] No attempt will be made here to explain or compare them or to evaluate their particular provisions. The Indiana statute resembles most closely the present proposal. The Oregon statute is patently inadequate. Nor has any investigation been made to learn how much they have been used and to what effect. There are relatively few cases in Indiana on practical location by the parties, but it is not known whether the statutory procedure has had anything to do with this. In Indiana and Oregon the statutory procedure has not been regarded as exclusive,[203] and in Louisiana boundaries have been located by estoppel.[204]

We may suspect that it would take more than a legislative

[202] Ind. Stat. Ann. (Burns, 1951) §§49-3311 to 49-3314; La. Civ. Code (Dart, 1945) arts. 823 to 855; Ore. Rev. Stat. (1955) §§209.160 to 209.180. Cf. Ill. Stat. (1957) c. 133, §11 et seq.; Ky. Rev. Stat. (1956) §73.190 et seq.

[203] Adams v. Betz, 167 Ind. 161, 78 N.E. 649 (1906); Horton v. Brown, 130 Ind. 113, 29 N.E. 414 (1891); McCully v. Heaverne, 82 Ore. 650, 160 P. 1166 (1917).

[204] Harper v. Learned, 199 La. 398, 6 S. (2d) 326 (1942); Selfe v. Travis, (La. App. 1947) 29 S. (2d) 786.

enactment to initiate any widespread use of an administrative procedure for locating boundaries. The inertia of habitual attitudes and practices may suggest the need for some special inducement. A provision might be included withdrawing from use all or part of the rules relating to practical location by the parties, on the ground that if a better method is available it ought to be exclusive.

Short of an administrative method of practical location, legislation might be considered which would reduce practical location by the parties to the simplest possible operation consistent with its reliability. It might be provided that all such practical locations be based on a survey by a competent surveyor, which, if accepted by the parties, should be marked by distinctive monuments authorized for the purpose. The necessity would remain for proof that such marking was done by both parties or with their consent. In the absence of bad faith, it might be necessary to preclude any later claim that such a mutual marking was not consistent with the survey on which it was based. A requirement of acquiesence in such a boundary for a prescribed period might be imposed, although this does not seem indispensable.

Under the latter proposal it may be doubted whether any room would be left for a separate doctrine of "boundaries by acquiescence." Consideration would then have to be given to the need for such a doctrine.

These proposals are offered with some diffidence and without any effort to spell out all the necessary features of any comprehensive and efficient legislative enactment. Nor is it assumed that legislation of this sort would solve all boundary problems. It is hoped merely that the need for improvement in present practices has been demonstrated and that there are those who will rise to meet it. It is hoped that, under appropriate auspices, a study of this problem by title lawyers, surveyors, and other interested persons, will somewhere and somehow be undertaken. We lawyers have too long assumed that this was a matter of concern only to surveyors until a dispute arises. We have too long washed our hands of it in our title opinions by telling our clients that their boundaries are a matter on which they must satisfy themselves, knowing full well that they probably will do nothing at all unless compelled by other interested parties, or that such satisfaction as they may gain will likely prove illusory. Surely we can bring our conveyancing practices into such order that we can escape the reproach that a man cannot know his boundaries.