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ANNOTATION

FENCE AS FACTOR IN FIXING LOCATION OF BOUNDARY LINE—MODERN CASES

by

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12 Am Jur 2d, Boundaries §§ 71, 88, 89, 116

Annotations: See the related matters listed in the annotation, infra.

5 Am Jur Pl & Pr Forms (Rev), Boundaries, Forms 32, 52, 54, 57

3 Am Jur Legal Forms 2d, Boundaries §§ 44:101 et seq.

1 Am Jur Proof of Facts 277, Adverse Possession; 2 Am Jur Proof of Facts 649, Boundaries

2 Am Jur Trials 669, Preparing and Using Maps; 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases; 3 Am Jur Trials 507, Preparing and Using Diagrams

ALR Digests, Boundaries § 10 L Ed Index to Annos, Boundaries; Fences; Real Property

ALR Quick Index, Adjoining or Abutting Landowners; Adverse Possession; Boundaries; Consent; Estoppel and Waiver; Fences; Limitation of Actions

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Fence as factor in fixing location of boundary line—modern cases

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I. Preliminary matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and analyzes representative modern state and federal cases in which the courts have discussed the role played by a fence in establishing a boundary line between adjoining landowners. However, the role played by fences in the application of the doctrine of adverse possession is beyond the scope of this annotation.[2]

Since the applicable principles do not vary depending on the nature of the barrier claimed to have become a boundary, the term "fence" is used generically to denote all barriers allegedly marking boundaries between adjoining landowners, without regard to whether the barrier was man-made or natural.

[b] Related matters

Fence as nuisance. 80 ALR3d 962.

Deeds: description of land conveyed by reference to river or stream as carrying to thread or center for only to bank thereof—modern status. 78 ALR3d 604.

Necessary or proper parties to suit or proceeding to establish private boundary line. 73 ALR3d 948.

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1. The present annotation supersedes the one at 170 ALR 1144.

2. See generally 3 Am Jur 2d, Adverse Possession §§ 6 et seq. See also the annotation at 80 ALR2d 1171, entitled "Adverse possession involving ignorance or mistake as to boundaries—modern views."

Right to maintain gate or fence across right of way. 52 ALR3d 9.

Adverse possession involving ignorance or mistake as to boundaries—modern views. 80 ALR2d 1171.

Rights and remedies of one purchasing at judicial or execution sale where there was misrepresentation or mistake as to acreage or location of boundaries of tract sold. 69 ALR2d 254.

Zoning regulations prohibiting or limiting fences, hedges, or the like. 66 ALR2d 1294.

Validity of zoning regulations, with respect to uncertainty and indefiniteness of district boundary line. 39 ALR2d 766.

Restrictive convenants as affecting fences, or walls or hedges similar thereto. 23 ALR2d 937.

Capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR2d 1279.

§ 2. Background, summary, and comment

[a] Generally

In determining whether a fence does, or does not, mark a boundary between adjoining landowners, the governing principles are those applicable to the doctrines of boundary by agreement or acquiesence. These principles are the subject of another annotation[3] and are not repeated in detail here, the purpose of the present annotation being to delineate the various factual settings in which fences have played a role in fixing a boundary. However, in order to facilitate an understanding of the cases, the following brief summary of the governing principles is offered.

It is a well-settled principle of law that a boundary line may, under certain circumstances, be permanently and irrevocably established by parol agreement of adjoining owners. When there is a doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line, the adjoining owners may by parol agreement establish a division line; and, where the agreement is executed and actual possession is taken under such agreement, it is conclusive against the owners and those claiming under them.[4] Such an agreement does not originate or create a line, or pass title to real estate. It simply serves to fix the true location between contiguous lands of a boundary line about which there is dispute; hence the agreement is not in contravention of the statute of frauds.[5] However, the location of the true line must be doubtful or uncertain, or in dispute, since otherwise a parol agreement changing its location would be within the statute of frauds.[6]

As a general rule, acquiescence in the line fixed by oral agreement need not be for the full statutory period required in cases of adverse possession; acquiescence for a reasonable period short of that time may be conclusive,[7] although there are a few courts holding that continued acquiescence for the full statutory period is required to make the boundary conclusive.[8] Just how long a period of acquiescence is necessary to conclude the parties when the statutory period

3. See the annotation entitled "Establishment of boundary line by oral agreement or acquiescence," at 69 ALR 1430, supplemented at 113 ALR 421.

4. See 69 ALR 1430, III.a.

5. See 12 Am Jur 2d, Boundaries § 78.

6. See 69 ALR 1430, III.b.

7. See 16 ALR 1430, III.e.

8. See 12 Am Jur 2d, Boundaries § 80.

is not required is a question which cannot be answered with exactness.[9]

An agreement to fix an uncertain or disputed boundary line is to be given effect notwithstanding that the adjoining owners may have been mistaken as to the location of the true line, so long as there has been no fraud or concealment on the part of one party which would mislead the other.[10] If, however, the parties undertake by a parol agreement to fix the location of a boundary line under the belief that they are fixing the true line when, in fact, it is not, their agreement is not binding and may be set aside by either party on the discovery of the mistake, unless there is some element of estoppel which would prevent it.[11]

A related, but theoretically separate, doctrine governing establishment of a boundary line is that of boundary by acquiescence. Thus, it is well recognized that if adjoining landowners occupy their premises up to a certain line which they mutually recognize and acquiesce in for a long period of time, usually the time prescribed by the statute of limitations, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one.[12] Such recognition of, and acquiescence in, a line as the true boundary line, if continued for a sufficient length of time, will afford a conclusive presumption that the line thus acquiesced in is the true boundary line.[13]

It has been said that the doctrine of boundary by acquiescence is in chaotic condition.[14] This confusion apparently results from the intermingling of the doctrine of boundary by acquiescence with that of boundary by parol agreement. Thus, the rule that an agreement as to a boundary is valid only when acquiescence in the agreement continues and, in some jurisdictions, that this acquienscence must continue for the statutory period has tended to obscure consideration of the fact that simple recognition and acquiescence in an established boundary may fix such boundary. As a result, the courts frequently state that acquiescence is simply evidence of a prior agreement, such an agreement being implied from the acquiescence. Since dispute or uncertainty is a prerequisite for application of the doctrine of boundary by agreement, the intermingling of the two doctrines has led some jurisdictions to also require dispute or uncertainty for application of the doctrine of boundary by acquiescence.[15] Indeed, this position seems to be adhered to by the majority of the jurisdictions in cases involving fences.[16] Other courts, however, recognizing the doctrine of boundary by agreement as distinct from that of boundary by acquiescence declare that from acquiescence for the statutory period arises a direct and conclusive inference, not of an agreement, but that the boundary acquiesced in is actually the true boundary, not to be controverted by evidence and unaffected by the existence or non-existence of a dispute or uncertainty concerning the original line.[17]

Another doctrine which has played a role in the fixing of boundary lines

9. See 12 Am Jur 2d, Boundaries § 80.
10. See 69 ALR 1430, III.1.
11. See 12 Am Jur 2d, Boundaries § 82.
12. See 69 ALR 1430, IV.a.
13. See 12 Am Jur 2d, Boundaries § 85.
14. See 69 ALR 1430, I.
15. See 69 ALR 1430, IV.c.
16. See §§ 3–27, infra.
17. See 12 Am Jur 2d, Boundaries § 87.

between adjoining landowners is that of estoppel. Thus, it has been stated generally that a parol agreement as to a boundary, acquiesced in and followed by occupation and use of the premises for a reasonable period of time, may estop the parties from claiming another boundary than that agreed on. Similarly, courts holding that an agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, may be set aside by either party when the mistake is discovered have qualified this rule when there is some element of estoppel present in the case, as where the rights of innocent third parties have intervened. And finally, the erection of improvements by one adjoining owner after entering lands in accordance with an agreement, or an acquiescence for a long period of time, as to the location of a boundary line may estop the other from asserting that such boundary line was not on the true line.[18]

These principles have been applied extensively in the cases in which a fence was claimed to have become the boundary between adjoining landowners. However, the cases have not been grouped on the basis of whether the court was applying the doctrine of boundary by agreement or that of boundary by acquiescence, in view of the aforementioned tendencies of the courts to mix the two doctrines. Rather, the cases have been grouped initially on the basis of whether one,[19] or more than one,[20] fence line was claimed as a boundary. In grouping the cases, the critical factor is not the number of fences involved, but rather the number of fence lines. Thus, cases in which a fence was rebuilt on the same location have been grouped with those involving a single fence line, while cases in which a single existing fence was moved from one location to another have been treated as involving more than one fence line.

In the cases involving a single fence line in which the fence was in place at the time of litigation and the person or persons building it were specified, there appears to be a tendency for the courts to hold that the fence line was established as the boundary by acquiescence or agreement where the fence was built by either the party opposing it as the boundary or by his predecessor in interest. The apparent reason for this tendency, although not often explicitly stated by the courts, is that the act of building a fence is itself some evidence of acquiescence in it as a boundary. Thus, the contention that a fence has not become a boundary by acquiescence or agreement is weakened when the party making such argument, or his predecessor, was the person building the fence. On the other hand, when the fence was built by other parties, some additional evidence of acquiescence on the part of a party opposing the fence as the boundary is required.

Thus, when the cases in which the fence was built by the party claiming it as the boundary are compared with those in which the fence was built by the person opposing it as the boundary, there is a greater tendency for the courts to hold that the fence did not become the boundary by acquiescence or agreement in the former situation,[21] than in the latter.[22] Indeed, where the fence was built by

18. See 12 Am Jur 2d, Boundaries § 89.

19. §§ 3–20, infra.

20. §§ 21–27, infra.

21. § 3, infra.

22. § 4, infra.

the party claiming it as the boundary, it was held to have become the boundary only in those cases in which there was some specific evidence or a finding that the disputed tract had been improved or altered.[23]

Where the fence was built by more than one party there is again the tendency for the courts to hold that the fence was established as the boundary by acquiescence or agreement where one of the building parties, or his predecessor, was the party opposing the fence as the boundary. Thus, where the fence was built by both the party opposing, and the party claiming the fence, as the boundary[24] by the predecessors of both parties,[25] or by a common predecessor of both parties,[26] the courts have generally held that the fence had become the boundary by acquiescence or agreement,[27] although there is some authority to the contrary.[28] Similarly, where the fence was built by the predecessor of the party opposing it as a boundary, as well as by the party claiming it as the boundary, the courts have held that the fence had become the boundary by acquiescence or agreement.[29]

The tendency of the courts to hold that the fence was established as a boundary by acquiescence or agreement in cases where it was built by the party opposing it as the boundary, or by his predecessor, is also reflected conversely in the cases in which the fence was built by the predecessor of the party claiming the fence as the boundary, the courts in these cases holding that the fence did not become the boundary.[30] However, this tendency has not emerged in the cases in which the fence was built by the predecessor of the party opposing it as the boundary,[31] or by the party opposing the fence as the boundary and the predecessor of the party claiming it as the boundary.[32] In these situations the courts have tended to hold that the fence had not become the boundary by acquiescence or agreement,[33] although there is some authority to the contrary.[34] There is also authority going both ways where the fence was built by some party other than those discussed above.[35]

In cases involving a single fence line in which the fence was in place at the time of the litigation, but in which the person building the fence was not specified, a factor which appears to have played a role in the court's holding with respect to whether the fence had become the boundary by acquiescence or agreement is the use of the land up to the fence. Thus, where the land on either side of the fence had been cultivated, the courts have held that the fence had become the boundary by acquiescence or agreement, such use of the land apparently being treated as evidence of acquiescence in the fence as a boundary.[36] On the other hand, where the land on either

23. § 3[b], infra.
24. § 5, infra.
25. § 8, infra.
26. § 9, infra.
27. §§ 5, 8[a], 9, infra.
28. § 8[b], infra.
29. § 10, infra.
30. § 6, infra.
31. § 7, infra.
32. § 11, infra.
33. §§ 7[b], 11, infra.
34. § 7[a], infra.
35. § 12, infra.
36. § 13, infra.

side of the fence was used for pasturage, the courts, in holding that the fence had not become the fence by agreement or acquiescence, have often treated such use as indicating that the fence was erected as a barrier rather than a boundary.[37] Where the land on either side of the fence was neither cultivated nor used for pasturage, the courts, under various circumstances, have reached conflicting results as to whether the fence had become the boundary.[38]

In the cases in which the fence claimed as the boundary was not in place at the time of litigation, the party so claiming is often faced with the additional task of proving exactly where the fence was located. This is especially so in the cases in which the fence, rather than being torn down, was allowed to deteriorate over the years; and as would be expected in view of the additional burden on the party claiming the fence as a boundary, the courts have tended to hold that in this situation the fence had not been established as the boundary[39] although there is some authority going the other way.[40] Where the fence has been torn down, the problem of establishing where the fence had been located is often not a factor, since in many instances the fence was torn down shortly before trial by the party opposing it as the boundary. Without this additional problem of establishing the location of the fence, the courts, under various circumstances, have tended to hold that the fence had become established as a boundary by acquiescence or agreement,[41] including where the fence was torn down in connection with the construction of another structure,[42] although in some cases involving a fence which had been torn down, the courts have held that the fence had been established as the boundary.[43]

In the cases discussed thus far the fence was either in place at the time of the litigation, or if it had been torn down or allowed to deteriorate, it had not been rebuilt. In numerous cases, however, the fence has been rebuilt on the same line. Since, as discussed previously, the act of building a fence can in itself serve as some evidence of acquiescence in it as the boundary, it would follow that the erecting of more than one fence on the same line would serve as even greater evidence of acquiescence. The results seem to bear this out since the courts, although not usually emphasizing the fact that the fence had been rebuilt on the same line, have generally held, under various circumstances, that in this situation the fence had become the boundary line by acquiescence or agreement,[44] although there is some authority to the contrary.[45] Only where there was specific evidence or a finding of a lack of prior uncertainty or dispute over the boundary, which uncertainty or dispute, as discussed previously, is generally held to be an element of the doctrines of boundary by acquiescence or agreement, have the courts held that there was no establishment of a fence line as the boundary.[46] However, in a few cases

37. § 14, infra.

38. § 15[a, b], infra.

39. § 18[b], infra.

40. § 18[a], infra.

41. § 16[a], infra.

42. § 17, infra.

43. § 16[b], infra.

44. § 19[a], infra.

45. § 19[b], infra.

46. § 20[a], infra.

of this type, the courts have applied the rule that uncertainty or dispute is not required and accordingly have held that, under the particular facts involved, the fence had been established as the boundary line.[47]

In the cases involving more than one fence line, some have also involved more than one contested boundary, as in the situation where a landowner's property was bordered on more than one side by the property of an adjoining landowner, or where there was a dispute with more than one adjoining landowner. In these cases, the courts under various circumstances have reached conflicting results as to whether a fence had been established as a boundary by acquiescence or agreement.[48]

However, in most of the cases involving more than one fence line, there was but a single contested boundary.[49] It should be noted that although these cases involved more than one fence line, only one was claimed to have become the boundary by acquiescence or agreement, the other fence line running along what was allegedly the "true" boundary between the properties in question.

Since the contention that a fence has been acquiesced in as a boundary is weakened if the fence has served some purpose other than as a boundary, it is not surprising that where there was specific evidence or a finding that the fence which was claimed to have become the boundary by acquiescence or agreement served some purpose other than a boundary, the courts have held that the fence had not been established as a boundary between the properties involved.[50] However, the opposite result has been reached where the predecessors of both parties recognized the fence as a boundary, even though it also served some other purpose.[51]

In the cases involving more than one fence line, but only a single contested boundary, in which there was no specific evidence or finding that the fence which was claimed to be the boundary by acquiescence or agreement was built for some purpose other than as a boundary, the courts under various circumstances have found that the fence had been established as the boundary, whether it had been built by a party other than a common grantor[52] or whether the builder of the fence was unspecified,[53] although in each instance there is authority holding that the fence had not become the boundary by acquiescence or agreement.[54] However, the courts are more evenly divided where the fence claimed to have become the boundary by acquiescence or agreement was built by, or in place when the land was owned by, a common grantor,[55] apparently since there is a greater possibility that a fence built when all of the land in question was owned by a single person was built for some purpose other than as a boundary.

[b] Practice pointers

Counsel representing either side in an action to establish a fence as a boundary should be aware of the different theories available in order to

47. § 20[b], infra.
48. §§ 26, 27, infra.
49. §§ 21–25, infra.
50. § 21, infra.
51. § 22, infra.
52. § 24[a], infra.
53. § 25[a], infra.
54. §§ 24[b], 25[b], infra.
55. § 23[a, b], infra.

be able to choose the one most helpful to his case. For example, if the fence in question has been in existence for less than the period required to establish adverse possession, counsel for the proponent of the fence-boundary should attempt to prove that the fence had become the boundary by agreement, since under this theory it is usually not necessary for the fence to have existed for the statutory period for adverse possession.[56] On the other hand, under the theory of boundary by acquiescence, evidence that the fence has existed for this period is usually required.[57] However, counsel should consider this theory if he anticipates difficulty in proving an agreement that the fence was to serve as a boundary, since some jurisdictions have recognized that acquiescence in the fence is sufficient by itself to establish it as the boundary.[58]

One of the most perplexing problems in cases involving boundary disputes is the varying emphasis accorded acquiescence. The resolution of this problem is of particular importance to counsel since it strongly affects the amount of evidence required to establish a fence as a boundary. For example, in jurisdictions taking the position that acquiescence in a fence as a boundary for a sufficient period of time will conclusively establish that the fence was a boundary, counsel need not present evidence of a prior uncertainty or dispute over the boundary, since in such jurisdictions it has been specifically recognized that such evidence is not required.[59] In other jurisdictions the acquiescence in a fence is said to create a presumption that the boundary was uncertain or disputed and that the parties had reached an agreement that the fence was to serve as the boundary.[60] However, counsel should note that this presumption is rebuttable by, for example, evidence establishing that no parties were available to make an agreement, that the line was set for a purpose other than establishing a boundary, that there was an absence of a dispute or uncertainty in fixing the boundary, or that there was mistake or inadvertence in locating the boundary.[61] Finally, in those jurisdictions treating acquiescence as merely evidence of an agreement resolving a boundary dispute,[62] counsel must be aware that the mere acquiescence in the existence of a fence, in the absence of a specific agreement that it should be taken as a true boundary, might not be sufficient to establish it as such.[63] Thus,

56. See, for example, Nagel v Philipsen (1958) 4 Wis 2d 104, 90 NW2d 151.

57. See, for example, Allen v Robbins (1961, Tex Civ App 3d Dist) 347 SW2d 362.

58. See, for example, Retherford v Daniell (1975, App) 88 NM 214, 539 P2d 234.

59. See, for example, Seidenstricker v Holtzendorff (1949) 214 Ark 644, 217 SW2d 836.

60. See, for example, Motzkus v Carroll (1958) 7 Utah 2d 237, 322 P2d 391.

61. See, for example, Wright v Clissold (1974, Utah) 521 P2d 1224.

62. See, for example, Joaquin v Shiloh Orchards (1978, 5th Dist) 84 Cal App 3d 192, 148 Cal Rptr 495, 7 ALR4th 46, wherein the court declared that a long-standing acceptance of a fence as a boundary line gives rise to an inference that there was, in fact, a boundary agreement between the coterminous owners resulting from an uncertainty or dispute as to the location of the true line.

63. See, for example, Drew v Mumford (1958, 2d Dist) 160 Cal App 2d 271, 325 P2d 240.

counsel should, if possible, introduce any other available evidence concerning the existence of an agreement to treat the fence as a boundary.

In numerous cases it has been recognized that mere acquiescence in the existence of a fence as a barrier, and not as a boundary, is not such recognition and acquiescence as will amount to an agreement as to the boundary or establish it as the true line.[64] Evidence of this sort should, of course, be introduced by counsel who should, in addition, remember that it can be effective even if only one of the parties in question considered the fence as a barrier, since it is well established that the acquiescence required to establish a fence as a boundary must be mutual.[65]

Counsel should keep in mind that the actions of the predecessors in title to the parties involved in a boundary line dispute with regard to fixing a fence as a boundary by agreement or acquiescence are binding.[66] Thus, the fact that one of the parties in a boundary dispute case denies that he treated the fence as a boundary is not conclusive on the issue. In this situation, counsel for the party attempting to establish the fence as the boundary should interview the predecessors in interest of the parties, as well as other witnesses in the neighborhood who are familiar with the fence and how it was regarded.

II. Single fence line

A. Generally

1. Fence in place

a. Person building fence specified[67]

§ 3. By party claiming fence as boundary

[a] Generally

Where a single fence line, which was not on the true line between the properties in question, was claimed to have become the boundary by acquiescence or agreement, and where the fence was built by the party claiming it as the boundary, was in place at the time of the litigation, and had not been rebuilt, the courts in the following cases held that the fence had not become the boundary, there being no specific evidence or finding that the disputed tract had been improved or cultivated.

Thus, a fence was held not to have been accepted by acquiescence as a boundary line between the property of the plaintiff landowners and that of the defendant adjoining landowners, in Webb v Miller (1963) 236 Ark 245, 365 SW2d 450, the court reversing a judgment against the plaintiffs in their action to enjoin the adjoining landowners from interfering with their property. The adjoining landowners, who had owned all of the property involved, had erected the fence in 1957, and in 1959 had conveyed to the landowners' predecessor in title a parcel of land measuring 200 feet from east to west, the parties at that time accepting the aforementioned fence as the western boundary of this parcel. In 1961, the land was

64. See, for example, Eggers v Mitchem (1948) 239 Iowa 1211, 34 NW2d 603.

65. See 12 Am Jur 2d, Boundaries §§ 78, 85.

66. See 12 Am Jur 2d, Boundaries §§ 78, 85.

67. Cases in which part of the fence was built by a specified party and part by an unspecified party, have been classified on the basis of the specified party.

Cases in which the fence was built by the spouse of a party, or at the direction of a party, are classified as if the fence had been built by the party.

7 ALR4th FE

conveyed to the plaintiff landowners who had a survey conducted showing that their property extended 17.8 feet west of the aforementioned fence. In holding that the landowners were not bound by the aforementioned agreement between the adjoining landowners and their predecessor in title, the court pointed out that there was no evidence that the landowners had ever heard of any agreed boundary line or that they had any notice of the adjoining landowners' claim of such an agreement; that their deed did not contain any provision that the land purchased was other than that contained in the description; and that although the landowners saw the fence, they thought nothing about it, believing that they were getting 200 feet. With respect to the acquiescence of the plaintiffs' predecessor, the court explained that in this case the predecessor had not acquiesced for the required 7 years. Finally, the court observed that the adjoining owners had once owned the entire tract and could, after a proper survey, have conveyed the intended amount of land to the predecessor or, at least, have mentioned the fence in the conveyance.

It was held, in Pra v Bradshaw (1953) 121 **Cal** App 2d 267, 263 P2d 52, that a wall which had been constructed by the defendants between their property and that of the plaintiffs on the south did not constitute the boundary between the properties even though both parties believed that the wall was on the boundary line from the time of its construction in 1939 until 1949, when the plaintiffs discovered by means of a survey that the wall encroached on their property. The court stated that inasmuch as the boundary was properly described in the deeds of both parties, there had been no dispute as to the boundary prior to the survey and that, therefore, there had only been a mistaken acquiescence in what was believed to be the true boundary. In such a situation, the court explained, the plaintiffs' acquiescence in a wrong boundary was considered in both law and equity as a mistake, and either party was free to claim the true line. The court thus affirmed a judgment for the plaintiffs in their action to quiet title to the land between the fence and the boundary as revealed by the survey.

In Fry v Smith (1967) 91 **Idaho** 740, 430 P2d 486, an action by the plaintiff landowner to quiet title to a disputed strip of land between his property and that of the defendant adjoining landowner to the east, the court held that a fence between the respective properties, which was west of the line described in the deeds, was not an agreed boundary, where (1) there was evidence that the fence had been erected for the convenience of the parties, rather than as a boundary; and (2) the true boundary between the properties was ascertainable. The land owned by the plaintiff was described as lot 10 of section 10, and the westerly 100 feet of lot 6, section 11, while that owned by the defendant was described as all of lot 6, except the westerly 100 feet thereof, in section 11. The fence was built in 1952 by the defendant's husband allegedly for the purpose of fixing the boundary between her property and that of the plaintiff, but the court emphasized evidence that the fence had been built on a portion of the plaintiff's property, with the permission of the plaintiff's predecessor, to keep cattle out of the predecessor's swimming pool and to permit the use of a portion of the predecessor's land by the defendant to "keep down the weeds," the court conclud-

ing that such evidence was sufficient to show that the fence was built for convenience, and not for the purpose of marking a boundary. Furthermore, the court pointed out that although there was evidence that the parties did not know of the exact location of the north section corner common to sections 10 and 11, there was no evidence that a survey following the government field notes would have been unable to establish this point. The court thus concluded that the boundary was not unknown, uncertain, or doubtful as required for application of the doctrine of agreed boundary.

Stating that mere acquiescence in the existence of a fence as a barrier and not as a boundary is not such recognition and acquiescence as will amount to an agreement as to the boundary or establish it as the true line, the court, in Petrus v Chicago, R. I. & P. R. Co. (1953) 245 Iowa 222, 61 NW2d 439, held that a fence built by the plaintiff landowners which encroached on the land of the adjoining landowner to the west, a railroad company, did not become the boundary by acquiescence where, at the time the fence was erected, letters from officials of the railroad company indicated that it was permitting the erection of the fence only with the understanding that the plaintiffs would be required to lease the disputed tract. The court pointed out that even though the disputed area was fenced in, it was definitely shown that the plaintiffs gave the employees of the defendant railroad company keys for the gates in the fence, thus indicating some right to the property in the defendant. Concluding, the court emphasized that the evidence did not disclose any circumstances which would indicate that the company had notice of any claim of ownership by acquiescence on the part of the plaintiffs.

In reversing a judgment against the plaintiff landowner on whose property the defendant adjoining landowner had erected a fence on what he erroneously believed to be the boundary line between their properties, the court, in Platt v Martinez (1977) 90 NM 323, 563 P2d 586, held that the fence had not become the boundary by acquiescence where the evidence established that the plaintiff had no knowledge of the fence. The fence had been constructed by the defendant in 1964, and, as viewed from the plaintiff's property, could not be seen without a specific effort to do so. Thus, the court concluded that even though the plaintiff, who had acquired her property in 1962, had been on the property numerous times, she had no actual knowledge of the existence of the fence. Stating that the issue was whether acquiescence could be found where a party should have known of the existence of a fence, the court, without actually holding that the plaintiff should have known of the fence in this case, held that for acquiescence to apply a party must have knowledge. Defining acquiescence as accepting or complying tacitly or passively, without implying assent or agreement, the court stated that this definition implies that a party must be aware of a condition to acquiesce in it. The court explained that the knowledge required is not that of an ultimate mental conclusion, such as that a fence is, or is not, on the true property line. However, the court concluded, there must at least be knowledge that the fence is in existence.

In affirming a judgment for the plaintiff landowners in their action to recove r possession of a parcel of

land between their property and that of the defendant adjoining landowners, the evidence establishing that the plaintiffs had record title to the disputed strip, the court, in Mazzucco v Eastman (1960) 36 Misc 2d 648, 236 NYS2d 986, affd (3d Dept) 17 App Div 2d 889, 239 NYS2d 535, held that the unilateral act of the defendants in fencing in the disputed land did not establish a boundary by acquiescence. The court explained that acquiescence will establish a boundary without the aid of the statutory prescription period of 15 years where the acquiescence is based on doubt or dispute between the parties. There has to be, the court continued, a composition of differences which involves bilateral action in determining the location of an agreed line. Although noting that the plaintiffs saw the fence when they bought the property in 1945, the court pointed out that it was not shown that they had any knowledge at that time that there was a dispute concerning the property line or whether the fence was properly located. The court further pointed out, in concluding that there had been no acquiescence, that the evidence showed that the plaintiffs' predecessors in title raised some question concerning the location of the fence and that there was no evidence of any bilateral action on the part of the defendants and the plaintiffs or their predecessors as to the establishment of the line when the fence was erected.

[b] Specific evidence or finding of improvement or alteration of disputed tract

In the following cases involving a single fence line which differed from the true boundary between the properties in question, where the fence was built by the party claiming that it constituted the boundary, was in place at the time of litigation, and had not been rebuilt, the courts held that the fence had become the boundary by acquiescence, there being specific evidence or finding that the disputed tract had been improved or cultivated.

Thus, the trial court's fixing of a boundary between adjoining landowners at a spot 108.7 feet west of the point described in one of the owner's deeds as the beginning point of his western boundary was held not to be so plainly and palpably wrong as to require reversal, in Salter v Cobb (1956) 264 Ala 609, 88 So 2d 845, where there was evidence that the landowner claiming the additional land had planted a hedgerow and had erected a wire fence on what was believed to be the true western boundary, had built a home on the disputed tract, and had openly occupied it for over 25 years, the court observing that there was no evidence that a question had ever been raised between the parties over the location of the boundary line until shortly before the present action.

Stating that when adjoining landowners acquiesce for many years in the location of a fence as the visible evidence of the line and thus apparently consent to that line, the fence line becomes a boundary by acquiescence, the court, in Palmer v Nelson (1962) 235 Ark 702, 361 SW2d 641, held that a fence between the property of the plaintiff landowners and an adjoining landowner, which fence varied from the government survey by as much as 61 feet, had become the boundary by long acquiescence where one of the plaintiffs testified that when his father had bought the property in 1941, the disputed boundary line was marked by a fence where the land was in woods and by a

turnrow where it was in cultivation, the fence later being extended by the plaintiffs for some distance along the turnrow, and where this plaintiff further testified that the land had been cultivated up to the turnrow on both sides. The court observed that this evidence was corroborated by several other witnesses, by aerial photographs, and by surveys that showed the location of the fence-turnrow line. In addition, the court pointed out that the adjoining owner's predecessor in title testified that, when his father purchased the land in about 1941, he and his father did not know exactly where the true boundary line was. Moreover, the court emphasized, the adjoining owner did not deny that through the years the boundary was marked by the fence and turnrow, and admitted that there had never been any controversy concerning the boundary. In affirming a judgment for the landowners, the court concluded that the chancellor was right in adopting the line that was openly marked and passively accepted by the parties and their predecessors in title for nearly 20 years.

In affirming a judgment for the plaintiff landowner in his action in equity to restrain the defendant adjoining landowner to the south from trespassing on the plaintiff's premises, the court, in Kotze v Sullivan (1930) 210 Iowa 600, 231 NW 339, held that a fence which had been constructed by the plaintiff along the north side of a road which separated the two properties had become the boundary by acquiescence and that, therefore, the defendant had no right to claim ownership of the strip of land between the fence and the true boundary line to the north, as established by survey. The record revealed that the plaintiff had cleared his property many years prior to the present controversy; that he had erected a log house on the premises and had maintained the fence in question in its present position for approximately 40 years; that he had further improved his premises by planting vegetation and had constructed two driveways from the highway onto his premises; that there had always been uncertainty and dispute as to the true location of division lines in the vicinity; and that at all times the defendant adjoining landowner knew of the plaintiff's claim of ownership and of the improvements he had made. Where, said the court, a line marking the boundary between adjoining owners is recognized as such for a period of 10 years and has been acquiesced therein for that period, such line becomes the true boundary notwithstanding that it is not the line fixed by government survey.

§ 4. By party opposing fence as boundary

[a] Fence held boundary

A fence built by the party claiming that it had not become the boundary between the properties in question, which fence was in place at the time of litigation and had not been rebuilt, was held, under various circumstances, to have become the boundary by agreement or acquiescence in the following cases involving a single fence line.

Thus, in affirming a judgment against a landowner who initiated an action to enjoin an adjoining property owner from constructing a drainage ditch which was allegedly on the landowner's property, the court, in Williamson v Rainwater (1963) 236 Ark 885, 370 SW2d 443, held that the evidence was sufficient to establish that a fence, which was approximately 50 feet to the east of the line which the landowner claimed was the true

property line, was established as the dividing line by the acquiescence of the parties. The record established that the landowner's husband had built the fence in 1946 and that it was constructed on or only a few feet from a line, marked by blazed trees, established by the adjoining owner several years previously, the court observing that there was no doubt that both parties acquiesced in the theory that the fence was on the true line. Emphasizing that it was the landowner's husband that had built the fence, the court reasoned that it was not likely that he would have left 50 feet of his land outside his fence, especially where there appeared to be no topographical reason for putting the fence at one place rather than the other. The court also emphasized, as establishing the fence as the boundary line by acquiescence, that in 1953 the adjoining owner cleared his land up to the fence; that the landowner's husband was present and made no complaint and, in fact, informed the operator of the bulldozer that the fence was the boundary line; and that the landowner's husband's only suggestion to the adjoining owner was that a tree that had fallen on the fence should be removed to preserve the fence.

Where the plaintiff landowner and the defendant adjoining landowners agreed that a fence, part of which having been in existence for some 30 years and the rest having been constructed by the plaintiff about 20 years ago, would be the agreed boundary line between their properties, the court, in Nutting v Hulbert & Muffly, Inc. (1957, 3d Dist) 155 Cal App 2d 464, 317 P2d 1007, held that the fence line had become the boundary by agreement, the court thus affirming a judgment against the plaintiff in his action to enjoin the defendants from trespassing on his property. There was testimony that both parties did not know where the true boundary was, but that in 1943 they specifically agreed to accept the entire fence line as the agreed boundary between their properties, the court observing that the plaintiff had noted that the fence was on both properties at various places and that accepting the fence as the boundary would be a fair compromise. The court rejected the plaintiff's contention that a boundary cannot be established by agreement when both owners know that the fence does not follow the true boundary between them, the court noting that it had been established by prior decisions that in order to invoke the doctrine of agreed boundaries, all that need be shown is lack of knowledge by both parties where the fence line should be drawn. The court added that the fact that an accurate survey is possible is not conclusive of the question whether a doubt exists as to the location of the boundary.

A wire fence which the plaintiff had built in 1911 and which had existed for more than 30 years was held to constitute a boundary line between his property and that of the defendant adjoining landowners to the east, in Crow v Braley (1950, La App) 47 So 2d 357, the court thus affirming a judgment against the plaintiff who had claimed that the fence had not been intended by him as a boundary and that he knew that the true boundary line was some 140 feet to the east thereof. The court explained that this claim was overcome by the clear preponderance of the evidence to the effect that the defendants exercised possession of the property up to the fence and that the plaintiff had not objected to the fence as a boundary line until about 1943.

Noting that the plaintiff's objection was apparently based on the results of a government survey, the court pointed out that it was well settled that an existing boundary would not be changed despite its failure to accord with the ideal or perfect boundary.

[b] Fence held not boundary

Under various circumstances, a fence built by the party claiming that it had not become the boundary between the properties in question, which fence was in place at the time of litigation and had not been rebuilt, was held not to have become the boundary by agreement or acquiescence in the following cases involving a single fence line.

Thus, although acknowledging that where there is a long period of acquiescence in an existing boundary, and in the absence of specific evidence rebutting the presumption that an agreement locating the boundary line has been made, it may be inferred that the parties have made an agreement as to the boundary line, the court, in Dooley's Hardware Mart v Trigg (1969, 2d Dist) 270 Cal App 2d 337, 75 Cal Rptr 745, held that no such agreement could be implied in the present action by the plaintiff hardware company against the adjoining landowner to the east, where a fence which had been constructed by the owner of the hardware company on the company's property had been erected since a city ordinance required fences around parking lots; the acquiescence in the fence amounted to only 8 years; and there was specific testimony from both parties that no agreement had ever been made by them concerning their common boundary. In affirming that part of the judgment for the plaintiff based on the absence of an agreed boundary, the court concluded that in view of the aforementioned testimony in direct contradiction to the existence of an agreement as to the boundary line, the presumption of an agreement from long acquiescence was not applicable in the present case.

In Prieshof v Baum (1934) 94 Colo 324, 29 P2d 1032, an action for the recovery of real property instituted by the plaintiff landowner against the defendant adjoining landowner to the west, the action involving ownership of a disputed tract between the true boundary line and a fence located to the east of that line, the court, in rejecting the defendant's contention that such fence had become the boundary by acquiescence, held that there was no evidence that the plaintiff ever recognized that the fence was placed on his west boundary line. Observing that there must be mutuality in the fixing of, and the acquiescence in, a boundary by owners of adjoining lands, the court emphasized that the evidence established that the plaintiff had placed the fence 40 feet inside of the west line of his quarter section before the defendant had moved onto the adjoining quarter section to the west, with the result that the defendant took no part in fixing the location of the fence. The court pointed out that even if it were conceded that the plaintiff landowner had acquiesced in the fence as the boundary line, the evidence established that it would not have been acquiesced in for a period of 20 years as required by statute. The court thus affirmed a judgment for the plaintiff landowner.

In reversing a judgment against the plaintiff landowner in his action against the defendant adjoining landowner to the south to quiet title to a strip of land between two boundary lines established by government sur-

vey, the court, in Van Meter v Kelsey (1956, Fla) 91 So 2d 327, held that the evidence had not established that a fence which the plaintiff had constructed on the initial survey line had become the boundary by acquiescence. The boundary had been initially established by a government survey conducted in 1870. In 1915, the plaintiff landowner constructed a fence on this line. However, in 1917, another government survey was made which moved the boundary between the properties south by approximately 400 feet. Observing that the defendant adjoining landowner had signed a petition offering to cooperate in the resurveying of the properties, the court characterized this as indicating that there was a question about the boundary line under the 1870 survey. However, the court pointed out that the plaintiff testified that it was agreed between himself and the adjoining landowner that if the new survey moved his line south, the adjoining landowner would likewise move south, and that there was nothing in the record to indicate that the fence in question was agreed on as the boundary between the two properties. Declaring that the existence of the fence itself was not sufficient to establish acquiescence in it as the boundary, the court pointed out that any recognition that it was a boundary appeared to have been conditioned on the results of the survey of 1917, made not before, but after, the fence was erected.

In affirming a judgment for the plaintiff landowner in her action in trespass against the defendant adjacent landowner to the east, the court, in Seaboard A. L. R. Co. v Taylor (1958) 214 Ga 212, 104 SE2d 106, held that the evidence was sufficient to establish that a fence between the properties had not been acquiesced in as the boundary line, where there was testimony that the husband of the plaintiff, who was in charge of erecting the fence, gave instructions to the people actually doing the work to place the fence far enough from the land lot line so that they would not have any trouble or conflict with the defendant adjacent owner. The court also pointed out that there was testimony showing that the land several feet east of where the fence was placed had been cultivated by the plaintiff prior to the erection of the fence.

§ 5. By both parties

In the following cases involving a single fence line, a fence which was built by both parties and which was in place at the time of the litigation and had not been rebuilt was held, under various circumstances, to have become the boundary between the properties in question by acquiescence or agreement.

Thus, the trial court's conclusion of law that since there had been no dispute or argument between the parties, the doctrine of agreed boundary was inapplicable was held erroneous, in Crook v Leinenweaver (1950) 100 Cal App 2d 790, 224 P2d 891, where the parties had taken definite steps, including the erection of a fence, to establish the boundary "on the ground". In 1924, a survey was made and a stake was placed on both the northern and southern boundary of the properties in question for the purpose of locating the north-south boundary line between the plaintiffs' property on the west and the defendants' property on the east. In 1941, all parties, in order to definitely establish the line between the stakes, planted trees, shrubs, and flowers and erected a fence for a distance of approximately 100 feet. In 1946, an-

other survey was conducted which fixed a line to the east of the former line. In reversing a judgment for the plaintiffs, who contended that the last survey was correct, the court explained that the fact that in 1941, the parties established the line between the stakes showed that some uncertainty existed with respect to how the boundary line ran. Otherwise, reasoned the court, it would have served no purpose to have taken such definite steps to actually establish the line on the ground. Observing that after the line had been established, the parties accepted and acted on that line for 5 years, the court concluded that these positive steps went far beyond a mere acquiescence, and disclosed an agreement within the meaning of the doctrine of agreed boundary.

It was held, in Kirkegaard v McLain (1962, 4th Dist) 199 **Cal** App 2d 484, 18 Cal Rptr 641, that there was substantial evidence to support the trial court's finding that the plaintiff landowners and the defendant adjoining landowners to the south had erected a fence along an agreed boundary line, where the evidence established that the defendants showed the plaintiffs what was thought to be the boundary line; that the plaintiffs accepted this line and proceeded, jointly with the defendants, to build a fence on the line; that the plaintiffs stated that it was their intention that the fence would be built on the boundary line; and that the parties agreed that since they had established the boundary line, it was not necessary to have a survey conducted. The court explained that there was an exception to the general rule that the period of acquiescence in an agreed boundry must be equal to the period of the statute of limitations where, as in the present case, the parties had improved their property to the extent that substantial loss would result if the agreed boundary line was subsequently changed. Although acknowledging that mere acquiescence in what adjoining owners mistakenly believe to be the true line, without any notion on their part of fixing a disputed or uncertain boundary line, does not constitute an agreed boundary, the court concluded that the aforementioned evidence established sufficient lack of knowledge of both parties to show uncertainty, the court observing that it is not required that the true location be absolutely unascertainable or that the uncertainty appear from the deeds.

In Taylor v Reising (1907) 13 **Idaho** 226, 89 P 943, the court held that the plaintiff landowner's complaint was sufficient to state a cause of action where it alleged that both the plaintiff and the defendant adjoining landowner derived title from a common vendor; that the vendor had informed both the plaintiff and defendant that a line established by a private survey was the boundary line between their properties; that the plaintiff permanently improved his property by erecting a fence on this line and erected improvements near the line; that the defendant adjoining owner, with knowledge that the plaintiff claimed to own all of the property on his side of the survey line, assisted the plaintiff in constructing the fence and other improvements; and that the plaintiff would suffer great loss if a government survey, rather than the private survey, were used to establish the boundary lines to his property. In reversing a judgment against the plaintiff, the court declared that where a person purchases according to boundaries specifically pointed out and marked on the ground, he is estopped subsequently to claim other

boundaries to the injury of others. Furthermore, continued the court, if a party establishes and marks a boundary line to his land without the exercise of proper care in determining the true line, his negligence has the same effect as to the parties misled by it as if he had acted knowingly. The agreement to establish a boundary line, the court emphasized, may be implied from acquiescence.

Although a fence between the property of the plaintiff landowners and the defendant adjoining landowners to the south did not extend for the entire distance across the properties, the court, in Berry v Steuer (1929) 246 **Mich** 300, 224 NW 391, held that the fence established the boundary since it ran as far as was necessary. Both the plaintiffs' and the defendants' lands were bordered on the west by the meander line of Lake Michigan. Along the shore was a steep and high bluff. A dispute as to the ownership of some fruit trees between the parties' predecessor in title led to a survey, which turned out to be erroneous, and the fence was constructed by the parties on the survey line. However, the fence ran only to the bluff since it was not necessary to extend it to the shore, the bank being too high and steep to permit cattle to go around the end of the fence. In affirming a judgment for the plaintiffs, the court rejected the contention that the fence did not set the boundary because it did not actually run down the bluff and across the shore. The court declared that it was as effective a barrier and gave as definite notice of the whole line as though it had been extended to the water's edge.

§ 6. By predecessor of party claiming fence as boundary

Where a single fence line, which was not on the true line between the properties in question, was claimed to have become the boundary, and where the fence was built by the predecessor in interest of the party claiming it as the boundary, was in place at the time of litigation, and had not been rebuilt, the courts in the following cases held, under various circumstances, that the fence had not become the boundary by acquiescence or agreement.

Thus, in Hagood v Hensley (1979, **Ala**) 371 So 2d 421, an action by the plaintiff landowners seeking to fix the boundary between their property and that of the defendant adjoining landowners, the court affirmed a judgment for the plaintiffs fixing the line in accordance with a survey, the accuracy of which was conceded by the defendants. Observing that there was evidence that the defendants' predecessor in title had built a fence on the plaintiffs' property 7 to 9 years ago and that the plaintiffs had permitted the defendants to dig a well on part of their property, but had from time to time requested that the fence be moved, the court concluded that such evidence did not require that the trial court find that the plaintiffs had lost title to their land by acquiescing in the defendants' use of it. To the contrary, the court declared, it justified the finding of the trial court that the boundary was as shown by the evidence.

In Pedersen v Reynolds (1939) 31 **Cal** App 2d 18, 87 P2d 51, an action to quiet title to a disputed tract of land initiated by a landowner against the defendant adjoining landowner to the south, the plaintiff landowner claiming that a fence between the properties had become the boundary by acquiescence and the adjoining landowner asserting that the true line was established by survey to be north

of the fence, the court held that it was error for the trial court to have found that the fence constituted a boundary by acquiescence in the absence of any showing that there was uncertainty among the parties as to the true location of the boundary. The court pointed out that the evidence established, without conflict, that the plaintiff's predecessor in title was not uncertain about the true location of the boundary line since he built the fence in question opposite a government stake which he assumed marked the true line, and that similarly, there was evidence that the defendant's predecessor in title believed that the fence was not on the true line, but rather that it was built south of such line as a convenience to the plaintiff's predecessor to take advantage of natural barriers. The court thus concluded that neither of the parties owning the properties in question when the fence was built were uncertain about the true boundary line. The court added that the mere permissive use of a fence on an owner's land for the accomodation of the adjoining property owner is not a sufficient basis on which to base an inference that the parties were accepting the fence as a boundary line.

Stating that the existence of an uncertainty as to the true boundary line, and an agreement that a fixed line shall represent the true boundary between adjacent landowners are indispensible elements in proof of title by acquiescence, the court, in Kiser v Howard (1961, Fla App D1) 133 So 2d 746, held that although a fence between the property of the plaintiffs landowners and the defendant adjoining landowner to the west had been in existence for approximately 40 years prior to the institution of the present action, it did not constitute a boundary by acquiescence, since there was no evidence that the adjacent property owner at any time agreed that the fence should represent the true boundary. The plaintiffs had acquired their property in 1941, and the defendant in 1942. The true boundary line, according to the deeds, was approximately 188 feet to the west of the fence, which had been constructed approximately 40 years previously when a predecessor in title of the defendant took possession of the disputed strip and enclosed it with the fence, the defendant purchasing his property in the belief that the fence constituted the true eastern boundary line of his parcel. Although holding that the defendant had acquired title to the disputed area by adverse possession, the court rejected the defendant's claim that title had been acquired under the doctrine of acquiescence, the court emphasizing the lack of evidence establishing that the true boundary between the properties had ever been in dispute or had been agreed on the true boundary line.

Stating that it was apparent from the testimony that the plaintiff landowner's predecessor in interest built a fence for the purpose of separating farmland from pasture land, the court, in Townsend v Koukol (1966) 148 Mont 1, 416 P2d 532, held that the fence had not been established as an agreed boundary between the land of the plaintiff landowner and that of the adjoining landowner to the west, who claimed that the boundary had been fixed by summary to the east of the aforementioned fence. In affirming a judgment against the plaintiff in his action to enjoin the defendant from erecting a new fence on the survey line, the court pointed out that there was no evidence that the fence, which had been constructed in 1924 or 1925, was intended to be a bound-

ary. Nor, continued the court, was there any evidence sufficient to show that the plaintiff's predecessor and the defendant acquiesced in the existence of this fence as a boundary. The court explained that in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the time prescribed by the statute of limitations; it must go further and show that there was uncertainty in the location of the line, that there was an agreement among the adjoining owners, express or implied, fixing the line, and that there was an actual designation of the line on the ground and occupation in accordance therewith.

In Kinkade v Simpson (1948) 200 Okla 507, 197 P2d 968, an action by the plaintiff landowners against the defendant adjoining landowner to the north to quiet title to a small strip of land between the respective properties, the court held that a fence, shown by survey, to encroach on the plaintiffs' property had not become the boundary by acquiescence. In 1930, both lots had been owned by the father of one of the plaintiffs who deeded the southern portion to the plaintiff in that year, while himself living on the northern half. At this time there was no division fence between the two lots. After losing the northern half in a foreclosure sale, the father moved in with the plaintiffs and, in 1932, gave the defendants' predecessors in title permission to build a fence along a portion of the northern part of the southern lot, the exact boundary line between the two lots not being definitely known or established at that time. However, all parties apparently assumed that the fence was constructed near the true boundary line, until the aforementioned survey. In affirming a judgment for the plaintiffs, the court pointed out that from the evidence it was clear that the fence was erected not as a boundary fence, but simply for the purpose of enabling the builders of the fence to serve their own purposes, and furthermore, was erected with an apparent understanding that the fence might be on the plaintiffs' property. In addition, the court declared, there was no establishing of a boundary by acquiescence, since for this to occur the possession must continue for the statutory length of time, in this case 15 years.

§ 7. By predecessor of party opposing fence as boundary

[a] Fence held boundary

Under various circumstances, a fence built by the predecessor of a party claiming that it had not become the boundary between the properties in question, which fence was in place at the time of the litigation and had not been rebuilt, was held to have become the boundary by acquiescence in the following cases involving a single fence line.

Thus, it was held, in Owen v Umberger (1947) 211 Ark 349, 200 SW2d 311, that the evidence was sufficient to support the chancellor's finding that a fence constituted the boundary between the property of the plaintiff landowner and the defendant adjoining landowner to the north, the court thus affirming a judgment for the landowner in an action to enjoin the adjoining landowner from trespassing and removing timber. The plaintiff landowner testified that he had purchased the property in 1922; that the following year he had had a surveyor establish his northern boundary line, after which he blazed the trees along the line as established by the survey; that when the fence in

question was built by the adjoining landowner's predecessor in title in 1925, it was built along the line marked by the blazed trees; and that he had been in possession of the land in dispute under claim of ownership ever since the fence was built. The adjoining landowner's predecessor in title denied that he had built the fence as a boundary, stating instead that he had purposely built it north of the true line so that the fence would be located entirely on his land. The defendant adjoining owner testified concerning a survey he had made in 1928, which showed the true line to be from 150 to 2 feet south of the fence, such testimony being corroborated by other witnesses. On the basis of this record, the court declared that it could not hold that the location of the boundary along the line as contended by the adjoining landowner was established by a greater weight of the testimony.

In Sachs v Board of Trustees (1976) 89 NM 712, 557 P2d 209, later app 92 NM 605, 592 P2d 961, the court held that a fence which had been built by a predecessor of the plaintiff landowner, rather than a line established by survey, constituted the true boundary between the plaintiff landowner and the defendant adjoining landowner, where the parties and their predecessors had, for 20 years, honored the fence as a boundary for the only purpose for which the land was used, namely the grazing of cattle. In reversing a judgment for the plaintiff which had established the survey line as the boundary, the court stated that the case was governed by the rule that the mutual recognition of a dividing fence as a boundary should prevail over the uncertainty which arises in any attempt, by the running of lines many years after the original survey, to establish the true line between the parties. With respect to the plaintiff's contention that to "honor" a fence as a boundary is not to "recognize" it, the court explained that "acquiscience" means to accept or comply tacitly or passively, without implying assent or agreement, while "to honor" is far less passive a form of recognition than acquiescence. The court further explained that there was no requirement of a showing that the parties "intended" the fence to mark the boundary between their properties, but that rather it was the recognition of the fence that made it the boundary. In this connection, the court observed that none of the parties to this action made any objection to the fence as a boundary from the time of its construction until the discovery of uranium more than 20 years later.

[b] Fence held not boundary

In the following cases involving a single fence line in which the fence was in place at the time of litigation, had not been rebuilt, and had been erected by the predecessor of the party claiming that the fence did not constitute the boundary between the properties in question, the courts, under various circumstances, held that the fence had not become the boundary by acquiescence or agreement.

Although observing that a few witnesses testified that they understood the location of a fence to represent the boundary line between the property of the plaintiff landowner and the defendant adjoining landowner to the west, the court, in Brown Paper Mill Co. v Warnix (1953) 222 Ark 417, 259 SW2d 495, held that the fence, which was approximately 35 feet west of the true boundary line as shown by a government survey, did not constitute an agreed boundary line, where

the aforementioned witnesses' belief was based merely on the fact that the fence was there and hence added nothing to the physical facts. In affirming a judgment against the plaintiff landowner in his action to enjoin the adjoining landowner's cutting timber on the disputed tract, the court emphasized testimony that the adjoining landowner's predecessor in title had erected the fence many years ago and had deliberately placed it west of his property line in order to leave space for a road on his own land, the court observing that a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side, unless such strip was adversely occupied by his neighbor for the required number of years. The court observed that there could be no adverse claim of possession in the instant case, since the land east of the fence had been wooded at all times.

It was held, in Talmadge v Moore (1950) 98 **Cal** App 2d 481, 220 P2d 588, that the boundary between the property of the plaintiff landowners and the defendant adjoining landowners was a line fixed in 1947 by survey, rather than a fence constructed in 1919, the court thus affirming a judgment for the plaintiffs in their action to enjoin the adjoining landowners from trespass on their property. The defendants claimed that in 1919, a dispute and uncertainty existed as to the location of the boundary line; that a survey was made and the line located by agreement and marked by a fence; and that the agreement had been acted on and acquiesced in until the aforementioned survey in 1947. In rejecting the defendants' contention that there had been an agreed on boundary, the court emphasized that the plaintiffs' predecessor in title, who had constructed the fence on the survey line fixed in 1919, testified that he had informed the defendants, who approved the building of the fence, that it was his intention to claim up to the true property line, wherever it might be, irrespective of the fence. This testimony, concluded the court, indicated that the agreement, if any, between the defendants and the plaintiffs' predecessor in title was not as to a boundary line, but rather, was that the fence, where it was built, was satisfactory. The court declared that where, as in the present case, the acquiescence in the fence was as a barrier, and not as a boundary line, no agreed boundary line was established.

It was held, in Ringwood v Bradford (1954) 2 **Utah** 2d 119, 269 P2d 1053, that even though a fence between the property of the plaintiff landowners and the defendant adjoining landowner to the east had been in existence for nearly 30 years and neither the plaintiffs nor their predecessor affirmatively claimed the property beyond the fence or made any use of it inconsistent with the theory that they recognized the fence as a boundary line, the doctrine of boundary by acquiescence did not apply, since there was evidence first, that the fence was not built for the purpose of marking the line between the respective properties, and second, that the plaintiffs did not use the eastern part of their property for any purpose. The court emphasized testimony of the person who had built the fence in 1923, under the direction of the plaintiffs' predecessor, that he had built the fence to protect trees from sheep, rather than as a boundary. The court pointed out that the evidence of the defendant, who claimed that the fence marked the boundary, only established that the fence was in existence at the time her cabin was

built in 1934 within a few feet of the fence, and that the then owner of the plaintiffs' property did not protest this action. Furthermore, observing that surveyor's stakes at least 20 years old were in the ground, although covered with brush, the court reasoned that it appeared that the usual mode of attempting to locate a boundary was employed at that time, a fact which weighed against the possibility that the parties would make an agreement or attempt to locate the boundary by guess. In affirming a judgment against the defendant who claimed ownership of all land up to her side of the fence, the court, in view of the aforementioned evidence, refused to imply, from the long existence of the fence and the lack of acts inconsistent with acquiescence, that the parties or their predecessors had reached an agreement that the fence was to be the boundary between their respective properties.

In Thomas v Harlan (1947) 27 Wash 2d 512, 178 P2d 965, 170 ALR 1138, an action by the plaintiff landowners against the defendant adjoining landowners to the south to quiet title to a 20-foot strip of land between a fence and a line established by survey as the true boundary between the properties, the court reversed a judgment for the plaintiffs and held that the fence had not become the boundary by acquiescence. The record revealed that in 1929, the defendants' predecessors in interest stepped off, and by tape measure, located a place where they desired to build a fence on the north side of their property. The defendants' predecessor explained to the plaintiffs' predecessor how he had located the fence line, and the plaintiffs' predecessor stated that it was alright as far as he was concerned. There were no further discussions between the parties or their predecessors with respect to the boundary between their lands, until a survey done at the plaintiffs' request showed that the true line was 20 feet north of the fence line. Stating that in all cases it is necessary that acquiescence must consist in recognition of the fence as a boundary line, and not mere acquiescence in the existence of the fence as a barrier, the court concluded that the aforementioned evidence did not meet the requirements of the doctrine of boundary by acquiescence.

Stating that in the absence of an agreement that a fence between properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of land, but rather that it is necessary that acquiescence must consist in recognition of the fence as a boundary line, rather than a barrier, the court, in Houplin v Stoen (1967) 72 Wash 2d 131, 431 P2d 998, held, in a quiet title action by the plaintiff landowner against the defendant adjoining landowner to the south, that a fence erected in 1935 by the plaintiff's predecessor, such fence being north of the line stipulated as the true boundary line, had not become the boundary by acquiescence. Observing that the plaintiff's predecessor had built the fence relying on an incorrect survey, the court emphasized that there was no evidence that the plaintiff or any of his predecessors had discussed the location of this fence with the defendant or his predecessors. The court pointed out that the plaintiff's predecessor mistakenly thought that the fence had been erected on the true boundary line and that his main purpose in building the fence was to keep in cattle, pigs, and horses. Stating that acquiescence in a property line cannot be a unilateral act, the

court, in reversing a judgment against the plaintiff, declared that there was no evidence in the record to support the conclusion that the defendant had acquiesced to anything.

§ 8. By predecessors of both parties

[a] Fence held boundary

Where a single fence line was claimed to have become the boundary between the respective parties, and where the fence was erected by the predecessors of both parties, was in place at the time of the litigation, and had not been rebuilt, the courts in the following cases held, under various circumstances, that the fence had become the boundary by acquiescence or agreement.

Thus, in Silva v Azevedo (1918) 178 **Cal** 495, 173 P 929, an action in ejectment initiated by the plaintiff landowners against the defendant adjoining landowners to the west, the court, in reversing a judgment for the plaintiffs, held that a fence, which was later shown to have been erected on the plaintiffs' property, had become the boundary by agreement where it was shown that the predecessors in title of the parties, acting jointly, engaged a surveyor to establish the boundary line; that in conducting the survey, the surveyor by mistake placed stakes too far to the east; that neither of the predecessors knew of this mistake; that they then joined in building a substantial fence on the line marked by the stakes, believing such line to be the true line called for by the deed; and that the defendant's predecessor had possessed, and erected improvements on, the disputed strip. In rejecting the contention that since the true location of the boundary could have been determined by a correct measurement, the required uncertainty as to the location of the boundary line did not exist, the court explained that in virtually every case of this type it was possible to ascertain the correct boundary line, the court observing that it is only where the true location was subsequently ascertained that actions of this sort arose. The court stated that the predecessors' uncertainty was established by the fact that they had the land surveyed, since the only purpose for so doing was to fix a boundary which, until ascertained, must have remained uncertain in their minds.

It was held, in Board of Trustees v Miller (1921) 51 **Cal** App 102, 201 P 952, that a fence between the land of the plaintiff landowner and the defendant adjoining landowners to the east was an agreed boundary, where the fence, which had been built by the parties' predecessors, stood at its present location as early as 1886, and then had the appearance of being 10 or 12 years old; that as far back as any witness knew the plaintiff landowner and its predecessors had occupied the lands to the west of the fence, and the defendants and their predecessors those to the east; that many years ago the defendants' predecessors cleared the land on the east side up to the fence and had thereafter cultivated it; and that the defendants and their predecessors had never been disturbed in their possession and use of the lands, nor had their rights thereto been questioned prior to the commencement of this action. Although acknowledging that, as contended by the plaintiff landowner, there was no direct proof that there was ever any uncertainty as to the location of the true boundary line, as required to establish an agreed boundary, the court pointed out that the aforementioned evidence justified the inference that the parties had agreed on the location of the

boundary. This inference, the court explained, was of a valid agreement, and necessarily implied that there was an uncertainty as to the true line.

Where the predecessor in interest of the plaintiff landowners and the predecessor of the defendant adjacent landowners to the south both participated in the building of a division fence on a line fixed by a surveyor, the fence being completed in 1917, and thereafter each occupied and cultivated his land up to the fence each year continuously for more than 8 years without objection from any source, the court, in Kesler v Ellis (1929) 47 **Idaho** 740, 278 P 366, held that the parties had acquiesced in the fence as the boundary between the properties and were bound by such acquiescence, even though all parties agreed at the time of trial that the fence was north of the true line. In affirming a judgment against the plaintiffs in their action to quiet title to the strip between the fence and the true boundary line, the court stated that the case fell within the general rule that where there is no express agreement as to the location of a boundary line, adjoining owners cannot question a line which they have, for a considerable number of years, recognized as the correct line between their properties. Although noting that the authorities were generally uncertain as to the time the acquiescence should continue in order to satisfy the aforementioned rule, the court reasoned that it was but logical to say that such acquiescence must continue for a period of not less than 5 years, thus conforming to the period established by the statute of limitation in cases of adverse possession.

In Moore v Bayless (1974) 215 **Kan** 297, 524 P2d 721, the court held that a fence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the south had become the boundary by acquiescence where the record established that in 1932, the parties' predecessors in title had determined that a hedge was located on their mutual boundary line; that each of the predecessors then proceeded to construct one-half of a fence along the hedge line; and that all witnesses testified that the fence was treated as the boundary by the parties their predecessors in title until 1969, when the defendants procured a private survey, the result of which showed that the true section line was several feet to the north of the original hedge line. In affirming a judgment quieting title to the disputed strip of land in the plaintiff, the court stated that the aforementioned acts of the parties' predecessors in title amounted to an agreement between them that the fence would be the boundary line, the court observing that an express agreement between the parties was not necessary. Although acknowledging the general rule that ordinarily the boundary line between adjacent properties is to be determined by reference to the deeds, the court remarked that an exception to this rule existed where a boundary had been established by agreement, either express or implied, and thereafter acquiesced in by the parties.

A fence between the properties of the plaintiff landowner and that of the defendant landowner to the north which had existed for 27 years, the parties each occupying the land up to their sides of the fence, was held to be the boundary between the lots by acquiescence, in Lewis v Smith (1940) 187 **Okla** 404, 103 P2d 512, the court reversing a judgment against the plaintiff in his action to quiet title to a strip of land between the fence and a line established as the true boundary

by survey. Noting that the fence had been built in 1911 by the parties' predecessors in interest and that there was no evidence, other than the erection and continued existence of the fence, of the predecessors' intentions when they built the fence, the court stated that the issue was whether there could be acquiescence when the following elements were present: (1) the division of a unit of land; (2) the building of a dividing fence which deviated from the true line as established by survey; (3) the continued maintenance of the fence for 27 years; and (4) the use by the parties of land lying on their respective sides of the fence only. In concluding that acquiescence was established under these circumstances, the court specifically rejected the contention that acquiescence can only arise where there is an uncertainty or dispute over the true line.

In Glenn v Yoder (1959, Okla) 339 P2d 108, an action to quiet title to a strip of land between the property of the plaintiff landowner and that of the defendant adjoining landowner to the south, the dispute arising from an agreement to place a fence 18 inches south of the true survey line, the court held that the fence had become the boundary by acquiescence. The record revealed that approximately 20 years earlier an oral agreement was reached between the then owners of the two lots whereby the boundary line was to be moved 18 inches south from the true line in order to accommodate a dwelling on the northern lot which had been remodeled so that a portion of it extended over the true boundary line by 18 inches. The court pointed out that in 1940, the then owners of the respective lots constructed a rock fence about 4 feet high along the agreed boundary line; that all subsequent owners of these lots had since that time acquiesced in maintaining the rock fence as a boundary line; and that the record failed to reveal whether this agreed boundary line had ever before been questioned by the owners of the lots. The court thus concluded, in affirming a judgment against the defendant, that the case was governed by the rule that long acquiescence in a line will establish it as the boundary regardless of whether it was accurately run along the true meridian line.

Stating that it was a well-settled principle that acquiescence in a boundary line assumed or established for a period of time equal to that prescribed in the statute of limitations to bar a reentry is conclusive evidence of an agreement to establish such a line and that the parties will be precluded from claiming that the line so acquiesced in is not the true boundary, the court, in Paquin v Guiorguiev (1976) 117 RI 239, 366 A2d 169, held that where the plaintiff landowners and the defendant adjoining landowners, and their predecessors in title, had acquiesced in a boundary line marked by a fence built by the parties' predecessors and a retaining wall for 46 years and had exercised unequivocal acts of ownership over their respective parcels of land, the line so marked became the boundary by acquiescence. In affirming a judgment for the plaintiffs in their action to enjoin the defendants from asserting any claim to property on the plaintiffs' side of the fence, even though the defendants had record title to the disputed strip, the court observed that the plaintiffs had acquired title to such strip either by acquiescence or by adverse possession.

[b] Fence held not boundary

Under various circumstances, a

fence built by the predecessors of both parties between the properties in question, which fence was in place at the time of the litigation and had not been rebuilt, was held not to have become the boundary by agreement or acquiescence in the following cases involving a single fence line.

Thus, it was held, in Allen v McMillion (1978, 2d Dist) 82 Cal App 3d 211, 147 Cal Rptr 77, that there was no material issue of fact as to whether a fence between the property of the plaintiff landowners and the defendant adjoining landowners had become an agreed boundary, the court thus affirming a summary judgment against the plaintiffs in their action to quiet title to the land up to the fence. The court emphasized that although the plaintiffs showed without contradiction that the fence had been in existence for about 14 years and that during that period they and their predecessor in title had been in peaceable possession of the property up to the fence, the affidavit of the defendants' predecessor in title established that there was an agreement between the plaintiffs' predecessor and the defendant's predecessor to extend the fence in question away from an existing fence, that there was no dispute or uncertainty as to the true boundary, and that neither of the predecessors gave any thought to the location of the true boundary, but rather that they simply installed the fence at a convenient location. Emphasizing that this testimony was uncontradicted, the court declared that the agreed boundary doctrine could have no application where there was no uncertainty or concern about the true boundary and no agreement except to locate the fence conveniently.

In Long v Myers (1921) 109 Kan 278, 198 P 934, an action by the plaintiff landowner to recover possession of a strip of land between his land and that of the adjoining landowner to the north, which dispute arose when the plaintiff had a survey conducted which established that the true boundary line ranged from 13 to 99 feet north of an old fence, the court reversed a judgment for the defendant on the ground that the testimony did not establish that the old fence had been acquiesced in as the boundary line. The plaintiff acquired his property in 1918. In 1882, the plaintiff's predecessor and the defendant's predecessor had measured off the plaintiff's property with a rope, had established the boundary line, and had built the fence on this line. From that time until the present, the parties on each side of the fence had farmed up to it and there had been no controversy concerning the boundary line. However, the defendant's predecessor testified that he had intended to get the property surveyed and that he did not know where the line was at the time he and the plaintiff's predecessor had measured it off with a rope. Stating that the use of a dividing fence without specific agreement that it shall be deemed a boundary between adjoining landowners is not an establishment of a true line, the court observed that the aforementioned testimony affirmatively showed that the fence had been erected temporarily until the true line could be established.

§ 9. By common predecessor

A fence built by the common predecessor of both parties which was in place at the time of litigation and had not been rebuilt was held, under various circumstances, to have become the boundary by acquiescence in the following cases involving a single fence line.

In Mello v Weaver (1950) 36 Cal 2d 456, 224 P2d 691, the court affirmed the judgment of the trial court in favor of the plaintiffs' quieting title and establishing a fence and a canal as the common boundary between their lands and the lands of the defendant, all of whom traced title to a common grantor. When the plaintiffs first negotiated with the defendant for the purchase of the property, the canal and the fence were indicated as the west boundary of their land. When the plaintiffs went into possession, and during their occupancy, they irrigated and farmed the land to the east bank of the canal without objection by the defendant for some time. Later, the defendant obtained a survey and a map, which he introduced into evidence as a correct representation of the boundaries of the lands. The survey placed the west boundary of the plaintiffs' land 100 feet easterly from the canal. The court rejected the defendant's contention that the absence of evidence that a boundary was established by the agreement of the parties precluded a finding for the plaintiffs. The defendant's ownership and occupancy successively of each tract of land and the mutual acquiescence in the canal and the fence as the boundary between him and the successive owners of the adjoining tract for a period of 30 years, said the court, constituted an admission against his interest and created a conflict with his testimony that there was no agreement concerning the boundary and that the fence had been built by his father only to turn stock. The court explained that the survey made 30 years later and showing the agreed line to be different from the surveyed line was of no consequence, for to permit the boundary to be changed by every subsequent measurement would produce an intolerable uncertainty in the title to lands.

Where the common predecessor in title of the plaintiff landowner and the defendant adjoining landowner to the north had established a division line that was approximately 1.98 chains north of a government survey line and had erected thereon a fence which had been in existence for at least 50 years, and where the parties and their predecessors in title had uniformly recognized and treated the fence as the boundary line between the properties, the court, in Kandlik v Hudek (1936) 365 Ill 292, 6 NE2d 196, held that the defendant adjoining landowners were precluded from denying that the fence was erected on the correct boundary line, the court thus affirming a judgment for the plaintiffs in their action to determine the boundary line between the respective properties. The court rejected the contention of the defendants that since the descriptions of the various properties in question referred to subdivisions of the government survey, there could be no ambiguity and thus nothing for the court to construe. The court pointed out that boundary lines may be fixed by parol agreement or by acquiescence when supported by possession in harmony with such agreement. The adoption of a division line between the owners of adjoining lines, the court continued, may be implied from their acts and declarations and by acquiescence in respect thereto. Emphasizing that the division fence in question had been established, maintained, recognized, and acquiesced in as a boundary line for more than 20 years, the court declared that the defendant adjoining landowners were precluded from denying that it was the correct line.

Stating that the essence of the doc-

trine of boundary by acquiescence is that where there has been any type of a recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner, the court, in Baum v Defa (1974, **Utah**) 525 P2d 725, affirmed a judgment against the plaintiffs in an action to settle a boundary dispute with the defendant adjoining landowner, where there was evidence that there was a fence between the two properties, part of which had existed for 36 years and the rest for 26 years. In holding that the fence had become the boundary by acquiescence, the court rejected the plaintiffs' contentions that (1) since the fence was constructed by the parties' predecessor when all of the property in question was in his name, it was intended simply as a barrier to control livestock; and (2) since the fence did not run in a straight line, it could not reasonably have been regarded as a boundary. The court reasoned that while it was true that the time during which the fence served as a barrier would not constitute part of the "long period of time" required to establish a boundary by acquiescence, the doctrine became applicable when the property on both sides of the fence was conveyed to separate parties under circumstances such that the parties should be assumed to accept the fence as the boundary line. Furthermore, the court pointed out that although most surveys ran in a straight line, many did not, and that, therefore, an irregular line did not preclude application of the doctrine of boundary by acquiescence.

§ 10. By party claiming, and predecessor of party opposing, fence as boundary

Where a single fence line, which was not on the true line between the properties in question, was claimed to have become the boundary by agreement or estoppel, and where the fence was built by the party claiming it as a boundary and by the predecessor of the party opposing it, was in place at the time of the litigation, and had not been rebuilt, the courts in the following cases held, under various circumstances, that the fence had become the boundary.

Where two brothers agreed to divide certain property between them and, in order to give effect to their agreement and being uncertain as to the line between their agreed parcels, jointly employed a surveyor and assisted him in locating the line, and where they then jointly constructed a fence along the line so located, which fence was accepted as the boundary line by them and their successors in title for approximately 12 years, the court, in Martin v Lopes (1946) 28 **Cal** 2d 618, 170 P2d 881, held that the fence had become the agreed boundary between the parties, the court affirming a judgment for one of the brothers in his action against the successors in interest of the other brother to quiet title to a disputed tract of land arising from a later survey showing that the fence was not constructed in accordance with the measurements stated in the deeds. Observing that one of the elements of the doctrine of agreed boundary was that the owners be uncertain as to the true position of the boundary, the court rejected the defendants' contention that it was the intention of the parties in constructing the fence to set the boundary along the true line called for by their deeds, that their failure to do so was merely the result of mistake, and that, therefore, the

required uncertainty was lacking. Stating that this contention revealed a misapprehension concerning the intention essential to establish an agreed boundary, the court explained that the intention required is not only to mark the true line, as assumed by the defendants, but also to accept the marked boundary as a true boundary. The court pointed out that the intention of the parties not to claim except in accordance with the true line is entirely consistent with the doctrine of agreed boundary, and that the application of the doctrine is not prevented by the parties' belief that the fence was on the line fixed by the deed or by the circumstance that the line of the deeds could be determined by a survey. Observing further that the defendants misconceived the extent of the uncertainty which should be present at the time of agreement, the court explained that lack of knowledge by both parties of where the line is or should be drawn is all that need be taken into consideration.

In holding that the defendant adjoining landowner, whose property was located to the west of that of the plaintiff landowner, was estopped from claiming that a fence which had been erected between the respective properties did not constitute the boundary line, the court, in Howell v Kelly (1930) 129 Kan 543, 283 P 500, held that there was testimony that the defendant had stated that the fence constituted the boundary and that she knew that the plaintiff's property had been subdivided into lots, one of which had already been sold, in reliance on the fence as the boundary line. In 1904, the plaintiff had hired a surveyor to establish the boundary line between the respective properties, and a fence was built on that line by the plaintiff and the defendant's predecessor in title, each party paying one half of the surveyor's charges. In 1928, another surveyor discovered that, although the southern extremity of the fence was correctly located, it was 16 feet too far west at its northern end, so that the defendant was deprived of a wedge-shaped tract of land immediately east of the fence. However, on being informed of this fact, the defendant informed the surveyor that her predecessor had said that the fence marked the line, that it had been the line for 30 years, and that it could not be changed. Although the defendant denied saying this, the court affirmed a judgment against her, stating that the jury was entitled to believe the testimony of the surveyor. In view of the evidence that the defendant asserted that the fence constituted the boundary line plus the fact that the surveyor had then completed his task on the assumption that the fence was to be the boundary, the court stated that there was too strong a case of estoppel against the defendant to permit the judgment against her to be disturbed.

However, where a deed established the boundary line between adjoining owners' property as the middle of a creek, the court, in Council v Clark (1969) 246 Ark 1110, 441 SW2d 472, rejected the contention of the owner of the northernmost property that the correct boundary line was a fence that had been constructed on the south bank of the creek by the owner of the northernmost property and the predecessor of the party owning the land to the south. Although the owner of the property to the north testified that the fence was constructed as a division or boundary fence, the owner of the land to the south denied this and testified further that the original plan was for him to build a fence halfway up the south bank while the other owner was to build a fence

halfway down the north bank, with a water gate to be placed across the creek to connect the two fences. In rejecting the contention that the fence had become a boundary line by long acquiescence, the court explained that in the present case there had been no peaceful occupation of the lands up to the fence by the owner of the land north of the creek, the court observing that this owner had cleaned up and cleared the north bank of the creek, but that, because of the other owner's objections, had done nothing to the south bank. In addition, the court pointed out that there was testimony that the cows of the northernmost owner were never seen on the southern side of the creek and that because of the terrain it would have been impossible to have built the fence in the middle of the creek, according to the description in the deed.

§ 11. By party opposing, and predecessor of party claiming, fence as boundary

Where a single fence line was claimed to have become the boundary between the properties in question, and where the fence was built by the party claiming that it was not a boundary and by the predecessor of the party claiming that it was the boundary, was in place at the time of the litigation, and had not been rebuilt, the courts in the following cases held, under various circumstances, that the fence had not become the boundary by acquiescence or agreement.

Thus, in Fish v Bush (1972) 253 Ark 27, 484 SW2d 525, an action to determine the boundary between the property of the plaintiff landowners and that of the defendant adjoining landowners to the south, the court held that a fence which was south of the boundary established by survey had not become the boundary by acquiescence, where there was insufficient evidence that the parties or their predecessors had mutually recognized the fence as the boundary. The fence had been erected in 1955 by the defendants and the plaintiffs' predecessor. One of the defendants testified that the fence had been built for the sole purpose of keeping their cattle apart; that he and the plaintiffs' predecessor had had the land surveyed, but doubted the competency of the surveyor; and that they then decided to put the fence up as a temporary division until an accurate survey could be made. Stating that the mere existence of a fence between adjoining landowners is not of itself sufficient to establish a boundary by acquiescence and that there must be a mutual recognition of the fence as the dividing line, the court concluded that the aforementioned evidence established that the required mutual recognition was not present in this case, the court noting that the defendant's testimony was corroborated by three other witnesses. Furthermore, in affirming a judgment against the plaintiffs, the court noted that the fact that the fence was not meant to be the permanent line was confirmed by the fact that it was not straight, but rather was nailed to trees at many points.

In reversing a judgment against the plaintiff landowners in their action to establish that a survey line, rather than a fence, constituted the boundary between their property and that of the defendant adjoining landowner to the east, the court, in Tillinger v Frisbie (1957) 132 Mont 583, 318 P2d 1079, held that the fence was not an agreed boundary, where the parties were mistaken as to the location of the true boundary, but believed

that they were erecting the fence on it. The fence was erected by one of the plaintiffs and the defendant's predecessor in title, both parties testifying that the fence was built by extending some existing fence lines, assuming them to be accurate and true, and that the fence was constructed as a stock barrier. Declaring that if 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, this will not amount to a binding agreement, the court pointed out that the defendant's predecessor had assumed that existing fences were in their correct location and had attempted to extend this fence in a straight line, both parties being mistaken as to where the true boundary line was when the fence was built. However, emphasized the court, there was no dispute between the parties as to where the true line was, the court adding that both parties knew that the boundary between their properties was the section line, but that they could not find the original government survey and apparently could not hire a surveyor to locate it for them. Thus, concluded the court, there was no agreement to fix a boundary and no dispute or controversy as to the true line.

§ 12. Other parties

A fence built by a party other than those described in §§ 3–11, supra, which fence was in place at the time of litigation and had not been rebuilt, was held to have become the boundary between the properties in question by acquiescence, in the following cases involving a single fence line.

Thus, in Fishman v Neilsen (1952) 237 **Minn** 1, 53 NW2d 553, an action to define the boundary line between the property of the plaintiff landowner and the defendant adjoining landowner to the east, the court held that a fence between the properties had been constructed for the purpose of serving as the boundary and was, therefore, to be accepted as such. The fence was constructed in 1923 and 1924 by a tenant of a predecessor in title of the plaintiff, the predecessor instructing the tenant to put the fence as close to the line as he could without going to any expense of surveying. There was evidence that the tenant and the defendant's predecessor in title made some measurements before the fence was constructed. The fence was accepted as the boundary until 1948, when a dispute arose. Noting that one of the ways that the practical location of a boundary line can be established is for the location relied on to have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations, the court held that the fence in question was established as the boundary by this manner. The court explained that the mere fact that the tenant who built the fence had also stated that the reason for constructing the fence was to keep his stock in his field would not offset the fact that the fence also established a practical boundary, the court reasoning that it was only normal that one of the purposes for the fence must have been to retain stock. In affirming a judgment against the plaintiff, the court stated that it was not necessary that either party have knowledge of the true boundary line in order for a fence to become the boundary by acquiescence.

However, in Chandler v Hibberd (1958, 2d Dist) 165 **Cal** App 2d 39, 332 P2d 133, an action to quiet title in which the plaintiff landowners contended that the true boundary line

between their property and that of the adjoining landowners to the south was south of a fence which the adjoining owners claimed had been established by acquiescence as the boundary, the court held that there was no evidence that the fence was intended to be a boundary when constructed or that it had become one by acquiescence. In 1938, the southern tract (subsequently owned and leased by the defendants) and the southern half of the northern tract (subsequently owned and leased by the plaintiffs) was leased by a single party who desired to erect a fence around the southern tract for the purpose of controlling his cattle and preventing other cattle from invading his grazing land. He then informed the owner of the northern tract of his desire to build a fence that would extend approximately 660 feet onto her property. The owner of the northern tract gave written permission to the party to construct the fence but specified that it was not to serve as a boundary. In modifying that part of the judgment establishing this fence as the boundary line between the properties, the court stated that the evidence did not support the finding of an agreed boundary, since the fence was neither agreed on nor intended as a boundary, but was considered and understood only as a cattle barrier.

b. Person building fence not specified

§ 13. Cultivation of land up to fence

A fence erected by unspecified persons which was in place at the time of litigation and had not been rebuilt was held to have become a boundary by acquiescence or agreement in the following cases involving a single fence line, where the land had been cultivated up to the fence on one or both sides.

Thus, where the undisputed evidence revealed that a landowner obtained possession of all land up to a fence when he purchased the property in 1943; that he had held actual possession to the fence for 19 years prior to the filing of this action; that an adjoining landowner had held up to the fence on her side for 17 years; that for over 10 years both parties had recognized and accepted the fence as the boundary line between their properties; that both parties jointly maintained the fence and had continuously worked their land up to the fence; and that no person other than the landowner had exercised possessory rights over the disputed strip since 1943, the court, in Sylvest v Stowers (1964) 276 Ala 695, 166 So 2d 423, held that the adjoining land owner was not entitled to have a line other than the fence declared the boundary line between the properties involved. In reversing a judgment against the landowner, the court thus rejected the adjoining owner's contention that the boundary had been established by a survey showing the true line to be at a location other than that fixed by the fence.

Where witnesses for the plaintiff landowners testified that 58 years before the present controversy arose, a stone marked the corner between the landowners' property and that of the adjoining owner to the north; that an old division fence extended between the two properties; that this division line was recognized as the boundary between the properties; and that the owners of the two tracts cultivated up to the division line, the court, in Robinson v Gaylord (1930) 182 Ark 849, 33 SW2d 710, affirmed a judgment for the plaintiff landowners in their action in ejectment against the adjoining landowner who claimed that a

survey established that the true boundary line was approximately 100 yards south of the fence row. The adjoining owner also testified that when his predecessor in title conveyed the land to him he informed the adjoining owner that the true boundary was approximately 100 yards south of the fence row, although the predecessor in title himself testified that he had told the adjoining owner that the fence row had been considered the division line for many years. Applying the principle that where there is doubt or uncertainty or a dispute as to the true location of a boundary line, the owners of the adjoining lands may, by parol agreement, fix a line that will be binding on them, although their possession under such agreement may not continue for the full statutory period, the court declared that under the aforementioned evidence the jury might have found that the long acquiescence in the division fence as a boundary line constituted a parol agreement to that effect.

Stating that the testimony was overwhelming that a fence had existed between the plaintiff landowners' property and that of the defendant adjoining landowners for more than 3 years, that since 1946 some of the plaintiffs had at different times lived on the land west of the fence and had cultivated or pastured it up to the fence line, and that the adjoining landowners had at no time objected to the location of the fence or complained about the occupancy by the plaintiffs of the land west of the fence, the court, in Stewart v Bittle (1963) 236 Ark 716, 370 SW2d 132, held that the fence line had become the boundary line by the acquiescence of the parties, the court thus affirming a judgment for the plaintiff landowners in their action to enjoin the adjoining landowners from destroying part of the fence. Although acknowledging that there had never been any express agreement to treat the fence as the dividing line between the two parcels of land, the court explained that such an agreement could be inferred by the actions of the parties, the court observing that in the present case the fence was visible, had been in place for at least 34 years, and had been silently acquiesced in as a boundary line by the adjoining owners. The court added that it was not error for the chancellor to have refused to admit a survey into evidence since, in view of the fact that the plaintiff landowners did not claim that the fence was located on the true line, what the official plat showed was immaterial.

Where there was evidence that a fence between the property of the plaintiff landowner and the defendant adjoining landowner to the east had been in existence for over 40 years and that the property had been cultivated up to the fence by both parties, the court, in Madera School Dist. v Maggiorini (1956, 3d Dist) 146 Cal App 2d 390, 303 P2d 803, held that the evidence was sufficient to sustain the trial court's finding that the fence had been agreed on and acquiesced in as the boundary line between the properties. In affirming a judgment against the plaintiff landowner, the court rejected it's contention that the case was governed by the principle that where the true line can be ascertained by reference to a recorded map there can be no doubt as to the true line and, therefore, the doctrine of agreed boundary is inapplicable. Although acknowledging that there was authority supporting such position, the court pointed out that in the present case there was evidence in the record indicating that the true

line was not described in the applicable recorded map. The court furthermore observed that prior decisions had established that the fact that an accurate survey is possible is not conclusive of the question whether a doubt exists as to the location of a common boundary, and that in order to invoke the doctrine of agreed boundary all that need by shown is lack of knowledge by both parties of where the line should be drawn.

In rejecting the contention of the defendant adjoining landowner that a 60-year-old fence between his property and that of the plaintiff landowners to the south did not constitute an agreed boundary because there was no showing that there was uncertainty concerning the location of the true boundary at the time the fence was constructed or that there was ever an agreement to treat the fence as a true boundary, the court, in Kraemer v Superior Oil Co. (1966, 4th Dist) 240 Cal App 2d 642, 49 Cal Rptr 869, held that direct evidence of these facts was not necessary, but that rather they could be inferred from the circumstances of the case. Although acknowledging that there was no direct evidence as to who had built the fence or why it was placed where it was, the court pointed out that it was a logical inference that the fence was built when the first surveys were still sufficiently recent that the corners and markings could yet be accurately identified on the ground. Emphasizing that uncertainty over a boundary line may be inferred from the circumstances, the court pointed out that the present dispute concerning the true boundary (the defendant claimed that it was located 200 feet to the south of the fence) was indirect evidence that there might have been uncertainty concerning the true boundary line at an earlier time. The court further declared that the required agreement that the fence was to be the boundary could be implied from the construction of the fence for the apparent purpose of marking the boundary and the subsequent acquiescence in its location for a period of 60 years, the court observing that there was no dispute that the plaintiffs had occupied and farmed the disputed parcel up to the fence over a period of from 47 to 60 years. The court further emphasized, in affirming a judgment for the plaintiffs, that there was no disagreement or dispute over the location of the fence for this period, until the initiation of the present action.

Stating that acquiescence in a line for more than 7 years is conclusive evidence of an agreement between adjoining landowners as to the location of a boundary line, the court, in Brantley v Thompson (1960) 102 Ga App 355, 116 SE2d 300, held that a fence between the property of the plaintiff landowner and the defendant adajcent landowner to the southeast was fixed as a boundary by acquiescence, where the evidence showed that the fence had been there for 40 or 50 years; that both parties had been in possession up to the fence; and that, except for a rough area through which a ditch ran, the land had been cultivated by the parties up to the fence for many years. In affirming a judgment for the defendant adjacent landowner, the court held that the county processioners had correctly marked the property line.

A fence which had existed for more than 50 years was held to constitute the boundary line between the property of the plaintiff landowner and that of the defendant adjoining landowners to the east, rather than a survey line located approximately 45 feet to the east of the fence, in Finck

Realty Co. v Lefler (1948, Mo) 208 SW2d 213, where the predecessors in title of both parties had had no controversy over the boundary line, each had used the land for pasture and cultivation, and the barbed wire used in making the fence was embedded in trees some 6 to 10 inches in depth. In addition, one of the defendants testified that when he purchased the property, the predecessor in title informed him that the fence was the boundary line. The fence, which ran in a north-south direction, stopped short of a creek which ran along the southern border of the properties and then turned sharply to the east and paralleled the creek. The court held that the trial court had ruled correctly in decreeing that the boundary line should run straight south to the creek despite the fact that the fence did not extend all the way to that point. Noting that the fence had been treated as a dividing line for many years, the court reasoned that that fact meant, of course, a straight line continuing to the center of the river, which was the boundary line of the defendants' land. A judgment against the plaintiff in his action of ejectment and to quiet title to the disputed strip of land was, therefore, affirmed.

However, in Wright v Clissold (1974, Utah) 521 P2d 1224, an action by the plaintiff landowners to quiet title to approximately 2 acres located to the north of a fence between their property and that of the defendant adjoining landowners to the north, the court rejected the defendants' contention that the fence had become the boundary by acquiescence, where there was evidence clearly implying that the fence was not built pursuant to an agreement between adjoining landowners. The evidence indicated that the fence was constructed to control cattle and not to locate an uncertain boundary; that the person building the fence situated it on his own land, so that there was no neighbor to consult; that as early as 1948, the defendants' predecessor was informed by the adjoining owner that the fence was not on the boundary, information which she conveyed to the defendants. The court pointed out that the evidence of the physiography of the area was consistent with testimony that the plaintiffs' predecessor had granted the defendants' predecessor permission to hay the disputed strip, which was separated from the remainder of the plaintiffs' property by uncultivatable ground. Finally, the court rejected the defendants' contention that although the parties or their predecessors had knowledge that the fence was not the boundary, their failure to do anything about it for a long period of time established the fence as a boundary by acquiescence.

§ 14. No cultivation of land up to fence—land used for pasturage

A fence erected by unspecified persons which was in place at the time of litigation and had not been rebuilt was held not to have become a boundary by acquiescence or agreement in the following cases involving a single fence line, where although there was no indication that the land on either side of the fence had been cultivated, there was evidence that the land had been used for pasturage.

Declaring that the mere existence of a fence between adjoining landowners is not in itself sufficient to establish a boundary by acquiescence, but rather that there must be mutual recognition of the fence as the dividing line, the court, in Warren v Collier (1978) 262 Ark 656, 559 SW2d 927, held that the trial court had incorrectly found that a fence fixed the boundary line between the plain-

tiff landowners and that of the adjoining landowners to the east, where the defendants testified that the fence had been erected by unspecified persons in 1946 or 1947 to keep cattle out and was not intended as a boundary line, and that the party owning the plaintiffs' property in 1952 had discussed with the defendants the fact that the fence was not on the boundary line. There was also evidence that the parties in possession of the plaintiffs' land from 1952 to 1971 also knew that the fence was not on the boundary line and were aware of approximately where the true boundary was. In view of this evidence, the court stated that the chancellor's finding of acquiescence in the fence as a boundary line incorrectly rested on the mere existence of the fence and on proof that the owners on either side of the fence had allowed their cattle to graze on opposite sides of the fence, in a wooded area. The court thus reversed a judgment for the plaintiffs, which judgment gave them title to the aforementioned wooded strip based on the chancellor's finding that the fence constituted the boundary line between the properties in question.

Although a fence dividing the property of the plaintiff landowner from that of the defendant adjoining landowner to the south had been in existence for over 34 years and the parties had pastured their stock up to the fence during that period, the court, in Copley v Eade (1947) 81 Cal App 2d 592, 184 P2d 698, held that the fence had not become the boundary by agreement, the court thus affirming a judgment against the plaintiff and holding that the true boundary line was that established by survey. The court emphasized that there was evidence that both parties, and their predecessors, treated the fence as a cattle guard only; that both parties and their predecessors recognized and publicly stated that they were in doubt as to the true boundary line; and that both agreed that a survey ought to be made to determine the boundary between their respective holdings. Observing that in order to give rise to an inference that an acquiesced in fence constituted an agreed boundary line, the fence must have been accepted as a boundary line and not as a barrier, the court stated that its conclusion that the fence in question was erected as a cattle barrier was supported by the fact that the contour of the land made it very difficult for a fence to be constructed on the true boundary line. Although recognizing that the long acquiescence in a boundary fence line is presumptive evidence of an agreement to fix the boundary line, the court concluded that this presumption was overcome by the aforementioned evidence.

The contention that a fence between the property of the plaintiff landowners and the defendant adjoining landowners to the north had become a boundary by acquiescence was rejected, in Kelly v Mullin (1966) 159 Colo 573, 413 P2d 186, where the fence, although in existence for over 30 years, was erected by unspecified persons as a barrier rather than a boundary line. In reaching this conclusion, the court emphasized that the fence was a meandering one, changing direction seven times over the plaintiff landowners' property and varying in distance from 250 feet to 1000 feet south of the true boundary line, as established by survey; since the plaintiff landowners described their property in terms of portions of a section, rather than by metes and bounds, the meandering fence was at variance with the concept of a section

line; a surveyor testified that the fence passed near several canyons and was placed in the most convenient location; and there was evidence that the fence served the purpose of separating field from pasture and pasture from pasture in an area where there were a number of such fences serving the same purpose, which fences had been erected without regard to ownership or legal description.

Although a fence between the property of the plaintiff landowners and the defendant adjoining landowners to the east had been used to contain the plaintiff's cattle for a number of years longer than the prescriptive period, the court, in Blackburn v Florida West Coast Land & Development Co. (1959, Fla App D2) 109 So 2d 413, cert den (Fla) 114 So 2d 3 and (ovrld on other grounds Meyer v Law (Fla App D2) 265 So 2d 737, quashed (Fla) 287 So 2d 37), held that the fence had not become a boundary by acquiescence, where a survey established that the true line was 500 feet west of the fence and where there was no evidence that there had ever been a dispute between the parties or their predecessors in title as to the location of the boundary line. Classifiying the doctrine of acquiescence as being in a chaotic condition, the court pointed out that regardless of the diverse situations in which the doctrine had been applied in other states, Florida decisions had clearly imposed the prerequisite that there be some dispute or uncertainty as to the location of the line recognized by both parties before a boundary may be established by acquiescence, an element which the court characterized as entirely lacking in the instant case.

A fence which had existed for more than 20 years between the property of the plaintiff and that of the defendant adjoining landowners was held not to have been established as the boundary by acquiescence, in Carter v Wyatt (1966) 113 Ga App 235, 148 SE2d 74. The court pointed out that there was no evidence that the defendants or their predecessors performed any act, or made any declaration, as to the fence as a dividing line that could be said to have brought the matter to the plaintiff's attention. In addition, the court stated that the plaintiff's recognition of the fence as the boundary was not established by testimony of a witness who had aided his father in building a fence through an area the title to which was not contested and in repairing the fence which the defendants claimed was the boundary. The court stated that the repairs did not show recognition by the plaintiff of the fence as the dividing line, especially in view of the plaintiff's testimony that this fence was an old pasture fence, and not a boundary. Furthermore, the court explained that the fact that the defendants cut timber up to the old fence did not establish it as a dividing line by acquiescence, since the defendants testified that they had not discussed this matter with the plaintiff, while the plaintiff testified that he had known nothing of it until shortly before the institution of the present action. The court thus reversed a judgment for the defendants establishing the fence as the boundary.

Stating that mutual acquiescence and recognition by the adjoining landowners is essential to the doctrine of practical location of a boundary line and that, furthermore, there must be at the time of the location a disputed, indefinite, or uncertain boundary line between the adjoining owners, the court, in Drury v Pekar (1960) 224 Or 37, 355 P2d 598, held

that the plaintiff landowners had failed to establish that an old fence had been acquiesced in as the boundary between the plaintiffs' property and that of the defendant adjoining landowner to the east, the court thus affirming a judgment against the plaintiffs in their action to determine ownership of a narrow strip of land between the fence and the true boundary line. The court pointed out that the plaintiffs had failed to prove satisfactorily that there was an agreement on the old fence as a boundary line; that it appeared probable from the evidence that the old fence line was put in (by whom not specified) to restrain cattle, rather than as an exact dividing or boundary line; that the true line was easily ascertainable, since the stakes and monuments at both ends thereof were in place; and that the mere fact that logging contractors were told that they would be safe in cutting up to the old fence was not sufficient to constitute the old fence as a boundary line by practical location or by acquiescence.

However, in Hartley v Ruybal (1966) 160 Colo 80, 414 P2d 114, an action to determine the boundary line between the plaintiff landowners' property and that of the defendant adjoining landowners to the north, the court held that where there was evidence that a fence had existed between the properties for at least 40, and perhaps as long as 60, years and that the landowners and their predecessors in interest had always been in open and visible possession of all the land on their side of the fence, the fence had become the boundary by acquiescence. Stating that one of the tests of acquiescence in a boundary line, in addition to the existence of a fence over the prescribed period of time, is the actual possession and dominion over the property up to the fence, the court emphasized that the plaintiff landowners grazed livestock on the disputed land and that one of the defendant adjoining landowners testified that there had never been any question concerning the parties' common boundary. The court rejected the contention of the defendants that if the plaintiffs were laboring under a misapprehension as to the location of the true boundary line, there could be no acquiescence in the fence as a boundary, reasoning that such argument was repugnant to the presumption which the law supplied in permitting a party to assert a 20-year or more existence of a fence as evidence of acquiescence in a boundary line. The court explained that implicit in the enactment of the statutory remedy was the proposition that the parties did not know the exact location of the real boundary between them.

§ 15. —Land not used for pasturage

[a] Fence held boundary

Under various circumstances, it was held in the following cases involving a single fence line that a fence erected by unspecified persons which was in place at the time of litigation and had not been rebuilt had become a boundary by acquiescence or agreement, where there was no indication that the land on either side of the fence had been cultivated or used for pasturage.

Thus, a finding that a fence constituted the agreed boundary between the plaintiff landowners' property and that of the defendant adjoining landowners to the east was upheld, in Hannah v Pogue (1944) 23 Cal 2d 849, 147 P2d 572, where one of the plaintiffs testified that the fence was in existence in 1917, when her husband acquired the property, that it remained standing down to the time

of the trial, and that she believed that it marked the boundary until she learned that the defendants had employed a surveyor to determine the boundary. This testimony, declared the court, established her acceptance of the fence as the boundary and in all likelihood reflected the belief of her husband and the defendants' predecessors in title. Noting that the witness also testified that she knew of no agreement that the fence should constitute the boundary, the court reasoned that such testimony did not necessarily rebut the inference that there was such an agreement, since the inference could be made that an agreement was inherent in the long-standing acceptance of the fence as the boundary. Observing that the boundary line could not be ascertained from the early surveys due to inability to locate the monuments involved, the court declared that the trial court properly recognized a line that had served for many years as the practical boundary.

In Duncan v Peterson (1970, 3d Dist) 3 **Cal** App 3d 607, 83 Cal Rptr 744, the court held that a fence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the west, although located to the west of a boundary established by a survey, had become an agreed boundary, where the fence had existed for at least 42 years, and probably longer, and where recognition of it as the boundary could be inferred from the evidence. Specifically, as evidence establishing such recognition, the court pointed out that (1) a roadway east of, and adjacent to, the fence was used by the defendants with the consent of the plaintiffs, but was considered to be the plaintiffs' road; (2) the defendants constructed irrigation facilities that terminated at the fence; and (3) the defendants asked, and received, permission from the plaintiffs to build an air strip, the center line thereof corresponding to the former fence line, (part of the fence was removed when the strip was built, but the fence north of the strip remained in place). In reversing a judgment against the plaintiffs, the court pointed out that the agreement between adjoining owners required for application of the doctrine of agreed boundary could be inferred and that long-standing acceptance of a fence as a boundary between the parties' lands was strong evidence of such an implied agreement.

It was held, in Euse v Gibbs (1951, **Fla**) 49 So 2d 843, that although a later survey showed that the true boundary line between the properties of the plaintiff landowner and the defendant adjoining landowner to the east was approximately 50 to 65 feet east of a fence which had served as the boundary for more than 27 years, the fence had become the boundary by acquiescence and the parties were bound by it, the court thus reversing a judgment for the plaintiff in his action to quiet title to the strip of land between the fence and the true boundary line. The record revealed that in 1924 and 1925 the defendant adjoining landowner, from separate vendors, purchased both his property and the land west of the fence, presently owned by the plaintiff landowner, and that at that time all parties agreed that the fence line should constitute the true line. In 1931, the plaintiff's predecessor in title purchased the land west of the fence, and there was evidence that he understood and agreed that the fence line should constitute the boundary line. The record also revealed that the defendant remained in actual possession of the strip of land lying be-

tween the fence line and the true line, claiming the same as his own. The court explained that this evidence showed that there was an uncertainty as to the exact boundary line between the properties in question at the time the deeds were executed in 1924, 1925, and 1931, and that in this state of uncertainty the parties all agreed that the fence line should constitute the true boundary. Emphasizing that this line had been established by acquiescence and recognized for a 27-year period, the court declared that the plaintiff could not now be heard to question the legality of the agreement.

Where a boundary line dispute between the plaintiff landowner and that of the defendant adjoining landowners to the west grew out of a survey which showed that an old fence line was not the true boundary, the court, in Hanlon v Ten Hove (1926) 235 Mich 227, 209 NW 169, 46 ALR 788, affirmed a judgment against the plaintiff in his action of ejectment and held that the fence constituted the boundary by acquiescence, where there was evidence that for over 40 years a fence had been maintained on the present line and that the defendant, who had purchased the property about 12 years prior to the present action, and his predecessor in title had both used and improved the property up to the line of the old fence. The court explained that a fence may become the true boundary line either by being accepted as a true line by adjoining landowners in settlement of a dispute concerning the boundary or by being acquiesced in for the statutory period. The court pointed out that improvements of some cost had been made by the defendants and that acquiescence in the line for more than the statutory period was abundantly sustained by the proof.

Where the record established that there was doubt between the plaintiff's predecessor in title and the defendants as to the boundary line between their adjoining properties, that they agreed to an existing fence line as a boundary, and that the plaintiff's predecessor had informed the plaintiff that the fence constituted the boundary, the court, in Shields v Collins (1978) 83 Mich App 268, 268 NW2d 371, held that the fence, rather than a line established by survey, constituted the boundary under the doctrine of acquiescence. In rejecting the defendants' contention that the doubt or disagreement over the location of the boundary line failed to rise to the level required to justify application of the doctrine of acquiescence, the court declared that such doctrine was as applicable where there was only a doubt over the location of the boundary line as where the doubt had flared into a dispute. Observing that the present case was not one in which the parties had made a mutual mistake as to the boundary, but rather one in which neither the plaintiff's predecessor nor the defendant knew where the correct boundary was, the court concluded that doubt existed as to the location of the boundary, which doubt was resolved by an agreement as to where the boundary line was to be located. In affirming a judgment against the plaintiff, the court pointed out that a further indication of the existence of doubt was the fact that the plaintiff was told by his predecessor that the fence, rather than a survey line, was the boundary.

Where the evidence established that for more than 25 years the plaintiff landowners, and their predecessors in title, had had full and exclusive possession of property lying

south of an old fence line, and that during this period both the plaintiffs and the defendant adjoining landowners to the north recognized the fence line as the boundary line, the court, in Johnson Real Estate Co. v Nielson (1960) 10 Utah 2d 380, 353 P2d 918, held that the old fence had become a boundary by acquiescence. In affirming a judgment for the plaintiffs in their action to quiet title to a disputed strip of land lying south of the fence, the court rejected the defendants' contention that the value of the fence as evidence was lessened because it was old, the wires down, and the posts rotted away. The court explained that the question was not its value or usefulness as a fence, but its value as evidence in establishing the fact of an ancient boundary acquiesced in for a long period of time. In fact, continued the court, the more the value of the fence was minimized as a fence because it was old and worn away, the more its value might actually increase as evidence of an ancient boundary.

[b] Fence held not boundary

In the following cases involving a single fence line, the courts held, under various circumstances, that a fence erected by unspecified persons which was in place at the time of litigation and had not been rebuilt had not become the boundary between the properties in question by acquiescence or agreement, where there was no evidence that the land on either side of the fence had been used for cultivation or for pasturage.

Thus, in Cossey v House (1956) 227 Ark 100, 296 SW2d 199, an action by landowners to recover a strip of land which they claimed by adverse possession, the adjoining landowner to the south being the record owner of the property, the court, in affirming a judgment for the defendant adjoining landowner, held that a fence located to the south of what a survey revealed to be the true boundary line had not become a boundary by acquiescence, where the land to the north of the fence was wild and unenclosed, and where the adjoining owner testified that he did not know where the true boundary line was until its location was determined by survey. Although noting that the plaintiff landowners probably assumed that the fence was the boundary line, the court held that they had not exercised dominion over the disputed tract for a continuous period of 7 years, as was required to acquire title by adverse possession. The court declared that a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side, such loss occurring only if his neighbor should take possession of the strip and hold it for the required period of years.

In Hoskins v Cook (1965) 239 Ark 285, 388 SW2d 914, an action by a landowner against an adjoining landowner to determine the boundary between their properties, the court rejected the contention of the adjoining landowner that, despite the fact that the landowner held record title to the disputed strip of land, a boundary by acquiescence had been established by reason of the fact that for many years a fence was maintained along the eastern border of the strip. The landowner claimed that this fence, which was nailed to trees within a wooded area in the disputed tract of land, ran along the bank of a slough through the property and was not intended to be a division line. In affirming a judgment for the landowner, the court stated that if the fence had divided pasture land or cultivated fields on both sides of it, its maintenance for

many years would have strongly indicated the existence of a boundary by acquiescence. However, the court reasoned, where a fence was nailed to trees in a timbered area, there was much less reason to suppose that the landowners meant to regard it as a division fence. The court thus concluded that the adjoining owner had not established a boundary by acquiescence by a preponderance of the evidence necessary to overturn the chancellor's decision.

In Raborn v Buffalo (1976) 260 Ark 531, 542 SW2d 507, a boundary line dispute between a brother who owned three contiguous 40-acre lots and his sister and her husband who owned the three contiguous 40-acre lots to the south of the brother's property, the court held that the chancellor erred in fixing the boundary between the properties, on the basis of acquiescence, along a fence line located to the north of the true boundary. In 1953, the father of the parties, who owned all of the lots except the middle southern one, conveyed the three northern forties to his son and the two southern forties to his daughter, both deeds reserving a life estate in the father as long as he should live. The father was in possession of five of the 40-acre lots until his death in 1971. In 1955, the daughter and her husband acquired the middle southern forty by purchase from a third person. Noting that title by long acquiescence in a boundary rests on the assumption of an implied agreement, the court, with respect to the middle southern forty, pointed out that since there was no indication in the evidence that the father acted, or had the authority to act, for his son, any acquiescence on the part of the father in the fence as the boundary would not be binding on the son. With respect to the other five 40-acre lots, the court, noting that the father as life tenant was in possession of all of them on each side of the disputed line, stated that obviously his acquiescence in his own possession on both sides of the line would be ineffective in binding his son, the remainderman, to an acquiescence in the fence as the boundary.

Stating that mere acquiescence in the existence of a fence and the occupancy of the land up to it would not amount to an agreement that it was on an accepted boundary line, the court, in Hill v Schumacher (1919) 45 Cal App 362, 187 P 437, held that the mere fact that a fence had existed, without expressed objection, for 20 or 30 years, between the property of the plaintiff landowner and that of the defendant adjoining landowner to the north did not establish that the fence had become the boundary line by acquiescence. Noting that a fence may become an accepted boundary line where there is either, in fact, an uncertainty as to the location of the true line or the parties believe that such an uncertainty exists, the court first pointed out that a survey of the block in question would at anytime have established the true boundary line between the properties, the court observing that a boundary is considered definite and certain when by survey it can be made certain from the deed. With respect to whether the parties believed that the boundary line was uncertain at the time the fence was erected, the court explained that there was no evidence that the parties ever considered the fence to be the line, that it was built as such, or that the defendant's lot was used up to the line. In affirming a judgment against the plaintiff landowner, the court concluded that the mere existence of the fence for 20 or 30 years without objection was insufficient evi-

dence to establish that the parties believed the boundary line was uncertain at the time that the fence was erected.

A retaining wall, the north edge of which was approximately one foot south of the true boundary between the plaintiff landowner's property and that of the defendant adjoining landowners to the north, was held not to have been acquiesced in as the boundary, in Davis v Hansen (1974, Iowa) 224 NW2d 4, the court reversing a judgment against the plaintiff in his action to enjoin the defendants from interfering with the true boundary markers. Stating that a boundary by acquiescence may be established where two or more adjoining owners or their predecessors, for 10 or more consecutive years, have mutually acquiesced in a line definitely marked by a fence, or in some other manner, as a true boundary, the court pointed out that both a predecessor of the defendants and the predecessor of the plaintiff testified that the boundary line was located approximately 2 feet north of the retaining wall. The court declared that even assuming that the plaintiff and the defendants recognized the retaining wall as a boundary line, the fact still remained that their respective predecessors in interest did not do so and that, therefore, the required mutual acquiescence for 10 or more consecutive years was not established.

In Cooley v Marx (1969) 17 Mich App 470, 169 NW2d 655, an action by the plaintiff landowner to quiet title to a disputed strip of land between his property and that of the defendant adjoining landowners to the northeast, the court held that the proper line was that established by a survey conforming to the calls and distances of the plaintiff's record title, rather than a fence which had been maintained by the plaintiff along the northeast side of his property off and on for approximately 30 years. The party erecting the fence was not specified. In remanding a judgment fixing the old fence line as the plaintiff's northeast boundary on the basis of acquiescence, the court pointed out that there was no evidence indicating that the fence was placed on the northeast line of the plaintiff's property, and that the testimony of the plaintiff himself indicated that it was placed without reference to his northeast line as a convenience to keep out trespassers. The court emphasized that nothing was conveyed in relation to the fence.

In Reel v Walter (1957) 131 Mont 382, 309 P2d 1027, the court held that the boundary between the properties of the plaintiff landowners and that of the defendant adjoining landowner to the south was a line established by a survey, rather than a fence to the north of such line which had existed for a long, though unspecified, time. Declaring that where two adjoining proprietors are divided by a fence which they suppose to be the true line, they are not bound by the supposed line, but must conform to the true line when ascertained, the court pointed out that the parties and their predecessors in interest recognized that the section line dividing the northeast and southeast quarters of the section in question was the true division line between their properties, and that they believed that the fence was located on this section line. Moreover, continued the court, neither of the parties nor their predecessors, while believing the true division line to be uncertain, ever fixed by any agreement a boundary line between their properties. Noting that the deeds by which the parties took their respective lands provided that the

deeds were "subject to any state of facts an accurate survey may show," the court concluded that the defendant thus knew that the boundary was subject to being ascertained by an accurate survey and that he had, therefore, failed in his burden of proof to show the existence of an agreement fixing the fence as the boundary line.

2. Fence not in place

§ 16. Fence torn down—generally

[a] Fence held boundary

A fence which had been torn down and not rebuilt was held, under various circumstances, to have become the boundary between the properties in question by acquiescence or agreement in the following cases involving a single fence line.

Thus, in Tull v Ashcraft (1960) 231 Ark 928, 333 SW2d 490, an action by a landowner to quiet title initiated when the adjoining landowners to the east claimed that the true boundary line, according to government survey, was actually 35 feet west of a fence which had existed for 35 years, the court reversed a judgment against the plaintiff landowner, where the plaintiff testified that he had been in undisturbed possession of his property for 33 years and that the fence, which had been constructed by the adjoining landowners' predecessor in title was always considered to be the boundary line and was maintained by the adjoining owners until part of it was removed a year or so before trial. The party removing the fence was not specified. Although the adjoining landowners' predecessor in title, who had erected the fence, testified that he did not recognize it as the boundary line and that he figured that it was "short" of the true line, he did not communicate his doubts to any other person and he admitted that the fence had remained in place for about 35 years, being kept up by the succeeding property owners. Observing that the landowner had not objected to the survey and that when the true boundary line was found to be west of the fence, he recognized the adjoining owners' rights by removing some young fruit trees he had planted on the strip in controversy, the court applied the principle that the mere fact that a party acquiring title to land by adverse possession thereafter recognizes the justice of another party's claim to the land does not divest the title from the former or estop him from asserting such title.

In Mann v Hughes (1973) 255 Ark 619, 502 SW2d 465, a boundary line dispute in which one landowner based his claim on a surveyed line and the other on a line established by common consent and acquiescence of the adjoining owners for some 10 years, the court accepted the latter contention, where the evidence showed that the predecessor of the party claiming that the line had been established by acquiescence testified that there had been an old fence between the adjoining properties that was in close proximity to the boundary line fixed by the chancellor. In addition, the party claiming acquiescence also testified as to the existence and location of the fence, as well as to the facts that he had regularly planted a garden within the disputed property and that the other claimant to such property had never attempted to use this property for any purpose. The party claiming that the boundary had been fixed by survey testified that he had built the fence relied on by the other party as the boundary partly to trap animals and partly to block the view of his property by the ad-

joining owner; that the adjoining owner's predecessor in title had not occupied the disputed area; that he had given the adjoining owner permission to use the disputed tract as a garden since he had no use for it at that time; and that the fence had been destroyed in 1969. Characterizing the conflicting evidence as creating a close question of fact, the court concluded that it was required to affirm the judgment of the chancellor that the boundary line had been established by acquiescence as being in close proximity to the old fence line.

See also Carney v Barnes (1960) 232 **Ark** 549, 338 SW2d 928, where the court, in reversing a judgment against landowners against whom a demurrer to the evidence was sustained, held that the landowners' proof raised a question of fact as to the existence of a boundary by acquiescence, where such proof showed that from 1921 to 1959 there existed a woven wire fence with two strands of barbed wire between the landowners' land and that of the adjoining owner to the south; that the landowners had possession and claimed ownership of all the lands lying north of the fence and fencerow from the time of their purchase in 1938; that the adjoining owners' predecessor, at least as early as 1941 and 1946, acquiesced in the fence and fencerow as the line between the adjoining property; and that the adjoining owners also acquiesced in the fence and fencerow as the boundary until they tore the fence down in 1959.

In Joaquin v Shiloh Orchards (1978, 5th Dist) 84 **Cal** App 3d 192, 148 Cal Rptr 495, 7 ALR4th 46, a quiet title action in which the plaintiff landowners contended that an old fence line which had served as the boundary between his property and that of the adjoining owner to the north was south of the true property line, the court, in reversing a judgment quieting title in the plaintiffs to the disputed strip, held that there was sufficient evidence from which the location of the old fence line could be fixed and that the trial court had thus erred in concluding that the only ascertainable boundary between the two properties was the quarter section line described in the recorded deeds. The fence had been constructed some time prior to 1944, and the two tracts were separately farmed and utilized up to the fence, the separate farming practices of the adjoning owners over the years having created a line evidenced by a change in elevation or "bench" between the two farms at the fence line. The fence was located at the top of this bench. In 1974, the defendant adjoining property owner removed the fence to help control weeds. Applying the principle that a long acceptance of a fence as a boundary line gives rise to an inference that there was a boundary agreement between the adjoining owners resulting from an uncertainty or dispute as to the location of the true line, and that once established such line becomes the true line regardless of the accuracy of the agreed location, the court emphasized the following testimony establishing that the former fence line could be presently ascertained: (1) that the embankment formed by the different farming practices had been rounded somewhat by discing, but that the original line had not been obliterated altogether; (2) that the fence had been located at the top of the bank; (3) that the fence had lined up with a particular road; (4) that the fence line corresponded to the boundary on the assessor's map; and (5) that a civil engineer was able to observe the top of the embankment and that when he com-

pared that line with the enbankment line apparent on an aerial photograph taken in 1957, the two lines were "very close" (from 2 to 5 feet).

An instruction that acquiescence for 7 years by acts or declarations of adjoining landowners shall establish a dividing line; that to establish a line by acquiescence it must appear that the line was in dispute, uncertain, and unascertained; and that the owners of the property to be affected acted in such a manner as to show that the line claimed was the true line between the estates, actual possession by the respective owners up to the line being evidence of acquiescence, but not indispensible for establishing acquiescence, was held supported by the evidence, in Greenway v Griffith (1969) 225 **Ga** 632, 170 SE2d 423, the court affirming a judgment for the plaintiff landowner in his action to enjoin the defendant adjacent landowner from trespassing on his property. The record disclosed that sometime after the defendant had bought the adjacent tract in 1954, he asked the plaintiff to help him find the dividing line between the tracts; that the plaintiff showed him the line; and that the defendant placed a fence thereon which remained until about 1965, when the defendant tore it down. Other witnesses testified that the fence remained in place for more than 7 years, and that during that period the plaintiff cultivated a portion of the disputed tract. The court concluded that though the defendant denied putting up the fence, the aforementioned evidence was sufficient to authorize the court to instruct on the law relating to the establishment of a boundary fence by acquiescence for 7 years.

It was held, in Strahorn v Ellis (1945) 66 **Idaho** 572, 165 P2d 294, that although a fence was 6 to 10 feet south of the true boundary line between the plaintiff landowners' property and the defendant adjoining landowners to the south, the fence had become a boundary line by agreement, where the evidence established that the fence was in place when the plaintiffs purchased their property in 1907; that from that time until the present, the plaintiffs had continuously farmed and occupied all of the property north of the fence; that the plaintiffs constructed a gate in the southeast corner of their tract, using the corner fence post as a gatepost, and a barn, the south end of which was built immediately adjacent to the fence and extended onto the defendants' property as defined by the true boundary line; and that the defendants and their predecessors accepted the fence as the boundary until 1943, when a survey established the true line and the defendants removed the fence. Declaring that a presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that such line has been definitely defined by the erection of a fence or other monument on it, and that the adjoining owners have treated the same as fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location, the court concluded that the fence had become the boundary line, and accordingly affirmed a judgment for the plaintiffs in their action to enjoin the defendants from interfering with their property.

In Nutterville v McLam (1964) 87 **Idaho** 377, 393 P2d 598, an action to resolve a boundary dispute involving ownership of a strip of ground approximately 9 feet in width between the properties of the plaintiff landowner and the defendant adjoining

landowner to the north, the court held that the evidence was sufficient to establish that the boundary had been fixed through an agreement of long standing entered into and recognized by the parties' predecessors in title. It was established that a fence which was recognized by the former owners as marking the dividing line between the properties had been constructed prior to 1901, and had remained in place for many years thereafter; and that after the fence was removed, by unspecified persons, there remained on the ground a number of things with which the fence line was identified, among which was a berm, an outdoor toilet, a telephone or light pole, a rose bush, and fruit trees. In affirming a judgment for the defendant adjoining owner, the court pointed out that there was testimony to the effect that the plaintiff, on several occasions, had discussed the boundary line with the defendant's predecessor in title, during which conversations the dividing line as claimed by the defendant was pointed out to the plaintiff, and that the plaintiff sought to purchase from the defendant's predecssor a 20-foot strip of ground on the defendant's side of the old fence line. The court applied the rule that where there has been a long period of acquiescence by adjoining property owners and their predecessors in interest, and recognition of a partition fence line as the boundary line between their lands, the parties will be bound thereby.

Stating that a line between adjoining tracts, definitely marked by a fence which has been acquiesced in and recognized by the owners of the tracts as a division line for more than 10 years, becomes, as between the parties, the true line, although a subsequent survey may show otherwise and although neither of the parties intends to claim more than his deed calls for, the court, in Mullahey v Serra (1935) 220 Iowa 1177, 264 NW 63, held that a fence which had been recognized as the boundary line for 32 years became the boundary line by acquiescence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the west. The fence had been erected in 1885 by the plaintiffs' predecessor in title, and both he and the defendants' predecessor had recognized the fence as the boundary until 1918. Though a portion of the fence was then removed by the plaintiff, portions of it continued to remain on the line thereafter, and there was evidence that some of the posts were standing until after 1930, and that some stumps were still in place. In affirming a judgment for the plaintiffs in their action to restrain the defendants from constructing a fence on the plaintiff's property, the court pointed out that even though there was no fence in place when the defendants purchased their property in 1930, the line was marked both by the aforementioned posts and other indications, so as to give ample notice that it was the line to which the adjoining owners occupied.

In Miller v Welsh (1953, La App) 66 So 2d 25, an action by the plaintiff landowner to judicially establish a boundary between her property and that of the defendant adjoining landowner who, with the plaintiff's permission, had removed a fence between their property, but who then claimed that the fence had infringed approximately 7 inches onto his land and refused to rebuild the fence unless the disputed strip of ground was given to him by the plaintiff, the court held that the fence, which had existed for more than 30 years, con-

stituted the boundary between the respective properties. The record indicated that the fence had been erected by a predecessor in title of the plaintiff along the boundary line that had been staked out for him by a surveyor. A long-time resident in the neighborhood, whose property adjoined the plaintiff's in the rear, testified that this fence tied in exactly with his fence line and had been in existence for more than 30 years. The defendant's predecessor in title, testifying for the plaintiff, said that he had had his property surveyed and that the surveyor's report showed that the fence did not encroach on his property. A court-appointed surveyor was able to ascertain the position of the original fence which, according to the plan, corresponded exactly with the boundary between the properties. The court thus concluded that the fence was located along the true boundary line, and affirmed a judgment ordering that a new fence be erected, at the joint expense of both parties, along the location of the original fence.

It was held, in Peloquin v Ciaccia (1980, RI) 413 A2d 799, that a fence had become the boundary by acquiescence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the west, where one of the plaintiffs testified that he had constructed the fence in 1958 and that it had stood undisturbed from then until 1972, when it was torn down by the defendants; the same plaintiff introduced into evidence photographs, dated from approximately 1959 to 1963, confirming the existence of the fence, and in addition testified that none of the defendants' predecessors in title had objected to the fence and that one of them had even added to it; two witnesses testified that they had seen the fence at various times from 1958 to 1971; and a surveyor who had performed a survey for the plaintiffs testified that there was evidence that a fence had existed on the property and estimated where it had stood. In affirming that part of the judgment for the plaintiffs awarding them possession up to the fence, the court concluded that the evidence was sufficient to substantiate the trial court's finding that the fence had existed for the required 10-year period and that the defendants and their predecessors had acquiesced in its location.

[b] Fence held not boundary

In the following cases involving a single fence line, the courts held, under various circumstances, that a fence which had been torn down and not rebuilt had not become the boundary between the properties in question by acquiescence or agreement.

Thus, in Davis v Randall (1948) 322 Mich 195, 33 NW2d 757, an action in ejectment by the plaintiff landowners against the defendant adjoining landowners to the north to establish title to an irregular piece of land between the two properties, the court rejected the plaintiffs' contention that the correct boundary line was established by a fence existing some 40 or 45 years before the present action was initiated. The fence had existed at a time before the land was platted when the defendants' predecessor in title owned the land north of the disputed area and one of the plaintiffs owned the land to the south. The fence in question was destroyed by this plaintiff about 40 years before. In affirming a judgment against the plaintiffs, the court pointed out that the record contained no proof as to which landowner built the fence,

whether there was any agreement at that time as to the fence being placed on the true boundary, or that the fence was ever intended as a line fence to establish the boundary. The property was platted in 1916, long after the fence in question had been destroyed; and both the plaintiffs and the defendants' predecessor in title were parties to the dedication of the plat. The court concluded that under the survey and dedication of the plat in 1916, and the conveyances in pursuance thereof, the plaintiffs failed to establish their claim of title, either by adverse possession or by location of the old fence line, by a preponderance of the evidence. The court pointed out that the evidence did not establish that the old fence was located where the plaintiffs claimed it to have been.

A fence which had admittedly been in existence for many years and which ran through wooded areas from tree to tree in a zigzag fashion and across open areas from post to post in a generally straight line was held not to constitute an agreed boundary between the property of the plaintiff landowner and that of the defendant adjoining landowner to the north, in Aley v Hacienda Farms, Inc. (1979, Mo App) 584 SW2d 126, the court affirming a judgment against the plaintiff in his action against the defendant for trespass. The fence was largely destroyed by the defendant when, after surveys were conducted, he claimed the property beyond the fence. The court pointed out that the failure of the plaintiff's evidence lay in the fact that it wholly lacked proof of the fence ever having been mutually agreed to, recognized, or acquiesced in as a boundary by any parties owning, or claiming to own, property on either side thereof. In fact, declared the court, it was not until the plaintiff sought to amend his pleading on the eve of trial that there was any formal claim made by him that the fence constituted an agreed boundary. The court hypothesized that for all that was known from the proof, the properties on either side of the fence could have been owned by the same person for many years who simply used the fence for reasons other than as a demarcation of boundaries, such as a barrier or an internal division of the property.

Holding that a fence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the west had not become an agreed boundary line by acquiescence and that, therefore, the defendants were not liable for removing the fence and stacking it on the plaintiffs' property, the court, in Beckman v Metzger (1956, Okla) 299 P2d 152, pointed out that the fence had been built by the plaintiffs in 1948, but that from 1932 until 1948 there had been no fence or marker nor any indication of acquiescence in a boundary other than that established by the official records. In attempting to prove an oral agreement in 1927 between the then respective owners of the lots, and the construction at that time of a fence on the agreed boundary line by the defendants' remote grantor, the plaintiffs offered a deposition of a former owner of the defendants' lot as to an oral agreement in 1917, rather than 1927, with a person different from the one named in the petition. The court stated that the trial court properly sustained objection to such testimony. The case was controlled, the court declared, by the rule that to establish a boundary line by acquiescence other than the true one, the claimed boundary line must be open to observation, marked by monum-

nets, fences, or buildings, and knowingly acquiesced in as a recognized true line for a long period of time.

In Inn Le'Daerda, Inc. v Davis (1976) 241 Pa Super 150, 360 A2d 209, an action in ejectment by the plaintiff landowners against the defendant adjoining landowners to the north in which the defendants claimed title by adverse possession to an old fence and tree line which was not on the true boundary, the court held that there was insufficient evidence to establish the line marked by the trees and fence as the boundary by acquiescence. With respect to the defendants' contention that the fence line constituted a consentable line, the court pointed out that in order to establish what is technically referred to as a "consentable line" there must be evidence of (1) a dispute with regard to the location of a common boundary line, (2) the establishment of a line in compromise of the dispute, and (3) the consent of both parties to that line and the giving up of respective claims inconsistent therewith. Although concluding that there was no evidence to support a finding of a consentable line, the court explained that Pennsylvania courts had long recognized that a boundary line could be proved by a long-standing fence without proof of a dispute and its settlement by a compromise. Noting that in such a situation the parties need not have specifically consented to the location of the line, the court pointed out that it must, nevertheless, appear that for the requisite 21 years a line was recognized and acquiesced in as a boundary by adjoining landowners. Applying this standard, the court again concluded that the fence and tree line did not constitute the boundary, since there was evidence that the line had been established in 1939 and destroyed in 1952 when the lot was strip mined; there was no evidence that the defendants or their predecessors in title acknowledged the fence line; and there was some evidence that some of the defendants themselves did not treat the line as the boundary, such as the fact that mobile homes on the lot of one of the defendants extended over the fence line.

Although a fence had existed between the property of the plaintiff landowner and that of the defendant adjoining landowner to the south for over 40 years, the fence being located to the south of the true boundary line, and although the defendant and his predecessors never interfered with the use by the plaintiff and her predecessors of the land north of the fence until the defendant tore it down in 1974, the court, in Hales v Frakes (1979, Utah) 600 P2d 556, held that the fence had not become the boundary by acquiescence, since the evidence failed to establish that the parties or their predecessors had treated the fence as a boundary. The court emphasized that the fence, which had been built by a common grantor, had been erected as a barrier to control livestock, rather than as a boundary, and was purposely offset from the true boundary so as to be south of a road that was to be built. The court further emphasized testimony of the defendant's predecessor that he never acquiesced in the fence as a boundary and did not consider that the fence was on the boundary line. The court added, in affirming a judgment against the plaintiff, that although the fence was erected by a common grantor, there was no evidence that the fence was intended by the parties or their predecessors to mark the boundary between them once they

had acquired the property from the common owner.

§ 17. —In connection with construction of another structure

It was held in the following cases involving a single fence line that a fence which had been torn down in connection with the construction of another structure, and not replaced by another fence, had become the boundary between the properties in question by acquiescence or agreement.

Thus, it was held, in Minera v Keith Furnace Co. (1931) 213 Iowa 663, 239 NW 584, that a fence which had been erected between the property of the plaintiff landowner and the defendant adjoining landowner to the west, a furnace company, had become the boundary line by acquiescence, the court concluding that the east side of a building erected by the furnace company had been built on the old fence line and thus reversing a judgment quieting title in the plaintiff to a strip of land to the west of the old fence which, according to a survey, belonged to the plaintiff. Although there was conflicting evidence as to whether the fence had been erected in 1903, 1904, or 1906, the court concluded that the fence, whenever erected, was placed on what was believed to be the true line between the two properties, the court emphasizing evidence of the furnace company's predecessor in title that the fence had been built by the plaintiff's predecessor, with the defendant's predecessor sharing the expenses, on the west side of the defendant's predecessor's east boundary line, and testimony of the plaintiff's predecessor that he had built the fence on the west boundary line of his property, as established by a survey. This evidence, the court remarked, established that the fence was erected as a partition recognized by the owners of the two tracts as the boundary line until the erection of the building of the furnace company was begun in 1921.

In Commonwealth, Dept. of Military Affairs v Kinder (1964, Ky) 379 SW2d 732, an action by the commonwealth to quiet title to a strip of land situated between property owned by it and that owned by the adjoining landowner, in which the adjoining landowner counterclaimed that the disputed strip had been enclosed by a fence which was torn down when the commonwealth constructed an armory, the court held that the evidence was sufficient to establish that the boundary line between the properties was where the old fence had been. The adjoining landower testified that when he purchased his property in 1943, there was a fence along the disputed area consisting of locust or chestnust posts to which were stranded four or five barbed wires, that bushes and trees had grown up around the fence, and that when the commonwealth began construction of the armory, it had torn down the fence and had taken possession of a 20 foot strip of his land. Six witnesses testified that they were familiar with the lands in question and that there had been a fence in the location specified by the adjoining landowner for approximately 35 years, until it was torn down by the commonwealth. In affirming a judgment for the adjoining landowner, the court stated that the fence was a well-known and long-recognized dividing line between the properties and that its location had been sufficiently well known to allow for a reconstruction of the boundary between the properties.

A fence which had been constructed by the plaintiff landowner and the predecessor in title of the

defendant adjoining landowners to the west was held to constitute the boundary between the properties, rather than the township line, in Miskotten v Drenten (1947) 318 Mich 538, 29 NW2d 91. In 1919, the plaintiff and the defendants' predecessor agreed to build a fence separating the two pieces of property, the predecessor building the south half of the fence and the plaintiff the north half. At an unspecified later time the fence was replaced by a drain, the drain following the fence line up to a bend, at which point the drain was dug to the east of the fence line for a distance of 10 feet before continuing parallel with the fence line. In modifying a decree giving the defendants title to the land west of the drain up to the bend and establishing the township line as the true line north of the bend, the court emphasized that the plaintiff and the defendants' predecessor had recognized the fence as the true and agreed line between the properties and that, therefore, the original fence line constituted the true boundary line. The court declared that it has been repeatedly held that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys.

However, in rejecting the contention of the defendant adjoining landowner that the boundary between its property and that of the plaintiff landowners had been established by the existence for more than the 30-year statutory period of a fence, a levee, and a road, the court, in Beene v Pardue (1955, La App) 79 So 2d 356, emphasized that none of these objects had been erected for the purpose of serving as a boundary line. The fence, the court pointed out, had been erected more than 30 years ago, but by a party who at the time owned all of the property in question and who apparently erected the fence to protect crops from roaming livestock, the necessity of the fence ending with the passage of stock laws. Approximately 20 years after the construction of the fence, a small levee was built slightly to the north of the fence, which was torn down when the levee was constructed. However, the court pointed out that this levee extended only along part of the border and had been built to keep back water off a cultivated portion of the property, a purpose which no longer existed after the construction of a larger levee in a different location. The road, which the defendant claimed extended from the end of the levee across the rest of the boundary, was classified by the court as not being a road at all, but instead a mere passage over which access was had to the properties and to wells thereon. The court observed that the road, like the fence and the levee, had never been maintained or repaired by any public authority. Although acknowledging that a fence, a levee, and a road may under certain conditions constitute a boundary between two estates, the court pointed out that in this case the alleged boundary line shifted and changed from time to time and thus could not be said to have remained permanent and stationary for the required 30-year period.

§ 18. Fence allowed to deteriorate

[a] Fence held boundary

In the following case involving a single fence line, the court held that a fence which had been allowed to deteriorate and had not been rebuilt had become the boundary between the properties in question, where conveyances had been made in reference to the fence.

Thus, where the evidence showed

that, in 1887, when the original owner of a tract of land conveyed the western half to the plaintiff landowner and the eastern half to the predecessor in title of the defendant adjoining landowner, there was a rail fence which rotted down and was removed in 1906 and not rebuilt, although the old fence line remained susceptible of location by stones in the line and at least one stump near the line, the court, in McDonald v Roberts (1928) 177 **Ark** 781, 9 SW2d 80, held that the chancellor had correctly found that the old fence row constituted the boundary between the properties, the court modifying the decree to allow the defendant adjoining landowner to appoint a surveyor to locate and establish the line in accordance with the chancellor's findings. The court pointed out that there was undisputed testimony establishing that, at the time the original owner conveyed the separate tracts, he did so with reference to this fence, not in so many words, but by the fact that he had so placed the fence as to divide the land into two equal parts as to acreage. Thus, explained the court, since the eastern tract was longer, he placed the fence so as to make it the narrower of the two tracts, thus accounting for the fact that the defendant landowner's tract was approximately one and one half chains narrower than the plaintiff landowner's tract.

See also Bennett v Perry (1950) 207 **Ga** 331, 61 SE2d 501, an action by one landowner to enjoin an adjacent landowner to the north from constructing a fence along an old fence row, the fence having apparently deteriorated over the years, where the court, in affirming a judgment against the plaintiff, held that the line represented by the fence row had been acquiesced in by the plaintiff and the predecessor in title of the defendant for more than 20 years, both parties having cultivated the lands up to that point. Noting that the testimony of the plaintiff and of her husband should have been construed most strongly against them, the court explained that the jury was authorized in accepting that part of their testimony showing the erection of the fence, apparently by them, and in rejecting the part to the effect that the fence was not intended to be the dividing line, but only to divide hog feed. Emphasizing that for about 29 years each party had cultivated up to the fence, the court concluded that the jury was justified in finding that by these acts there had been acquiescence in the fence as the line for more than 7 years.

[b] Fence held not boundary

Where a fence had been allowed to deteriorate to the point that it was either gone, or nearly gone, at the time of the litigation, the courts in the following cases involving a single fence line held, under various circumstances, that the line represented by the fence had not become the boundary between the properties in question by acquiescence or agreement.

The court, in Johnson v Buck (1935) 7 **Cal** App 2d 197, 46 P2d 771, held that a fence between the property of the plaintiff landowners on the north and the defendant adjoining landowners on the south had not become a boundary by acquiescence where there was no actual or believed uncertainty as to the true boundary line. The fence in question had been erected more than 5 years prior to the initiation of the present action by a predecessor in title of the plaintiff, the record not disclosing how its location was determined. The fence extended eastward for approxi-

mately 135 feet, and there were a number of old survey stakes on the same course as the fence for the remaining 757 feet to the eastern boundary of the two properties, there having been a fence on this portion of the line from approximately 1926 until 1932. The plaintiff's immediate predecessor in title testified that when he obtained the property he was told by one of the defendants that the fence was not in the proper place and that a survey was needed. A later survey showed that the fence was located 15 inches south of the correct boundary line. The court emphasized the testimony of the plaintiff's predecessor in title that the defendants knew that the wire fence was south of the true line and desired a survey to fix it as establishing that the required uncertainty was not present, the court thus reversing a judgment for the plaintiffs. The court declared that since the defendants had done nothing to establish the line and had not agreed to the location of the fence, they were not estopped to question it.

A fence which had apparently existed at least from the turn of the century was held not to have become an agreed boundary between the property of the plaintiff landowners and that of the defendant adjoining landowners, in Finley v Yuba County Water Dist. (1979, 3d Dist) 99 **Cal** App 3d 691, 160 Cal Rptr 423, the court affirming a judgment against the plaintiffs in their action to quiet title to the disputed strip. The court pointed out that although the fence line roughly followed the boundary claimed by the plaintiffs, it meandered, was tacked to trees in many places, and had largely collapsed; and that the plaintiffs had often leased the adjacent land from the defendants' predecessors for the grazing of their cattle. Equally important, emphasized the court, was that there was no evidence indicating: (1) that the boundary line was uncertain at the time the fence was constructed; (2) exactly when or why the fence was put up, or by whom; (3) when, or by whom, a corral was built on the plaintiffs' side of the fence, and why the plaintiffs were able to use it; and (4) who planted apple trees on the plaintiffs' side of the fence, when and why they were planted, and why the plaintiffs were able to harvest them. The court declared that the mere fact that a landowner allows his neighbor to occupy or use part of his land does not automatically fix the boundary between them or give the neighbor a right to use or take the property in perpetuity.

A fence which consisted of a woven wire fence and a barbed wire fence joined together was held not to have been acquiesced in as the boundary line between the property of the plaintiff landowner and that of the defendant adjacent landowner to the north, in Bedingfield v Brewer (1964) 220 **Ga** 453, 139 SE2d 389, where the testimony of the plaintiff landowner established that the woven wire part of the fence was built by a tenant of a predecessor of the plaintiff for the sole purpose of enclosing and protecting the tenant's crops; that when this fence was constructed the aforementioned predecessor owned both lots in question; that the fence was not on the true line between the lots, but instead followed an irregular course along a branch; and that it had long since fallen into decay and had not, for many years, been a fence at all; and where there was no evidence that the fence was built at the predecessor's request. A witness for the plaintiff, who testified that he was hired to construct a barbed wire fence between the prop-

erties in question, contradicted his testimony on cross examination. A predecessor in title to the defendant, who cultivated the property only up to the fence, testified that the old fence actually was in such bad repair that it did not function as a fence at all and that his cattle roamed beyond the fence during the period that he owned the property. The court pointed out that the defendant's immediate predecessor testified that he did not cultivate across the fence because he had all of the land under cultivation that he desired and that he did not cut timber beyond the fence because he was saving such timber to make repairs on his dwelling. The court further noted that it was not established that the defendant's immediate predecessor knew anything concerning the plaintiff's allegedly pasturing cows up to the fence line.

A board fence between the property of the plaintiff landowner and that to the east owned by the defendant city, such fence being to the west of the true boundary and constructed along the western side of an alley which extended onto the plaintiff's property, but which had never been legally established by the city, was held not to constitute a boundary by acquiescence, in Benjamin v O'Rourke (1924) 197 **Iowa** 1338, 199 NW 488, the court affirming a judgment for the plaintiff landowner. The court observed that the fence had been erected more than 20 years prior to commencement of the present action and had remained in place until it had rotted down. The court emphasized that there was no evidence showing exactly when the fence was erected or by whom; no showing that the plaintiff had notice or knowledge of the erection of the fence; and nothing to indicate that it was erected as a partition fence. Furthermore, the court pointed out that there was nothing in the record establishing, or tending to establish, that the fence was erected by the owners of two adjacent tracts of land as a boundary between their tracts, and that no buildings or monuments had been erected on the premises in view of the existence of the fence, either before or after it disappeared. Accordingly, the court pointed out, the facts in the case did not bring it within the rule regarding long-continued acquiescence in a fence or other visible monument as marking the division line between two adjacent tracts of land owned by different parties.

It was held, in Brown v McDaniel (1968) 261 **Iowa** 730, 156 NW2d 349, that a fence located approximately 6 feet north of the boundary line established by survey between the property of the plaintiff landowner and the defendant adjoining landowner to the north had not become the boundary by acquiescence. Although the plaintiff testified that when he purchased his property in 1949, there was a woven wire fence along the boundary line between his property and that of the defendant, the court pointed out that there was virtually no evidence as to the maintenance of the fence or its purpose, the court commenting that there was evidence to support the trial court's finding that there was little or no proof that this fence line existed, or was maintained, after 1952. Furthermore, the court noted, there was no substantial evidence to show any use or occupation of the disputed strip by the plaintiff or his predecessors in title. Observing that there was testimony that the plaintiff had gathered peaches for about 3 years from some trees on the disputed strip, but that he did not know when the trees were planted and that he believed that the

defendant had cut them down, the court declared that this evidence was not sufficient to permit an inference of acquiescence by silence. Noting that recognition of a boundary line must be by both parties, the court explained that there was no showing that the defendant's predecessor, a trust, knew of the plaintiff's adverse conduct towards the title of the trust. In affirming a judgment for the defendant, the court pointed out that the fence may have been used to keep in stock or to fence out animals from a garden, and thus could not have become the boundary by acquiescence.

It was held, in De Hollander v Holwerda Greenhouses (1973) 45 Mich App 564, 207 NW2d 187, that a fence which had been erected by the plaintiff landowner's predecessor in title in 1910, which fence was shown by a later survey to be 13.5 feet east of the actual property line, had not become a boundary by acquiescence, the court thus affirming a judgment for the defendant adjoining landowner to the east. The fence was erected by the mutual consent of the parties' predecessors. Shortly after the aforementioned survey, the defendant's predecessor informed the plaintiff's predecessor of the discrepancy between the fence and the true boundary, at which time the plaintiff's predecessor, who had previously spent 9 months in a mental institution, asked the defendant's predecessor not to start any trouble. This request was complied with, and thereafter the fence was not maintained and was allowed to deteriorate, so that at trial only remnants remained. Stating that the doctrine of acquiescence is applicable only when the agreed line is the product of a bona fide controversy, the court concluded that there was no evidence indicating that the erection of the fence in 1910 was the product of such a controversy. Furthermore, the court continued, the evidence clearly demonstrated that the defendant's predecessor did not acquiesce in the fence after the survey was made, the court noting that although the evidence indicated that the fence was erected under the erroneous impression as to the true location of the proper boundary line, it was not acquiesced in after the proper boundary was determined.

A fence between the property of the plaintiff landowners and that of the defendant adjoining landowner to the west, which fence was located 40 to 100 feet east of the true boundary line, was held not to have become the boundary by acquiescence, in Muench v Oxley (1978) 90 Wash 2d 637, 584 P2d 939, the court reversing a judgment against the plaintiffs in an action to quiet title to the area between the fence and the true boundary. When the plaintiffs' predecessor had a survey conducted in 1972, there were remnants of the aforementioned fence through a dense growth of trees and underbrush, but it was so dilapidated, and ran at such an angle to the true line, that the surveyor ignored it. Emphasizing that to prevail the party claiming a boundary by acquiescence must demonstrate agreement or acquiescence in the line by both parties for the period required to establish adverse possession, the court pointed out that there was no evidence that any of the plaintiffs' predecessors recognized the fence as the true boundary line. Noting that a party whose parents had been tenants on the defendant's property testified that he was unaware of any controversy as to the boundary line, the court explained that this witness also testified that during those years no one occu-

pied the plaintiffs' property and that his family's closest neighbor lived half a mile or more in the opposite direction. The court declared that in view of this testimony, the fact that he was not aware of a controversy did not constitute clear and convincing proof that the fence was recognized as the property line.

B. Fence rebuilt on same line

§ 19. Generally

[a] Fence held boundary

In the following cases involving a single fence line, the courts, under various circumstances, held that where a fence had ceased to exist, but had been replaced by another fence on the same line, the line so marked had become the boundary between the properties in question by acquiescence or agreement.

Thus, a finding by the trial court that an existing fence was the boundary line between several coterminous landowners and that an old fence had been at the same location since at least 1933 was affirmed, in James v Mizell (1972) 289 Ala 84, 265 So 2d 866, the court thus rejecting the contention of some of the property owners that the boundary line was that shown by a survey made in 1968. Although there was some testimony that there had been no fence prior to 1959, when the present fence was built, the court emphasized that there was also evidence indicating that a fence did exist at the exact line on which the new fence was built, that some of the witnesses testifying that there had never been a fence prior to 1959 conceded that parts of a fence had been in the general vicinity of the old fence and that the new fence had been put up generally where the old fence had been, and that there was testimony that the old fence had run down the middle of a hedgerow which had existed prior to 1959. The court concluded that the aforementioned evidence was sufficient to support the trial court's finding that the fence marked the boundary between the properties in question.

In Vaughn v Chandler (1963) 237 Ark 214, 372 SW2d 213, an action by a landowner against the adjoining landowner to the north, the parties' property had a common boundary line 1,593 feet long. South of the survey line, which the landowner contended was the true boundary, was an existing fence extending from the eastern boundary for a distance of approximately 1,295 feet. When the present action was initiated by the landowner to determine the location of the boundary line, the adjoining owner extended the existing fence westward approximately 297 feet, there being within this 297 foot strip of land a driveway from the road to the adjoining owner's house. There was evidence that an old fence had existed at the same location as the present one. In affirming a judgment against the plaintiff landowner which fixed the old fence and the new extension as the boundary line, the court, with respect to the 1,295-foot segment of the boundary line, emphasized that numerous witnesses testified that the existing fence was situated on the boundary line as established and recognized before and since 1947, when the adjoining owner purchased his property. In concluding that this segment had been established as the boundary by acquiescence, the court further emphasized that the parties apparently accepted this boundary until 1957, even though the landowner had owned his property since 1937, and the adjoining owner since 1947. With respect to

the 297-foot segment of the boundary, the court emphasized testimony of the adjoining owner that when he moved onto his property in 1947, the plaintiff landowner voluntarily pointed out their common boundary line which the adjoining owner relied on when he built the new fence at the time the present litigation arose, the adjoining owner claiming that the new fence of approximately 300 feet was merely an extension westward to the street of the old existing fence. The court further emphasized testimony that the driveway on the disputed strip of land had existed and served the property now occupied by the adjoining landowner before and since his purchase and that an old fence once existed on the same location where the new fence was erected. Furthermore, concluded the court, it was undisputed that the adjoining owner had used the driveway continuously and without any question or dispute with the plaintiff landowner from 1947 until 1955. On the basis of this evidence, the court concluded that this segment of the fence had been agreed on as the boundary.

In York v Horn (1957, 3d Dist) 154 **Cal** App 2d 209, 315 P2d 912, an action by the plaintiff landowners to quiet title to a strip of land between a fence and a line shown by survey to be the boundary between their property and that of the defendant adjoining landowners to the south, the court held that the fence had become an agreed boundary where there was evidence that a fence had existed at this spot as early as 1900, or at any rate prior to 1927; that a new fence had been erected on the same spot in 1927 by the adjoining landowners' predecessor in title; and that prior to 1952, when the plaintiff landowners had a survey conducted, no one disputed the fence as the boundary. In affirming a judgment against the plaintiff landowners, the court declared that such long acquiescence permitted the inference that there was an agreement as to the boundary. The court explained that the fact that an accurate survey might have been possible was not necessarily conclusive, since if the parties were uncertain as to the line, the doctrine of agreed boundary was properly applicable. The court added that the uncertainty required for the application of the doctrine may be inferred from the circumstances surrounding the parties at the time the agreement is deemed to have been made.

It was held, in Drew v Mumford (1958, 2d Dist) 160 **Cal** App 2d 271, 325 P2d 240, that a fence located 21 inches on the plaintiff landowners' land had by acquiescence become the boundary line, the court thus affirming a judgment against the landowners in their action to enjoin the defendant adjoining property owners from maintaining the fence. The evidence established that in 1944, when the adjoining owners acquired their property, there was a fence between the two tracts, there being no evidence as to who had built the fence, or when. In 1956, the fence, which had become dilapidated, was torn down by one of the plaintiff landowners; and shortly thereafter a new wire fence was constructed on the same location by the adjoining owners who alone assumed the obligation to pay for the fence although the plaintiff landowners promised to partially compensate them. In concluding that there was substantial evidence of an implied agreement that the new fence was to constitute a boundary line, the court explained that it was unlikely that the adjoining owners would have intended to construct a fence on the landowners' property or to pay all or

any portion of the cost of such a fence; that the landowners made no objection to the construction of the fence at any time; and that the landowners impliedly approved of its construction by promising to contribute to the cost. The court rejected the landowner's contention that the doctrine of agreed boundary was applicable only if the true boundary was absolutely unascertainable, reasoning that it was only where the true location was subsequently ascertained that actions of this kind arose.

In reversing a judgment for the plaintiff landowners in their action to enjoin the defendant adjoining landowners from trespassing on their property, the court, in Williams v Johntry (1968, Fla App D1) 214 So 2d 62, held that the plaintiffs were precluded by the conduct and acquiescence of their predecessor in interest from claiming that a boundary line marked by a long established fence, which had apparently been replaced by the plaintiffs, was not the true boundary between the properties, even though such line might not be correct according to the descriptions in their deeds or other instruments of conveyance. The record revealed that although the plaintiffs had only acquired the property some 8 or 10 years prior to this action, one of the plaintiffs testified that the fence had been there for more than 50 years and that the defendants had been using the land up to the fence and had cultivated it. Witnesses for the defendants also testified that the fence had been at the same location for more than 50 years and had been considered by everybody to be the boundary line. The present dispute arose when a survey in 1963 indicated that the boundary was at a location other than that marked by the fence. The court declared that where a boundary between adjoining owners has been established by agreement and acquiesced in and recognized over a great number of years by the respective landowners and their predecessors in title, the enforcement of such agreement does not depend on establishment of adverse possession. Such boundary line, the court continued, followed by actual occupation and recognition or acquiescence therein is binding on the parties and their predecessors.

In affirming a judgment for the plaintiff which fixed a fence as the boundary between his property and that of the defendant adjoining landowner to the east, the court, in Frost v Williamson (1977) 239 Ga 266, 236 SE2d 615, emphasized the following evidence: (1) the testimony of the plaintiff that, when he and the defendant's predecessor jointly purchased all of the property involved in this litigation, there was a fence on the land, and that when the property was divided, the plaintiff acquired the land west of the fence and the defendant's predecessor the land to the east; (2) the plaintiff's testimony that the fence had been torn town, but had been put back in the same place in 1954, and that the same fence was still present; (3) the testimony of owners of adjoining property in the area that the fence had existed for at least 50 years; (4) the testimony of the defendant's predecessor in title recognizing the fence as the boundary and his declaration that he never intended to sell the defendant any property west of the fence line; and (5) the testimony of the county surveyor that the present fence was in the same position as was the fence which stood in 1944, when a survey had divided the property between the plaintiff and the defendant's predecessor on the basis of the fence line.

On the basis of this evidence, the court concluded, the jury was justified in believing that the fence line was in the same location as shown on the aforementioned survey.

Stating that all monuments, whether natural or artifical, are deemed superior to courses and distances, the court, in Lyons v Bassford (1978) 242 Ga 466, 249 SE2d 255, held that where the deed to the plaintiff landowner's property referred to a fence as being the boundary between his property and that of the adjoining landowner to the north, such fence constituted the boundary even though it was inconsistent with the distance and courses noted in the deed. In reversing a judgment against the plaintiff entered on a directed verdict, the court pointed out that the plaintiff had introduced evidence that the fence in existence at the time of trial was in the same place as the original fence described in the deed. The court declared that though this fact was disputed by the defendant adjacent landowner, the issue should have been submitted to a jury.

It was held, in McLeod v Lambdin (1961) 22 Ill 2d 232, 174 NE2d 869, that a fence which was to the east of the true boundary line between the property of the plaintiff landowner and that of the defendant adjoining landowners to the east had become the boundary. The record revealed that since 1912, a hedge fence had been accepted by the respective owners of the parcels as the boundary between them. The hedge fence was removed in 1949 by the plaintiff and the defendants' predecessor who erected an electric fence along the line of the former hedge row for the purpose of grazing and pasturing cattle, the electric fence running from a 2-foot hedge stump at the south end of the former hedge fence to a wooden stob which the plaintiff had set at the north end of the former fence. The court concluded that the many years during which the respective owners farmed up to the hedgerow and utilized it as a fence to contain their cattle fairly implied an agreement to establish and recognize the hedge row as the boundary line. Furthermore, continued the court, even absent such an agreement, the plaintiff and his predecessors had held undisturbed possession to the hedge row for more than 20 years, the court thus affirming a judgment for the plaintiff establishing the fence as the correct boundary.

In Stalcup v Lingle (1921) 76 Ind App 242, 131 NE 852, an action by the plaintiff landowner against the defendant adjoining landowners to the south to quiet title to a strip of land between the two properties, the court, in affirming a judgment for the landowner, held that a fence marked the agreed boundary line between the properties, although it gave the plaintiff more land than described in his deed. When the common owner of both properties conveyed the north portion to a predecessor in title of the plaintiff, a dividing line was agreed on and a plank fence was built on this line. In 1901, the plaintiff had a new fence erected along the same line, and the defendant adjoining landowners paid for half of the expenses and acquiesced in the location of the fence. The court concluded these facts were sufficient to sustain the trial court's finding that the plaintiff and the defendants agreed that the fence was a partnership fence and that it was a true and agreed line between them. Such a practical location was, the court pointed out, conclusive between the parties and those claiming under them, even though

the possession had not been for the statutory period.

A fence which had been in existence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the east since 1888 when it had been built by a common owner of the property, the fence being torn down in 1949 when a survey conducted by the defendants showed that the true line was approximately 5 feet to the east of the fence, was held to have become the boundary by acquiescence, in Fyler v Hartness (1951) 171 Kan 49, 229 P2d 751, the court affirming a judgment for the plaintiffs in their action to quiet title to the disputed tract. There was testimony that the plaintiffs' predecessor in title had accepted the fence as the boundary line between the properties; that when the plaintiffs acquired their property in 1930, they were informed that the fence marked the boundary line; that the defendants, who had lived on their property since 1933, made no objection when the plaintiffs replaced the fence in 1946 with a new fence located on the same spot; and that all parties had occupied the land up to the fence and treated it as their own. Furthermore, if the survey line were accepted as the boundary line, the plaintiffs' house would be approximately 3 feet onto the defendant's property and a water line to the plaintiffs' would be approximately 2 feet within the defendants' property. The court stated that there was ample evidence to establish that all parties, when purchasing, recognized the fence as the boundary line. The court acknowledged that while there was no direct evidence of a definite and specific agreement between the parties that the fence line was the true boundary, nevertheless the evidence as a whole clearly showed such agreement circumstantially.

In Leaveau v Primeaux (1959, La App) 117 So 2d 304, the court, in reversing a judgment for the plaintiff landowner in his action to require the defendant adjoining landowner to relocate a chain-link fence which, according to a survey, was located on the plaintiff's property, the court held that the plaintiff, who had once owned all the property in question and who had sold a portion of it to the defendant in accordance with an earlier survey showing the fence as the boundary, was now estopped from asserting a different boundary line. The court emphasized that the plaintiff had sold the land to the defendant with knowledge that there was an old fence located along exactly what the surveyor said was the boundary line between the estates, the fence having been erected by a former tenant approximately 20 years ago, and that the plaintiff had joined with the defendant in erecting the present chain-link fence, not only not objecting to such action but even contributing half of the cost of the new fence. The court added that the boundary established by the later survey ran through a part of the garage on the defendant's property and that, therefore, changing the boundary would cause great hardship to the defendant.

In Bradford v Hume (1897) 90 Me 233, 38 A 143, an action by a property owner against city officials for causing the removal of a fence in front of the plaintiff landowner's house on the ground that the fence was within the limits of the street, the court held that the evidence was sufficient to establish that the fence had existed in the same place for more than 40 years and that it was, therefore, to be deemed the true boundary, as provided by statute. Emphasizing that there was no doubt that the

fence had existed in front of the plaintiff's house for more than 40 years, the court explained that the real controversy, in view of the fact that a new fence had been built in 1876, was whether the new fence was built on the same place as the old fence. Observing that the plaintiff, the carpenter who built the new fence, and other witnesses all testified that the new fence had been built on the same location as the old, the court reasoned that in view of the fact that the road was only 30 feet wide, the moving of the fence 3 or 4 feet into the street, as claimed by the city officials, would have been seen and would have been known to hundreds and perhaps thousands of persons. Noting that the number of witnesses who had testified that the fence was not located in the same location was comparatively small, the court affirmed a judgment in favor of the plaintiff.

It was held, in Mothershead v Milfeld (1951) 361 Mo 704, 236 SW2d 343, that the north side of a wall located between the property of the plaintiff landowner and the defendant adjoining landowners to the south, which north wall was on the same line as a previous fence, had become the boundary by acquiescence. A photograph taken in 1913 showed that a picket fence ran between the properties later owned by the parties in this action. There was testimony that when the defendants constructed their wall, there was a post where the end of the fence had been, the fence not extending further north than the post, and that the wall was built at practically the same location as the post. The court pointed out that there was no evidence that the former owners of the properties had ever contended that the fence was not on the true line, nor was there evidence of any understanding that the fence was on a tentative boundary line. The court added that the former owners of the defendants' land had occupied their property up to the fence. Observing that long acquiescence in a fence as a boundary line will warrant a presumption that it is the true line and that where the line has been acquiesced in for a great number of years by all the parties interested, it is conclusive evidence of an agreement to that line, the court concluded, in reversing a judgment against the plaintiff who had alleged that the true boundary line was south of the aforementioned wall, that the north side of the wall had been agreed on as the northern boundary of the defendants' property.

It was held, in McBride v Allison (1967) 78 NM 84, 428 P2d 623, that a fence that had existed for over 28 years had been acquiesced in as the boundary between the property of the plaintiff landowner and that of the defendant adjoining landowners to the west, the court affirming a judgment for the plaintiff in his action to establish the old fence line as the true boundary. The plaintiff had acquired his property in 1936, at which time the fence was there. After buying the lot, the plaintiff rebuilt the fence on the same line. A predecessor in title of the defendants, who had acquired the land in the late 1930's, had not only repaired the existing fence, but had extended it in a straight line further south. The next predecessor in interest of the defendants neither did nor said anything about the fence while he owned the property, this predecessor then selling it to the defendants in 1964. Emphasizing that the defendants' predecessors in title had either acquiesced in the location of the boundary fence or had actively

confirmed its location, the court declared that the finding of the trial court that the defendants and their predecessors silently acquiesced in the location of the old boundary fence for about 28 years had substantial support. The court relied on the principal that a boundary line may be established by long acquiescence where there has been long recognition by abutting owners.

In Allen v Robbins (1961, Tex Civ App 3d Dist) 347 SW2d 362, an action in trespass by the plaintiff landowner against the defendant adjoining landowner to the west to establish title to a disputed strip of land between their respective properties, the plaintiff claiming ownership of all land up to a fence and the defendant asserting that the true line was approximately 6 feet east of the fence, the court held that where the evidence established that prior to the defendant's acquisition of his property, all owners of the two lots had occupied the lands without dispute as to the location of the wire fence for a period of more than 25 years, the fence had become the boundary by acquiescence. The court pointed out that there was no dispute either as to the original location of the fence or that it had remained at its original location until it was torn down by the defendant or his wife in 1955. However, the court noted, a new fence was built on the same line, and remained in place until about 1959, when it was removed by the defendant. In 1960, another fence was constructed by the plaintiff along the old fence line, but a month later this fence was also torn down by the defendant. In affirming a judgment for the plaintiff, the court declared that the prior owners were presumed to have known the location of their boundaries and that their acquiescence in the location of the fence as separating the two tracts was a circumstance of great weight in support of the trial court's findings.

Where the evidence was clear and not in dispute that for more than 45 years prior to trial there was a fence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the south, that the house on each lot was occupied by the owner, and that the respective owners and their predecessors treated the fence as the boundary, the court, in Motzkus v Carroll (1958) 7 Utah 2d 237, 322 P2d 391, held that the fence had become the boundary by acquiescence despite the fact that a survey showed that the true boundary line was 4 feet south of the fence. In reversing a judgment for the plaintiffs, the court rejected their contention that since there was no evidence of dispute or uncertainty in the location of the true boundary line, the doctrine of acquiescence could not apply. The court explained that the establishment of a long period of acquiescence in a fence as marking the boundary line gives rise to a presumption that the true boundary line is in dispute or uncertain and places the burden on the party opposing the doctrine to produce evidence that there was no dispute or uncertainty. With respect to the plaintiffs' contention that the doctrine was not applicable because there was no evidence of an agreement that the fence should mark the boundary line, the court pointed out that not only need a party claiming a boundary line by acquiescence not produce evidence of such an agreement, but also that proof of such acquiescence for the required long period of time is proof so conclusive that the opposing party is precluded from offering evidence to the contrary. Observing

that there was evidence that the defendants' predecessor did not protest when the surveyor showed her where he had located the boundary line; that she consented when the plaintiffs removed a part of the fence, which was later rebuilt by the defendants, and that the defendants knew where the surveyors had located the boundary line when they purchased the property, the court declared that this evidence did not nullify the establishment of a boundary line by acquiescence, since the acquiescence had long been completed before the defendants purchased the land. Finally, the court rejected the plaintiffs' contention that the fence was so crooked and the posts so varied in size that it could not mark the boundary line by acquiescence, the court emphasizing the testimony of the surveyor that when the fence was erected it was as straight as the eye could make it.

In Harding v Allen (1960) 10 **Utah** 2d 370, 353 P2d 911, an action by the plaintiff landowner against the defendant adjoining landowner to the north to quiet title to a triangular strip of land between a fence and a line north of the fence established by survey as the true line between the respective properties, the court held that the fence had become the boundary by acquiescence where, in 1937, when the defendant acquired her property, the fence was so aged as to be rotting away, thus justifying the conclusion that it had been there for a long time, and where from 1937 to 1954, there was no affirmative action by any party insisting on its removal. The old fence was replaced by the defendant in 1947, and was in turn extended by a chain link fence erected by the plaintiff with the defendant's permission. The plaintiff's property consisted of two separate tracts purchased in 1951 from two different predecessors. In rejecting the plaintiff's contention that, since one of the tracts was vacant, no boundary by acquiescence could be acquired as to that tract, the court pointed out that the previous owner of this tract had approached the defendant and had secured her written consent to operate a candy store thereon, although this plan did not materialize. Observing that the occupancy intended as a requirement in satisfying the doctrine of acquiescence may be actual or constructive, by an owner shown to have knowledge of the physical facts that might create rights in others to his land, the court concluded that such requirement was satisfied in the present case, particularly where the property's situs was in a busy city. The court thus affirmed a judgment for the defendant.

A fence located 4 feet south of the true boundary line between the property of the plaintiff landowner and that of the defendant adjoining landowners to the south was held to have been established as the boundary by acquiescence, in Universal Invest. Corp. v Kingsbury (1971) 26 **Utah** 2d 35, 484 P2d 173, the court reversing a judgment against the plaintiff in his action to quiet title to the area between the fence and the true boundary line. In 1937, there was an old fence, estimated to be 50 years old, located approximately 4 feet south of the line described in the deed of the plaintiff's predecessor's. This fence was replaced by a new one on the same line in 1940, and both the plaintiff's and the defendants' predecessors cooperated in their replacement. The record indicated that both parties and their predecessors treated the fence as the boundary. In rejecting the defendant's contention that the location of the true boundary was not un-

known, uncertain or in dispute, the court pointed out that the only support for this position was the testimony of the plaintiff's predecessor that he was aware that by deed he was entitled to a specific frontage along a particular street. Emphasizing that the predecessor also testified that he had always considered the fence to be his south boundary, the court concluded that the defendants had not met the burden of supporting the contention that there was no dispute or uncertainty concerning the true boundary line.

[b] Fence held not boundary

Under the various circumstances of the following cases involving a single fence line, in which a fence had ceased to exist but had been replaced by another fence on the same line, the courts held that the line so marked had not become the boundary between the properties in question by acquiescence or agreement.

Thus, it was held, in Clements v Cox (1959) 230 Ark 818, 327 SW2d 83, that the defendant adjoining property owners failed to sustain their burden of establishing that they had an agreement with the plaintiff landowners' predecessor in title as to the location of the boundary between the properties involved. The plaintiffs had acquired their land in 1948 and had had a survey conducted to establish the true boundary line. The defendant adjoining landowners contended that they and the plaintiffs' predecessor in title had agreed on a boundary line in 1944, that several fences were built, but washed away, that they had constructed the last fence more than 4 years before the landowners had acquired their property, and that the landowners' predecessor in title had at all times recognized the agreed boundary line. In rejecting the adjoining landowners' position and affirming a judgment for the plaintiff landowners, the court emphasized that no witness, with the exception of one of the adjoining landowners, testified to any agreement between the adjoining landowners and the landowner's predecessor in title, and that the witnesses who did testify for the adjoining landowners as to old blazes and marks, and the existence of an old fence, were rather indefinite and uncertain.

Likewise, in United States v Wilcox (1966, ND Iowa) 258 F Supp 944 (applying Iowa law), the court held that the plaintiff landowner failed to establish that a fence between its land and that of the defendant adjoining lnadowner to the north had become the boundary by acquiescence, it being conceded that the fence was not on the true boundary line. The plaintiff introduced evidence that in 1952 or 1953, it had replaced an old fence with a new one, and that the defendant knew of this fence and did not notify the plaintiff until a year later that the fence was not on the boundary line. However, noting that 10 years of acquiescence is required, the court pointed out that there was insufficient evidence that prior to 1953 either party had acquiesced in the fence as the boundary. The court explained that the fence had initially been built for undisclosed reasons by a party who owned all of the land in question. The defendant denied that he ever recognized the old fence as a boundary, and the court pointed out that there was nothing in the record to dispute this position. The court further pointed out that although there was some evidence indicating that the plaintiff believed the fence to be the boundary, there was no evidence that the defendant or anyone in privy with him knew of this belief.

Finally, the court pointed out that the defendant did not live on the land except possibly sometime in the 1930s; that the fence was in very bad shape due to the fact that the Missouri River periodically flooded the land; and that in many places, the wire or post was down or the wire was nailed to trees.

§ 20. Specific evidence or finding of lack of prior uncertainty or dispute over boundary

[a] Generally

In the following cases involving a single fence line in which a new fence had been rebuilt at the same location of an earlier fence, the courts held that the fence line had not become the boundary between the properties in question by acquiescence or agreement, where there was specific evidence or a finding that there was no prior uncertainty or dispute concerning the location of the boundary.

Thus, it was held, in Phelan v Drescher (1928) 92 **Cal** App 393, 268 P 465, that the evidence was sufficient to support the trial court's finding that a fence between the property of the plaintiff landowner and that of the defendant adjoining landowner to the south had not become the boundary by agreement where the true boundary was marked by granite monuments and was a straight line, while the fence was irregular and built partly on high ground to avoid the swales and overflow of a nearby river, and where a predecessor in title of the adjoining owner had admitted to the landowner's superintendent that the fence was not on the true line and had agreed to move it. Despite its location, the fence was destroyed by floods several times, but was always rebuilt on the same location. The court was not able to say as a matter of law that acquiescence and occupancy of the disputed strip of land for 5 full years was sufficient under the circumstances to require overthrowing the finding of the trial court that there was no agreement that the fence should be the dividing line between the two properties. The court explained that recent decisions had established that mere acquiescence in the existence of a fence and the occupancy of the land on either side of it does not amount to an agreement that it is an accepted boundary line, but rather that there must be a showing that the boundary line was uncertain, or believed by all parties to be uncertain, and that the adjoining owners had agreed to fix and establish the dividing line and that they actually did designate the agreed line on the ground.

A fence between the property of the plaintiff landowner and the defendant adjoining landowner to the north which had been rebuilt several times on the same location was held not to have established a boundary by agreement, in Dibirt v Bopp (1935) 4 **Cal** App 2d 541, 41 P2d 174, where although there was acquiescence in the existence of the fence, there was no dispute as to the true boundary line, which was actually located 3 feet to the north of the fence. The record revealed that a city block was divided into 20 lots running from lot one at the north to lot 20 at the south, each lot being 30 feet wide except the last lot, which was 33 feet in width. The plaintiff landowner owned the two southernmost lots, and the defendant adjoining landowner owned the two lots immediately to the north. The plaintiff testified that he believed that all of the lots were 30 feet wide and that he did not realized that he was entitled to an extra 3 feet. The defendant adjoining landowner also testified that she assumed that the fence

constituted the boundary line, until the initiation of the present action. Emphasizing that the fence was originally built under the impression that each of the parties had 60 feet and not in accordance with any settlement of a dispute as to where the line was, the court concluded that the evidence sustained the implied finding of the trial court that there was neither the establishment of a line nor an agreement that it should be accepted as the true boundary line, as was required under the doctrine of agreed boundary.

In Cothrin v Burk (1975) 234 **Ga** 460, 216 SE2d 319, an action by the plaintiff landowners based on trespass and seeking injunctive relief against the defendant adjoining landowner to the south, the plaintiffs contending that a fence between the respective properties had become the boundary by acquiescence, the court held that the evidence supported the trial court's conclusion that the fence had not become the boundary by acquiescence. In 1960, the adjoining owner built a fence along most of the north boundary of his property in the general area of the line for the purpose of keeping cattle in. The fence consisted of strands of barbed wire running through the woods from tree to tree in a zig-zag manner and running across the open field from post to post in a generally straight line. Substantial portions of the fence needed to be replaced from time to time due to spring floods. Both the plaintiffs' predecessor in interest and the defendant adjoining owner cultivated their land generally up to the fence and never disputed, or even discussed, the location of the boundary. When the property was sold by the plaintiffs' predecessor at auction, a survey was held establishing the boundary line to be 30 to 70 feet north of the fence, and there was evidence that at the conclusion of the survey, the defendant and the plaintiffs' predecessors shook hands and agreed to the survey line as their boundary. The court explained that a line may not be established by acquiescence unless there is some contention between the landowners over the location of the line as the result of which a boundary is established in which the landowners subsequently acquiesced.

A fence between the property of the plaintiff landowners and that of the defendant adjoining landowners to the south was held not to have been agreed on as the boundary, where the true boundary was known, in Gameson v Remer (1975) 96 **Idaho** 789, 537 P2d 631, the court reversing a judgment for the plaintiffs which had fixed the fence as the boundary between their respective properties. The action involved three lots numbered, from north to south, 27, 28, and 29. In 1964, the parties' predecessor owned all three lots, the plaintiffs residing as tenants in a house on lot 27, and the predecessor in a residence on lot 29. There was no residence on the middle lot, 28. In that year, a fence was constructed across lot 28, the predecessor furnishing the materials and the plaintiffs providing the labor. In 1971, the plaintiffs rebuilt the fence, apparently on the same line. One of the plaintiffs testified that the predecessor stated that, in building the fence, he was dividing lot 28 between the houses located on lots 27 and 29. In 1966, the predecessor conveyed lot 27 to the plaintiffs, and in 1972, he conveyed lots 28 and 29 to the defendants, the plaintiffs, however, contending that by agreement they had acquired title to all of the land north of the fence, that is, to the northern half of lot 28 as well. Stating that the

doctrine of agreed boundary rests fundamentally on uncertainty concerning the location of the true boundary, the court pointed out that the aforementioned testimony of one of the plaintiffs established that the true boundaries of lot 28 were known. The court thus concluded that the trial court erred in applying the doctrine of an agreed boundary line.

It was held, in Stith v Williams (1980) 227 Kan 32, 605 P2d 86, that a fence had not become the boundary by agreement between the property of a landowner and that of the adjoining landowner to the east where there was no evidence that the boundary line was in dispute or unknown. The landowner's predecessor in title, in order to straighten the boundary between her property and that of the adjoining landowner to the east, had purchased a strip of land to the east of her boundary, thereby reestablishing the boundary between the two properties along a former fenceline. When the landowner's predecessor sold her property, she forgot about the additional land she had purchased up to the fence, and the deed did not include this additional purchase. After acquiring the adjoining property and discovering that the landowner's predecessor still retained title to the strip up to the fence, the adjoining landowners purchased this strip from her, thereby reestablishing the original boundary between the properties. The present dispute arose when the landowner began building a fence on the former fenceline. In rejecting the landowner's contention that this line had been established as the boundary by agreement, the court pointed out that the record was void of evidence that the parties agreed to establish a boundary line at variance with the stated boundaries set forth in the deeds to the property. The court emphasized that the property of the landowner's predecessor stretched to the former fenceline, not by express boundary agreement but by deed, and that there was no evidence of intent to do otherwise. Finding that the parties thus established the boundary lines, not by mutual agreement but by deed, the court affirmed a judgment for the adjoining landowner in his action to enjoin the landowner from continuing the construction of the fence.

In reversing a judgment for the plaintiff landowner in his action to restrain the defendant adjoining landowners to the east from tearing down a fence which the trial court had held had been established by acquiescence for more than 15 years as a boundary between the properties, the court, in Blank v Ambs (1932) 260 Mich 589, 245 NW 525, held that the doctrine of acquiescence did not apply since there was no doubt or controversy concerning the boundary line. The record showed that a fence had existed for many years prior to 1909, and had become quite dilapidated; that in 1915, the plaintiff's predecessor in title and the defendants' agreed to erect a new fence; that in an attempt to insure that the new fence would be on the correct boundary line, the properties were measured; and that the new fence was then built substantially on the line of the old one, with no subsequent dispute until the defendants tore down the fence in 1928, after a survey indicated that the true boundary was 66 feet west of the fence. The court pointed out that prior to 1915 there had been no claim that the fence was on the boundary. After 1915, the court continued, the parties acquiesced in the fence, not as marking an unknown or doubtful boundary

agreed on, but as establishing the true boundary. The court thus applied the principle that where the parties attempt to find the true line and are mutually mistaken, subsequent acquiescence under the mistake of fact does not establish the boundary, at least not until the acquiescence is continued for the statutory period.

Stating that the doctrine of boundary by acquiescence requires that it must be shown that there was some uncertainty as to the true boundary, which resulted in a line being established, generally by a fence, and that thereafter the adjoining landowners acquiesced in and recognized this line as the true boundary line between them, the court, in Boothe v Fuentes (1953, **Tex** Civ App) 262 SW2d 754, held that a fence which had been constructed over 25 years ago between the land of the plaintiff landowner and that of the defendant adjoining landowner to the north had not become a boundary by acquiescence. The fence had originally been constructed in 1926, but had been neglected and had become ineffective as a barrier, until an entirely new fence was constructed along the same line by the defendant in approximately 1942. The record was silent as to the reasons why the fence was constructed where it was in 1926. With respect to the fence built in 1942, the defendant testified that it was purposely constructed off the line in order to keep his livestock further away from the plaintiff's buildings. Finding that the required uncertainty of boundary was not established, the court concluded that the judgment for the plaintiff could not be upheld on the theory of boundary by acquiescence or agreement. The mere erection of a fence off a boundary line, the court added, is not in itself sufficient to make the doctrine applicable; uncertainty of boundary must be shown.

[b] Application of rule that uncertainty of boundary is not required for acquiescence

In the following cases involving a single fence line in which apparently there was no prior uncertainty as to the location of the boundary, the courts applied the rule that uncertainty as to the location of a boundary is not a prerequisite for application of the doctrine of boundary by acquiescence and thus held that a fence which had been rebuilt on the same line as an earlier fence had become the boundary by acquiescence between the properties in question.

In Gregory v Jones (1947) 212 **Ark** 443, 206 SW2d 18, the court held that a fence between the property of the plaintiff landowner and an adjoining landowner to the south had been acquiesced in as the boundary line, where it had existed for 34 years. The fence was initially made of rails and had been constructed by a predecessor in title of the adjoining landowner and had been acquiesced in as the boundary by the predecessor in title of the plaintiff landowner. Four years later, the landowner acquired the property with the understanding that the rail fence constituted the boundary line, and he and the adjoining owner's predecessor in title erected a wire fence to replace the old rail fence. The court rejected the contention of the adjoining owner that since there was no dispute prior to the establishing of the rail fence line, it did not become the boundary. The court stated that the recognition of that line for 34 years showed an acquiescence for so many years that the law would presume an agreement concerning the boundary.

Although a survey conducted in

1963 established that the true boundary line between the property of the plaintiff landowners and that of the defendant adjoining landowners to the east was approximately 15 feet west of a fence which had been built between 1936 and 1938, the court, in Lamm v McTighe (1967) 72 Wash 2d 587, 434 P2d 565, held that the fence had become the boundary by acquiescence. After the defendants' predecessor, in 1934, had marked the southwest corner of his property with a stake, he and the plaintiffs' predecessor, in order to mark more clearly the division of their lands, agreed to erect a fence, the defendant's predecessor accomplishing this by running a fence from the stake to a marker at the northwesterly corner of his property. After acquiring their property in 1945 and finding the aforementioned fence in disrepair, the defendants erected a new fence on substantially the same line as the earlier one and at the same time collaborated with their neighbor to the east in fencing the boundary between their respective properties. Until 1963, all parties and their predecessors honored the fence as the boundary. In affirming a judgment for the plaintiffs in their action to quiet title to the disputed strip, the court pointed out that uncertainty or dispute about the location of the boundary is not an indispensable element of the doctrine of boundary by acquiescence; it is sufficient if the adjoining parties have, for the requisite period of time, actually demonstrated an acquiescence in the given line as a mutually adopted boundary between their properties.

III. More than one fence line

A. Single contested boundary

1. Presence of specific evidence or finding that fence claimed as boundary by acquiescence or agreement served purpose other than boundary

§ 21. Generally

In the following cases involving more than one fence line, but only one contested boundary between the properties in question, the courts held that there had been no acquiescence or agreement in a fence line as a boundary, where there was specific evidence or a finding that the fence allegedly constituting the boundary by acquiescence or agreement had been constructed to serve some purpose other than a boundary.

Thus, stating that the issue was whether the trial court had erred in entering a final decree granting the plaintiff landowners 4 feet of land outside of a stock fence and fixing the boundary line between their property and that of the defendant adjoining landowners on the outside margin of the 4-foot strip of land, the court, in Bukley v Carroll (1978, Ala) 366 So 2d 1094, held that the boundary line had been correctly fixed. A fence had originally been built by the father of one of the plaintiffs when he owned the defendants' farm. When the plaintiffs purchased their property, they informed the defendants that the fence had been built on the plaintiffs' property, but the defendants believed it to be on the boundary line. In 1953 or 1954, the plaintiffs offerred to help build a boundary fence, but the defendants refused to participate. The plaintiffs then informed the defendants that, rather than building the fence on the boundary line, they would build it where they could move it at any time they desired. The plaintiffs then built a stock fence on their own land, apparently not on the same location as the former fence, and stated that they believed that the

neighboring cattle herds should be kept at least four feet apart, since otherwise they would tend to break in and get with other cattle, as evidenced by the fact that some of the defendants' cattle broke through the aforementioned fence, requiring the plaintiffs to have two of their registered cows aborted. This evidence, the court concluded, was sufficient to sustain the location of the boundary.

In Carney v Barnes (1962) 235 Ark 887, 363 SW2d 417, a boundary line dispute between the plaintiff landowners and the adjoining landowners to the south, the court held that a fence which was to the south of the true boundary line between the properties, and which thus deprived the adjoining landowners of a portion of their property, had not been acquiesced in as constituting the boundary line, where the original owner of both properties had testified that when a county road had been constructed between what were presently the properties of the parties in this action, he had moved an existing fence southward as a barrier to the road, and that he knew that the true boundary line was to the north of the fence. In affirming a judgment for the adjoining landowners, the court emphasized that there was nothing in the record showing that any of the owners of the properties in question had agreed on the fence as a boundary line, nor was there such a mutual recognition and acceptance of the fence as a boundary line as would constitute acquiescence. In addition, the court pointed out that the adjoining landowners and their predecessors in title appeared to have cleared off the disputed strip between the fence and the true line and to have exercised the control normally associated with ownership. The court added that it would be a strange theory that if a man erected a fence as a barrier adjacent to a county road, the land between his fence and the road would be subject to entry by the landowner on the other side of the road.

It was held, in Eggers v Mitchem (1948) 239 Iowa 1211, 34 NW2d 603, that a fence which deviated from the true boundary line as established by survey by running along a creek bank at two points where the creek crisscrossed the true boundary line had not become the boundary by acquiescence, where there was evidence that the purpose of erecting the fence in this manner was to eliminate a water gap. The record showed that the true boundary between the property of the plaintiff landowner and the defendant adjoining landowner was crisscrossed by a creek in such a manner as to, at one point, detach approximately two acres from the plaintiff's property and attach it to the defendants, while reversing this effect at another point. Approximately 30 years prior to the initiation of the present action, the parties' predecessors agreed to run the fence between their property along the creek bank, rather than straight through along the government survey line, to eliminate the water gap. In 1947, the defendant built a fence on the government survey line. Affirming a judgment against plaintiff in his action seeking to establish the old fence as the boundary by acquiescence, the court emphasized testimony of the defendant's predecessor in title that the purpose of the fence was to eliminate the water gap, and not to effect a change in title to any property. Emphasizing further that the plaintiff himself testified that although he claimed a right to use the land up to the fence, he did not claim title to it, the court relied on the principle that mere acquiescence in the existence of a fence as a barrier is

not such acquiescence as will establish it as the true line.

In affirming a judgment for the plaintiff landowner in his action to establish a boundary between his property and that of the defendant adjoining landowner to the east, the court, in Bryant v Harris (1974, La App) 295 So 2d 566, held that the true boundary was that established by a survey plat, rather than a fence line, where there was no evidence that the parties or their predecessors in title had agreed that the fence, which was up to 215 feet west of the survey line, was to be the boundary line. Although the defendant testified that he regarded the fence as the boundary and there were several witnesses testifiying that the fence had been in existence for at least 30 years, the court relied on the testimony of a predecessor in title of the plaintiff who testified that he had built the existing fence between 1942 and 1946; that he had erected it to keep his hogs in; and that he had placed it west of the true line in order to skirt a slough, or low place, which was usually under water and detrimental to the wire fencing material used in construction of the fence. This witness also testified to the existence of an older fence in the area, but the court pointed out that this fence had apparently been used to divide areas of an old plantation, of which the lands in litigation were formerly part, and that there was no evidence that this older fence was ever intended as a boundary between the properties in question.

§ 22. Recognition by predecessors of both parties of fence as boundary

In the following cases involving more than one fence line but only one contested boundary between the properties in question, although there was evidence that the fence claimed to have become the boundary by acquiescence served a purpose other than a boundary, the courts held that such fence had become the boundary by acquiescence, where there was also evidence that the parties' predecessors regarded the fence as the boundary between their properties.

Thus, where a fence had run along the "old big branch" for over 40 years and had been used to contain cattle, the court, in Kimbrell v Allred (1975) 294 Ala 357, 317 So 2d 487, held that this fence marked the true line between adjoining property owners, the court rejecting the defendant property owner's contention that the true property line was a fence recently erected that followed the "new big branch." In affirming a judgment for the plaintiff property owner, the court pointed out that the plaintiff and his predecessors had maintained and recognized the fence on the old big branch as the property line and that the defendant's predecessor in title testified that he had acquired his property with the understanding that the old big branch was the true property line, the court further observing that, as far back as 1890, deeds to the property in question referred to the big branch as the boundary line.

An old rail fence which had existed between the properties owned by the plaintiff landowner and the defendant adjacent landowner for 25 or 30 years was held to have been acquiesced in as the boundary between the properties, in Dye v Dotson (1946) 201 Ga 1, 39 SE2d 8, the court rejecting the defendant's contention that the correct boundary was a line established by survey and on which he had erected a new wire fence. In affirming a judgment for the plaintiff in her action to eject the defendant from the

area between the two fences, the court emphasized that there was evidence that the plaintiff's predecessor in title had erected a fence approximately 25 or 30 years ago and had cultivated a portion of the land up to the fence; that there were currently marks on trees along the line where the old rail fence had been; and that the defendant's predecessor in title also tended the land on her side of the fence. The defendant testified that the old rail fence had been a pasture fence of his predecessor in title, who had owned property on both sides of the fence. Observing that questions of where old fences stood in the past and how long they stood in certain localities were peculiarly questions of fact for the jury, the court concluded that the aforementioned evidence was sufficient to authorize a finding that the parties' predecessors in title had recognized the old rail fence as their boundary line, the court applying the principle that a boundary line acquiesced in by adjacent owners and their possession regulated by it for 20 or more years, is conclusive on the parties and those claiming under them.

2. Absence of specific evidence or finding that fence claimed as boundary by acquiescence or agreement served purpose other than boundary

§ 23. Fence claimed as boundary by acquiescence or agreement built by, or in place when land was owned by, common grantor

[a] Fence held boundary

It was held in the following cases involving more than one fence line, but only one contested boundary, that where the fence claimed to be the boundary by acquiescence or agreement had been built by the parties' common grantor and where there was an absence of evidence or findings that such fence had been built for a purpose other than a boundary, the fence had become the boundary between the properties in question by acquiescence or agreement.

Thus, a survey which established a boundary line between the property of the plaintiffs and the defendant adjoining landowner to the north, which line was south of a fence claimed by the plaintiffs to have been established as the agreed boundary, was held not to divest the plaintiffs of title of all land to the fence, in Martin v Hays (1921, Mo) 228 SW 741. In 1864, the party owning both parcels of land conveyed the south half to the plaintiffs' predecessor with the understanding that the fence constituted the boundary between their properties, the court observing that possession was held by them and their successors in title to the fence line from that time until the defendant had a survey conducted, which established a different boundary line, and built a new fence thereon. The court pointed out that some years later a predecessor of the defendant, with gun in hand, stoutly maintained that the original fence was a boundary line, and that some time later a precedessor of the plaintiffs ordered the defendant's predecessor to stay on his side of the fence. The court declared that whether the original fence was on the true line or not, when fortified by possession in accordance therewith, it became the permanent boundary between these two tracts of land. The court added that if there had been no direct evidence of the establishment of an agreed boundary line, the possession and use of the land on each side of the fence would establish that there was an agreement

to fix the line. The court explained that it was only necessary that the possession and the use of the land continue long enough to indicate the understanding of the adjoining landowners.

It was held, in Woodburn v Grimes (1954) 58 NM 717, 275 P2d 850, that a fence which had existed for over 40 years, before the defendants tore it down and built a new fence to the south, had become the boundary by acquiescence between the property of the plaintiff landowner and that of the defendant adjoining landowners to the north, even though there had been no controversy or dispute over the location of the boundary. In about 1909, the former owner of all of the lands involved in this controversy built an east-west fence, dividing the property substantially into two equal portions, and subsequently extended the fence to the east side of the section, so that the northern boundary of the land to the east of the plaintiff's was also marked by the fence. Neither the defendants nor their predecessors ever contended that the fence was not the correct boundary line until shortly before the present action. There was evidence that the defendants' immediate predecessor was aware of the occupancy by the plaintiff and his predecessors up to the fence, as well as being aware that the owner of the property to the east of the plaintiff also occupied his tract up to the fence. The court stated that such long recognition of the old fence, when location of boundaries could be better ascertained from original landmarks, was a controlling circumstance and afforded ample evidence that the old fence was built on the true boundary line between the premises. In affirming a judgment for the plaintiff for the wrongful destruction of the fence, the court rejected the defendant's contention that the trial court erred in refusing to instruct the jury that doubt, uncertainty, or dispute is a necessary element in the establishment of a boundary line by acquiescence.

[b] Fence held not boundary

Where a fence claimed to have become the boundary by acquiescence or agreement was built by the parties' common grantor, and where there was no specific evidence or finding that this fence had been built for some purpose other than a boundary, the fence was held not to have become the boundary between the properties in question by acquiescence or agreement in the following cases involving more than one fence line, but only a single contested boundary.

Thus, in Buckley v Gadsby (1921) 51 Cal App 289, 196 P 908, an action in ejectment by a landowner against the adjoining landowners to the west, the court held that the plaintiff landowner was entitled to the land described by metes and bounds in his deed. The court rejected the contention of the defendants that the boundary between the properties should be determined by the fact that the original grantor of both parties had subdivided the land, erected buildings on each lot, and built a fence between the buildings prior to any transfer to the predecessors of the parties herein, such action thereby determining the boundaries of each lot. The court explained that this fence was not a permanent structure and thus could hardly be said to overcome the specific descriptions in the deeds defining the dimensions of the lots. With respect to the defendants' contention that the evidence established an acquiescence in the boundary line marked by the fence,

the court pointed out that shortly after the parties' predecessors had began to occupy their respective lots, there had been slippage of the soil which had caused the fence to become loose and wobbly, and that it was from time to time replaced by the respective parties without particular regard for its original line or location. Concluding that it was unable from the evidence to determine where the fence originally stood, the court declared that it could not hold that the parties had ever acquiesced in a boundary line, the court thus affirming a judgment for the plaintiff landowner.

In affirming a judgment for the plaintiff landowner in his action against the defendant adjoining landowner to the east in the form of trespass to try title, the court, in Higginbotham v Bagley (1961, Tex Civ App 9th Dist) 346 SW2d 142, writ dism w o j, held that the evidence was not sufficient to establish that a fence located west of the true boundary line, as established by survey, had become the boundary by agreement. Emphasizing that there was no direct evidence of an express agreement as to the location of the dividing line, the court pointed out that the party who originally owned all of the land in question had built the fence by himself, rather than in conjunction with the defendant's predecessor. Although observing that the plaintiff admitted a community of action between himself, his predecessor and the defendant's predecessor in keeping up the fence, the court pointed out that the plaintiff also testified that they acted together under an express agreement that, when located by a survey, the true dividing line would be honored by all parties. In addition, the court placed emphasis on the plaintiff's testimony that, as repaired and rebuilt, the fence at times stood east and at times west of its original location. With respect to evidence that the plaintiff and his predecessors acquiesced for over 40 years in the use of the land east of the fence by the defendant and his predecessors, the court explained that acquiescence in a line over a period of several years, although constituting evidence from which it may be inferred that the parties had agreed to the line, is not conclusive evidence of that fact.

§ 24. Fence claimed as boundary by acquiescence or agreement built by person other than common grantor

[a] Fence held boundary

Under various circumstances, the courts in the following cases involving more than one fence line, but only a single contested boundary, held that the fence claimed to have become the boundary by acquiescence or agreement had become the boundary between the properties in question by acquiescence or agreement, where this fence had been built by a person other than the parties' common grantor and where there was no evidence or finding that the fence had been built for some purpose other than as a boundary.

Thus, in Parrish v Norton (1971) 287 Ala 670, 255 So 2d 14, an action to establish a boundary line between adjoining property owners, the court, in affirming a judgment for the southernmost property owner, held that the evidence established that the line was fixed by an old boundary line fence that had been erected in 1936 by the southernmost property owner and the northernmost property owner's predecessor in title and which had been accepted as the boundary by the northernmost property owner when he assumed title in 1950. Al-

though there was evidence that in 1970, the property owners agreed that a line should be surveyed in accordance with their record title, and that after such a line was surveyed, a fence was constructed thereon, with each property owner paying a half of the cost of the construction of the fence and of the survey, the court accepted the southernmost owner's contention that the purpose for the survey was not to establish the boundary line between the parties, but rather was for the purpose of establishing and maintaining a true boundary line between the parties in order to develop the property or to sell it off into lots, as well as for the purpose of determining the location of the old boundary line fence in relation to the surveyed line, the court observing that the old boundary line fence was not removed.

Where a predecessor in title of the defendant adjoining landowners, who owned property to the west of the plaintiff landowners, had erected a fence near their eastern boundary, but for an undisclosed reason had left a strip of land less than an acre in area outside the fence, and where all parties had recognized this fence as the true boundary line for more than 20 years, at which time the adjoining landowners moved the fence over to the true boundary line and attempted for the first time to exercise dominion over the area in controversy, the court, in Neely v Jones (1960) 232 Ark 411, 337 SW2d 872, held that there was sufficient evidence to raise a question of fact as to the existence of a boundary by acquiescence, the court thus reversing a judgment against the landowners which have been entered on a sustained demurrer to the landowners' evidence. Although adhering to the basic principle that a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side in the absence of adverse possession by the other landowner, the court pointed out that in the present case both tracts had been improved and occupied, thereby supporting an inference that the fence had been accepted as the boundary line. The court concluded that it was unable to say that the landowners' proof fell completely short of establishing a prima facie case.

In Brockman v Rowell (1963) 235 Ark 847, 362 SW2d 678, the court held that adjoining property owners had acquiesced in a fence as a boundary line, the fence having been built to the west of the true boundary line by the plaintiff landowner, where the plaintiff had constructed the fence more than 7 years prior to the defendant property owner's acquisition of the adjoining lot, the defendant's predecessor in title had built a garden fence next to the plaintiff's fence and had asked permission to attach her fence to the west side of the plaintiff's fence, and the fence line was identified and shown on a surveyor's plat as running parallel with the true property line and one foot west of that line. In affirming a judgment for the plaintiff, the court applied the rule that when adjoining landowners acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes a boundary line by acquiescence.

Where the plaintiff landowner and the predecessor in title of the defendant adjoining landowner to the west had a survey conducted in order to properly mark the boundary line between their properties and then located a fence on this line, both parties then occupying their land up to

the fence for approximately 22 years, the court, in Moniz v Peterman (1934) 220 Cal 429, 31 P2d 353, held that the fence had become an agreed boundary line, despite the fact that a later survey showed that the real boundary line was 18 feet to the east of the fence, the defendant then erecting a new fence on this line. The court emphasized that there was no doubt that the boundary was uncertain as demonstrated by the fact that it was necessary to employ a surveyor to fix it. The court acknowledged that if the true location of the boundary line is known by both parties, or by one of them, but nevertheless another and different line is agreed on or acquiesced in as the boundary line, acquiescence in such line even for a long period of time will not suffice to establish such line as the true boundary line. However, the court stated, the rules applicable to the situation where the boundary was, in fact, known had no application to the present case where the boundary line was not the true boundary line, but was in good faith, through a mistaken belief in the correctness of the original survey, accepted as such by both parties. The court explained that no good reason existed why the same rule should not apply where the adjoining owners honestly believed, as in the present case, that a certain line marked the true boundary and built a fence thereon as are applied where the owners do not know where the boundary line is and, being uncertain, by agreement establish a line as the boundary.

In Young v Wiggins (1972) 229 Ga 392, 191 SE2d 863, an action by the plaintiff landowner to enjoin the continuing trespass of the defendant adjoining landowner who constructed a new fence 4.8 feet west of an old fence which the plaintiffs claimed was the boundary line between the properties, the court accepted the plaintiffs' contention, where it appeared without dispute, that the plaintiffs and their predecessor in title had been in possession of the land up to the old fence from the time it had been erected by the plaintiffs' predecessor in 1953; and that the defendant adjoining landowner paid for the wire and the plaintiffs' predecessor put up the posts and erected the wire, which fence remained in place until the defendant, in 1969 or 1970, removed it and erected the aforementioned new fence. The court declared that this evidence showed the establishment of a dividing line by the erection of a fence, possession by the plaintiffs and their predecessor in title up to that fence for a period exceeding 7 years, and acquiescence by the defendant in both the location of the fence and the possession of the plaintiffs. In affirming a judgment for the plaintiff landowners, the court declared, as the governing principle, that if separate proprietors of adjoining lots erect a fence, and they or their successors acquiesce in the fence as the dividing line for more than 7 years, the fence will become the established dividing line, although it may encroach on the property of the other, according to the original plat of the lots.

In La Mont v Dickinson (1901) 189 Ill 628, 60 NE 40, an action in trespass by a plaintiff landowner against the defendant adjacent landowner to the east, the court held that a fence, part of which had been constructed by the plaintiff and the remainder by the defendant, had become the boundary line between the properties, although the range line originally established by government survey was to the west of the fence. The record revealed that a railroad crossed the properties in question in an east-west

direction. Based on a line established by private survey in 1889 as the dividing line between the proerties, the defendant erected a fence from his southern boundary north to the aforementioned railroad. Approximately 10 years later, the plaintiff continued the fence north from the railroad to his northern boundary. The defendant then tore down the portion of the fence erected in 1898 by the plaintiff and erected a fence west of this line on the original government range line. In affirming a judgment for the plaintiff, the court stated that where the boundary line between two estates is indefinite or unascertained, the owners may, by parol agreement, establish a binding division line. In rejecting the defendant's contention that he never agreed to accept the survey line established in 1889 as the boundary line, the court emphasized that the fact that he shortly thereafter built a fence on this line was strong evidence against such contention.

Stating that the issue was whether the 10-year prescriptive period provided by statute applied only to boundaries fixed in accordance with formal code provisions or whether it also applied where, as in the present case, these formal requirements had not been met but where, instead, the parties had informally fixed a visible boundary to which they had consented for over 10 years, the court in Lacalle v Chapman (1965, La App) 174 So 2d 668, held that the 10-year prescription period applied to the present situation.[68] The plaintiffs and the defendant owned adjoining farms, the boundary between which consisted of a meandering line marked by a lane and an old fence. Sixteen years earlier, both parties had employed a surveyor who straightened the line, with the result that 3.9 acres of the plaintiff's property, the property in dispute in this case, became part of the defendant's property. The surveyor's fee was split by the parties and a new lane was constructed on the new line and each party built a fence along the lane and accepted it as the boundary. In rejecting the plaintiff's contention that, because the new line was not established in compliance with various formal code provisions, it was not binding, the court stated that if two adjacent property owners agreed, even extra-judicially, that the boundary line between their properties shall be a certain line and a fence is erected on that line and accepted for 10 years, the right to bring an action to correct the boundary no longer exists. Observing that the consent to the boundary must be more than a passive acceptance, the court emphasized that the aforementioned facts established that the present case was not a situation where one party established a visible boundary and the other only passively acquiesced, the court thus affirming a judgment against the plaintiff in his action alleging ownership of the disputed tract.

Where the plaintiff landowner hired a surveyor to survey his premises and then proceeded to enclose his land by a fence which, for 13 years, served as the accepted boundary between his

68. See, however, Fiorello v Knight (1976, La App) 334 So 2d 761, cert den (La) 338 So 2d 300, where the court adopted the opposite conclusion, represented by a line of cases requiring a survey made in accordance with the formalities set forth in the Code, and rejected the line of jurisprudence holding that the 10-year prescription applies only where the lines are fixed based on a survey made in accordance with the formal requirements of the Code.

property and that of the defendant adjoining landowners to the east, the plaintiff then moving a substantial portion of the fence eastward 4½ feet, the court, in Nagel v Philipsen (1958) 4 Wis 2d 104, 90 NW2d 151, held that the original fence line had become the boundary by acquiescence even though, as normally required, it had not been accepted as such for the 20-year statute of limitations required for the acquisition of title by adverse possession, the court thus reversing a judgment against the defendants on the counterclaim for trespass. The court pointed out that the rule requiring acquiescence to endure for the statutory period did not apply where (1) as a result of a dispute between adjoining landowners as to the location of the boundary line, a fence was erected pursuant to an agreement that it marked the location of the true boundary line; (2) a fence was erected by a common owner who then sold adjoining parcels, representing to the purchasers that such fence marked the true boundary line; or (3) subsequent to the erection of the fence, one of the adjoining owners by his conduct caused a third party to believe that the fence marked the boundary line, and in reliance thereon the third party purchased the land of the other adjoining owner. Emphasizing that in this case the fence was built in reliance on a survey, the court concluded that the facts fell within still a further exception to the general rule. The court declared that the reliance on the survey, together with the acquiescence of the parties for 13 years in the line so established was sufficient to prima facie establish that the fence marked the true boundary line. The court added that if competent evidence had been introduced showing the true boundary line to have been different from that of the original fence line, then the general rule requiring that the fence must have stood for 20 years would have been applicable.

[b] Fence held not boundary

Under various circumstances, it was held in the following cases involving more than one fence line, but only a single contested boundary, that the fence claimed to have become the boundary between the properties in question by acquiescence or agreement had not become the boundary in this manner, where the fence had been built by a person other than the parties' common grantor, and where there was no evidence or finding that the fence had been built for some purpose other than as a boundary.

Thus, in Gibson v Schultz (1908, Iowa) 116 NW 140, the court held that the fact that a fence between the property of the plaintiff landowner and that of the defendant adjoining landowner to the south had been built by the parties' predecessors in 1874 and existed until 1905, and had been acquiesced in by the parties and their predecessors in title as the boundary line, did not preclude the parties from accepting a new line, established by survey, as the true line. The record revealed that the defendant suggested to the plaintiff that a survey be made to determine the true boundary line between their properties; that a survey, and a resurvey when the defendant was dissatisfied with the first one, were made with the defendant and his sons taking an active part and sharing in the expense; that both surveys established that the true boundary line was south of the existing fence; and that the defendant then gave his approval to the plaintiff's building a new fence on the true boundary line, was present at varying

times during the building, and expressly acquiesced therein. In affirming a judgment for the plaintiff in his suit to enjoin the defendant from removing the new fence, the court pointed out that the plaintiff went to the expense of erecting a new fence and took possession of the land acquired by the change, and that the defendant was now bound by the line so established.

Where the plaintiff landowner and the defendant adjoining landowner to the west, in 1885, employed the county surveyor to locate the boundary between their properties and subsequently occupied and cultivated their holdings with respect to the line established by that survey, the parties constructing a fence on that line in 1889 or 1890, and where in 1902 the defendant had a new survey conducted which established that the true boundary line was located 15 rods east of the prior line, the court, in Kimes v Libby (1910) 87 Neb 113, 126 NW 869, held that the parties were bound by the second survey in accordance with the rule that where the true line can be ascertained and the parties by mistake agree on an erroneous line as their boundary, believing it to be the true line, they will not be precluded by such agreement from claiming to the true line when discovered, unless the statute of limitations has run or equitable reasons exist for establishing an erroneous line. Although 17 years had passed between the two surveys, and the statute of limitations was only 10 years, the court pointed out that the parties did not gain legal title to the property until 1894 and 1895, so that the required 10 years had not passed when the second survey was performed in 1902. With respect to the absence of equitable reasons for adhering to the erroneous line, the court pointed out that no improvements other than a fence were constructed on the disputed strip of land; that the plaintiff had the same opportunity as the defendant to ascertain the correct boundary; that the plaintiff had specifically recognized the second survey as the correct one and had agreed to move his fence, and in fact did so and, until 1907, acquiesced in the later line as the correct boundary; and that the plaintiff had taken advantage of the second survey to secure from another neighbor possession of a tract of land theretofore occupied and claimed by that neighbor. The court thus affirmed a judgment against the plaintiff in his action to quiet title to the disputed land.

§ 25. Fence claimed as boundary by acquiescence or agreement built by unspecified person

[a] Fence held boundary

In the following cases which involved more than one fence line, but only a single contested boundary, and wherein the person who built the fence that was claimed to have become the boundary by acquiescence or agreement was not specified, the courts held that this fence had become the boundary by acquiescence or agreement where there was no specific evidence or finding that it had been built for a purpose other than as a boundary.

Thus, in Clay v Dodd (1964) 238 Ark 604, 383 SW2d 504, the plaintiff landowners initiated an action against an adjoining landowner, who had moved a fence dividing their properties 20 feet to the east, to restrain him from further trespassing and interfering with the quiet enjoyment of their lands. The landowners claimed that for more than 50 years the fence dividing their property from the adjoining landowner's had been mutu-

ally accepted as the boundary. Observing that the adjoining owner contended that many years ago there had been two fences, with a road between them, the court explained that it was not clear when the easternmost fence had ceased to exist. Furthermore, the court pointed out that there was testimony that there had never been more than one fence, and that it appeared undisputed that when the landowners bought their property 14 years ago there was only one fence, which constituted the west boundary line of their property. Consequently, the court concluded, the trial court was justified in finding that the old fence line had become the boundary line by the acquiescence of the parties and their predecessors in title, the court observing that it was not seriously contended by anyone that there had ever been any misunderstanding about, or trouble over, the fence line for over 50 years.

The chancellor's finding that an old fence row and fence had, by acquiescence, been established as the boundary line between the property of the plaintiff and that of the adjoining owner to the west was held to be supported by sufficient evidence, in Kittler v Phillips (1969) 246 Ark 233, 437 SW2d 455, the court affirming a judgment for the plaintiffs. The plaintiff testified that he and his predecessors in title had occupied the lands east of the fence for at least 25 years and had recognized the old fence row and line as the visible boundary for a period of approximately 50 years; that neither the defendant nor his predecessors in title had at any time occupied, used, or controlled the disputed land east of the old fence line; that he had never offered to buy the disputed strip of land from the defendant, but that the defendant had never communicated to him any nonrecognition of the fence line as being the accepted boundary; that the defendant had never cleaned up any land on the eastern side of the fence; and that the first attempt by the defendant to use the disputed strip was in 1967 when he constructed a new fence to the east of the old fence line. Although acknowledging that to establish a boundary line by acquiescence there must be a mutual or express agreement as to the dividing line, the court pointed out that such agreement may be inferred by the actions of the parties. Furthermore, observed the court, a boundary line by acquiescence may well exist without the necessity of a prior dispute.

In affirming a judgment against a landowner who claimed that a fence was not the accepted boundary between his property and the defendant adjoining landowners to the west, the court, in Todd v Wallace (1938) 25 Cal App 2d 459, 77 P2d 877, held that there was sufficient evidence concerning the existence of an uncertainty as to the true boundary line, and an acceptance of the fence as the boundary, to support the trial court's finding that the fence had become the agreed boundary. The fence had been erected by an unspecified person approximately 40 years before the present action, the northern half of the fence having been removed after approximately 17 years by unspecified persons, and the southern half approximately 20 years later by the plaintiff, who then built a new fence 20 feet to the west. With respect to the contention that the exact location of the fence could not be ascertained, the court pointed out that certain posts and post holes, as well as a pile of rocks which had been placed against the fence, served to locate where the southern half of the fence had been erected. The court observed

that the location of the northern part of the fence was fixed by testimony that the easterly edge of a road was approximately 2 or 3 feet west of the fence. With respect to the plaintiff's contention that there was no uncertainty since the true boundary line could have been ascertained at any time from an earlier government survey, the court emphasized the testimony of a surveyor concerning inaccuracies in the government survey. Finally, with respect to the contention that there was no agreement among the parties or their predecessors that the fence was to be the boundary line, the court emphasized that the fence had been built approximately on the middle line of the section involved; that the land in question was rough country where the true line would be difficult, if not impossible, to locate; that rocks were piled along a large part of the fence, the size and location of which indicated that they were taken from the land on both sides; that the road and one half of the fence remained for approximately 40 years, while the other half of the fence was in existence for some 20 years; that the parties improved their property and set out trees corresponding to the line of the fence and road; and that for some 40 years no question was raised by the owner of either parcel of land.

In affirming a judgment for the plaintiff landowners in their action against the defendant adjoining landowners to the east to fix a boundary line and to quiet title to a disputed strip, the court, in Shelton v Malette (1956, 4th Dist) 144 Cal App 2d 370, 301 P2d 18, held that the evidence was sufficient to support the trial court's finding that a barbed wire fence had been acquiesced in by both parties as the boundary between the two properties. One of the plaintiff landowners testified that when he acquired the property in 1929, his grantor stated that the barbed wire fence constituted the east boundary line of the property; that remnants of this fence were still on the property at the time of trial; and that the defendants made no assertion of any right to change the boundary line fence and acquiesced in it until 1951 when they caused a fence to be erected approximately 450 feet west of, and parallel to, the barbed wire fence. In concluding that this evidence was sufficient to establish a boundary by acquiescence, the court declared that an agreement to locate a boundary line need not be expressed, but may be implied by long acquiescence; that the implied agreement must have been based on a doubtful boundary line, but that a dispute or controversy is not essential; that it is not required that the uncertainty should appear from the deed or from an attempt to make an accurate survey from the calls in the deed; and that a doubt may arise from a believed uncertainty, which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made.

Where the plaintiff landowner and the defendant adjoining owner to the north had recognized an old fence as being on the true boundary line between their properties and had acquiesced therein for more than 10 years, the court, in Bradley v Burkhart (1908) 139 Iowa 323, 115 NW 597, held that the fence had become the boundary by acquiescence, even though a later survey conducted at the defendant's expense showed that the true boundary line was approximately 2 feet south of the fence, the defendant then tearing down the old

fence and erecting a new fence on the survey line while the parties were negotiating a proper settlement of their boundary dispute. The plaintiff had erected a house on his property that was located close to the old fence and had used the disputed area between the old and the new fences for water pipes and for use in washing the windows of his house. In applying the doctrine of acquiescence, the court emphasized that the old fence was a permanent one, was erected to mark the division line between the two tracts, and was regarded and recognized by the parties as being on the true line for many years. In affirming a judgment for the plaintiff, the court rejected the defendant's claim of estoppel based on what happened after the defendant located the true boundary line. The court pointed out that while negotiations were pending for some kind of an amicable settlement, the defendant went ahead and built his fence, and that almost immediately thereafter the plaintiff brought this action to secure the removal of it.

In Schlender v Maretoli (1934) 140 **Kan** 533, 37 P2d 993, an action by the plaintiff landowners against the defendant adjoining landowner to the west to recover a strip of land lost when the defendant moved a division fence approximately 5 feet to the east to a line shown by surveys to be the true dividing line between the two lots, the court affirmed a judgment for the plaintiffs, where the fence had been in its former location for 35 years, and all parties had regarded the fence as being on the dividing line and had used the ground up to the fence on their respective sides. There was testimony that when the defendant discovered that the existing fence was on his property, he had declared that he would not "make a fuss about a foot or two," and would agree to leave the fence where it was, the defendant denying that he had ever made such statement. In concluding that there was sufficient evidence to sustain the trial court's finding that the parties had agreed to accept the fence as originally located as the boundary line, the court declared that when adjoining landowners, not knowing the exact location of the line between their lands, locate such line and construct a permanent fence thereon with the understanding that it shall be the partition line, it becomes so by virtue of such agreement, although a later survey shows otherwise.

In Tillman v Hutcherson (1941) 348 **Mo** 473, 154 SW2d 104, an action to determine the title to a strip of land about 20 feet wide between the property of the plaintiff landowner and the defendant adjoining landowner to the west, the court held that the proper boundary between the parties' property was an old fence that had existed for over 50 years, rather than a new fence to the east of the old fence which the defendant had erected based on the results of a survey he had had conducted. Two long-time residents of the neighborhood testified that successive owners of each tract had occupied, used, and farmed the land up to the old fence as a boundary line for 50 years, and another witness said that he had been familiar with the fence for 28 years. The defendant testified that he had been informed by his predecessor in title that the fence was not on the true line. In affirming that part of the judgment quieting title to the disputed strip in the plaintiff, the court declared that long acquiescence in a fence as a boundary line would warrant a presumption that it is a true line; that the law does not prescribe

what the duration of acquiescence shall be, other than that it be long enough to evidence mutual acceptance of the dividing line by the adjoining owners as the common boundary of the respective lands; and that there need be no specific agreement that the fence should constitute the boundary, the acquiescence for a length of time being sufficient evidence of the existence of an agreement.

Where the record revealed that for about 60 years a fence had existed between the property of the plaintiff landowner and that of the defendant adjoining landowners to the east, and that the prior owners of the defendants' tract knew that the boundary line was established by the old fence and always accepted it without question; and where one of the plaintiff's predecessors, long before the present controversy, rebuilt the fence along the old fence line and treated it as a boundary between the two tracts, the court, in Retherford v Daniell (1975, App) 88 NM 214, 539 P2d 234, held that the old fence had become the boundary by acquiescence and that the defendants had acted without justification in building a new fence to the west of the old one. The court explained that under New Mexico law, even if there is no dispute, long recognition of the boundary by abutting owners amounts to acquiescence and that a boundary may be established in this manner, even though the acquiescence results from silence. Accordingly, the court affirmed a judgment for the plaintiff in his action to establish the old fence line as the boundary.

Where from at least 1912 to 1951 a fence and later a post marked the accepted boundary between the property of the plaintiff landowners and that of the defendant adjoining landowners to the west, the court, in Van Dusen v Lomonaco (1959) 24 Misc 2d 878, 204 NYS2d 778, held that this line should be accepted as the true boundary, rather than a survey line established in 1951, which ran through a portion of the plaintiffs' house. The predecessors in title of the defendants testified that a fence 3 feet east of a house had been treated as the boundary line. The plaintiffs and their predecessor testified that there was a post approximately 3 feet from the defendants' house and that they had planted flowers for many years up to an imaginary line leading directly from the post to the rear of the properties. This testimony was substantiated by photographs taken in 1942 and 1943. There was no evidence that prior to 1949, anyone thought the line went through part of the plaintiffs' house. In rejecting the defendants' contention that one post should not be deemed a marker, the court pointed out that from the evidence and from logic and reason it could be concluded that the owners treated the line as running northerly from the sidewalk through the post by the shortest route to the rear boundary. The court further pointed out that the conclusion that the fence was the accepted boundary was fortified by a map drawn in 1903 and amended in 1912. In enjoining the defendants, who had erected a new fence on the alleged true boundary line, from trespassing on the plaintiffs' property, the court declared that a settled rule in New York prohibited the disturbance of a practical location which had been acquiesced in for a long period of time.

In reversing a judgment against the plaintiff landowner in her action against the defendant adjoining landowners to the northeast to require them to remove a new fence which

they had allegedly built on the plaintiff's property after tearing down an old fence, the court, in Dimura v Williams (1972) 446 **Pa** 316, 286 A2d 370, held that the old fence which, before it was removed by the defendants, was part of a boundary between two townships had been acquiesced in as a boundary between the respective properties. With respect to the defendants' contention that the old fence was not a substantial one, the court explained that while a fence must be substantial if the enclosure of land by such a fence is relied on to sustain a claim of adverse possession, the law is different if a long-standing fence is relied on for the establishment of a boundary between two adjacent parcels of land. Declaring that it cannot be disputed that occupation up to a fence on each side by two parties for more than 21 years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, whether the fence is precisely on the right line or not, the court emphasized that the old fence had long been recognized as a boundary line between the parties' property. The court noted that the fact that the defendants might not have consented specifically to the fence in question did not require a different result.

In affirming a judgment for the plaintiff landowners in their action to enjoin a trespass against the adjoining landowners to the east who had torn down part of an old board fence and erected a new fence closer to the plaintiffs' house, the court, in Di Maio v Ranaldi (1928) 49 **RI** 204, 142 A 145, held that where the evidence established that the board fence had remained unchanged between the respective properties and had been acquiesced in as a boundary line for that period of time, the fence had become the boundary by acquiescence. Noting that the plaintiffs' house was about 3½ feet from the fence, the court pointed out that it appeared from the record that the only way to get to the rear door of the house from the street was to walk between the house and the fence, and that this way had been used for more than 30 years. Emphasizing that this use of the land was so continuous, overt, and notorious that the owners of the adjoining land must have known of it, the court pointed out that it has been held that when a fence between adjoining estates has been recognized and acquiesced in by the owners of both estates as being on the true dividing line for a period of time longer than that required by statute to create title to real estate by adverse possession, the owners of both estates are precluded from asserting that the fence is not on the true boundary line.

[b] Fence held not boundary

Although there was no specific evidence or finding that the fence claimed to have become the boundary by acquiescence or agreement was built for a purpose other than as a boundary, the courts in the following cases which involved more than one fence line, but only a single contested boundary, and in which the builder of the aforementioned fence was not specified, held that the fence had not become the boundary by acquiescence or agreement.

Thus, in Doria v Suchowolski (1975, **Tex** Civ App 4th Dist) 531 SW2d 360, writ ref n r e, an action in the nature of a trespass to try title to a strip of land between the property of the plaintiff landowner and that of the defendant adjoining landowners to the south, the court, in reversing a judgment for the plaintiff, held that a

fence which was 3 feet to the south of the correct boundary line, but which had been moved to the correct line by the defendants, had not become the boundary either by a parol agreement or by acquiescence. Stating that for either theory to be applicable there must exist uncertainty, doubt, or dispute as to the true boundary line, the court held that the evidence failed to establish this requirement. Noting that the plaintiff testified that at the time he purchased his property, the real estate agent handling the sale informed him that the fence constituted his southern boundary, a fact supported by the testimony of the agent, the court emphasized that there was nothing in this testimony to indicate any doubt, dispute or uncertainty as to the boundary and, furthermore, that the agent lacked the authority to enter into a boundary line agreement on behalf of his principal. Noting that one of the defendants testified that when she bought her property she believed that the fence constituted her northern boundary until receiving a plat to the property indicating otherwise, the court again emphasized that her testimony failed to establish any dispute, doubt, or uncertainty as to the location of the boundary. Finally, the court observed that there was no evidence as to when, why, or by whom the fence was built.

In Florence v Hiline Equipment Co. (1978, Utah) 581 P2d 998, a declaratory action to determine the boundary line between the plaintiff landowners and that of the defendant adjoining landowner to the east, the court held that a fence shown to have existed as early as 1936, and located to the west of the true boundary line, had not become the boundary by acquiescence, the court affirming a judgment for the plaintiffs. The court pointed out that although the fence had been in existence for a number of years, there was no evidence that the parties or their predecessors had acquiesced in treating the fence as their mutual boundary, the court noting that the plaintiffs' predecessor had started, and the plaintiffs had attempted to complete, a chain link fence on the true line. The court pointed out that there was no allegation or proof that any of the parties relied on the fence as being the true boundary. Stating that the parties knew where the true boundary was located and treated it as such, and that another party who had purchased part of the defendant's property bordering the disputed boundary line testified that the property conveyed to him by deed went only to the legal description, the court concluded that there would be no inequities in holding that each party was to be the owner only of his legally described tract.

B. More than one contested boundary

§ 26. Fence held boundary

In the following cases involving more than one fence line, and more than one contested boundary, the courts, under various circumstances, held with respect to each of the contested boundaries that a fence had become the boundary by acquiescence or agreement.

Thus, where the property of the plaintiff landowners, who owned the northwest quarter of a section, was divided from the property of the defendant adjoining landowners, who owned the remainder of the section, by two fences running north and west from a post assumed by the parties to be the center of the section, the court, in Brehm v Johnson (1974,

Colo App) 531 P2d 991, held that the fences had become the accepted boundaries, although a later survey established that the true center of the section was several feet southeast of the common post from which the fences ran and that, in effect, the fence lines reduced the plaintiffs' property by approximately .64 acres. Although certain portions of the fences were taken down, there was evidence that their former locations continued to be treated as boundary lines. Stating that where parties mistakenly locate a fence between their properties and thereafter conduct themselves in a manner indicating that they claim no property beyond that fence for a period exceeding 20 years, the fence line becomes the accepted boundary between the properties, the court, without further discussion, declared that the trial court's finding that the fences had been acquiesced in for more than 20 years was supported by the evidence, the court thus affirming a judgment against the plaintiffs.

Although there was no evidence concerning who had erected a fence between the property of the plaintiff landowner and that of the defendant adjoining landowner whose lands bordered the plaintiff's on the north and west, the court, in Buckner v Russell (1958, Okla) 331 P2d 401, held that the fence, which was on the northern and western boundaries of the plaintiff's property, had become the boundary by acquiescence, where all parties had accepted it as such for over 15 years. The plaintiff testified that he had been familiar with the area for 33 years; that the fence had been in the same place for all of this time and had been acquiesced in by the owners on each side of the fence as the true dividing line; and that the only change made in the location of the fence was the moving of a corner post a few feet to avoid a washout. Seven other witnesses who had been familiar with the land involved for from 20 to 43 years corroborated the plaintiff's testimony. There was no positive proof, the court observed, that the fence had been materially moved in repairing it. In affirming a judgment for the plaintiff in his action to enjoin the defendant from trespassing on his property, the court rejected the defendant's contention that acquiescence necessitates a knowledge of the true line. The court emphasized that the evidence was very positive that the fence in question had been recognized and acquiesced in by the owners and occupants as the true dividing lines for over 15 years prior to the filing of this action.

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In Ferrari v Meeks (1970, Iowa) 181 NW2d 201,[69] the court held that the defendant adjoining landowners had acquired title to a disputed strip of land, used as a roadway, on the east side of their property, which roadway was bordered on its eastern side by a fence, where although record title to the roadway was in the plaintiff landowners, the evidence established that the fence was a boundary fence and had been acquiesced in as the true boundary between the properties for at least 40 years. Observing that by statute a boundary line or partition fence is customarily maintained by the adjoining owners, the court pointed out that in the present case each property owner

69. This case also involved a boundary dispute with the adjoining landowner to the south, the court holding with regard to that dispute that the fence had not become the boundary by acquiescence; see § 27, infra.

maintained one half of the fence. In addition, the court emphasized, both the defendants and the plaintiffs' predecessor in title testified that they regarded the fence as the true boundary line between the respective properties. In reversing a judgment for the plaintiffs, the court declared that where two adjoining owners for 10 years or more mutually acquiesce in a line, definitely marked by a fence, or in some other manner, as the dividing line between them, such line becomes a true boundary, although a survey may show otherwise and although neither party intended to claim more than called for by his deed.

§ 27. Fence held not boundary

Under various circumstances, it was held in the following cases, involving more than one fence line and more than one contested boundary, that in no instance had a fence become the boundary between the properties in question by acquiescence or agreement.

Thus, in reversing a judgment against the plaintiff landowner in his action in trespass against an adjoining landowner whose property was boarded on the north and east by the plaintiff's property, the court, in Palmieri v Bulkley (1950) 137 **Conn** 40, 74 A2d 475, held that there was no evidence that fences erected by the defendant adjoining landowner along both the north and east boundaries of his property marked the true boundary lines. With respect to the fence on the north boundary of the defendant's property, the court simply noted that there was no evidence to sustain the trial court's conclusion that such fence constituted the true boundary. With respect to the fence on the defendant's east boundary, the court noted that the basis of the trial court's conclusion that this fence was not an encroachment on the plaintiff's land was that the occupation for over 50 years by the defendant up to an earlier fence, which had been replaced by the aforementioned fence, fixed the line or gave him title by adverse possession. In concluding that the facts did not support either ground, the court pointed out that although where there is uncertainty or dispute about a boundary, its determination by the parties by pratical location has been sustained, there was no finding that any uncertainty or dispute existed in the present case.

In reversing a judgment for the plaintiff landowner in his action to quiet title to a strip of land along the boundary with the adjacent landowner's property, the plaintiff's land bordering that of the adjacent owner on the north and west, the court, in Brown v Brown (1910) 18 **Idaho** 345, 110 P 269, held that fences on each of the common boundaries had not been acquiesced in as the true boundaries, even though there was evidence that one of the fences had existed for approximately 28 years and the other for 16 years, and the parties and their predecessors in title had occupied and cultivated the land up to the fences. However, the court emphasized that the parties had agreed that if a survey showed the boundary lines to be elsewhere, the fences would be moved to these loctions. Although acknowledging that where boundaries are doubtful, actual occupation for a number of years up to the line where a party believes his land to extend, without any opposition from the adjoining proprietor, is strong presumptive evidence of the true line, the court explained that strong presumptive evidence was not enough to overcome the positive evidence of the parties' intention to move the fences when the true line was ascertained.

Noting that it did not appear that improvements of any value, aside from the value of the fences, had been placed on the land in dispute, the court declared that this case did not come within the rule that a party permitting, without objection, another to place valuable improvement on his land is estopped from afterwards claiming the land.

It was held, in Disheroon v Cox (1956, Tex Civ App 5th Dist) 292 SW2d 379, that an old fence between the property of the plaintiff landowner and two different adjoining landowners to the west had not been acquiesced in as the boundary between the respective properties. The old fence had been built by one of the defendants more than 25 years prior to trial and had stood in various states of repairs until 1951, when this defendant tore it down and built a new fence several feet further east. The other defendant, whose fence had connected with the old fence, then moved his fence so that it connected with the new fence. The defendant who had originally built the fence testified that, in so doing, he had not attempted to put it on the boundary line, since at that time he did not know where the line was located, but had just tied the fence onto the rear corner of his barn for convenience, to contain his stock and chickens. The predecessor in title of the other defendant testified that she had never had any discussion with neighbors as to where the boundary line was and that her fence, which was also attached to the other defendant's barn, had been built to retain stock and to protect her garden. The court pointed out that although the plaintiff testified that he considered the old fence to be on the true boundary line, there was no testimony in the record that either of the defendants or their predecessors so recognized the old fence, as required for a line to become a boundary by acquiescence. The court thus affirmed a judgment against the plaintiff.

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In Ferrari v Meeks (1970, Iowa) 181 NW2d 201,[70] an action by the plaintiff landowners against the adjacent landowners to the south to enjoin them from using a road along the plaintiffs' southern boundary, which road was bordered on its northern side by a fence, the court held that the defendants had not acquired title to the road by acquiescence since the aforementioned fence did not constitute a boundary fence. The court pointed out that, by statute, a boundary fence is customarily maintained by the adjoining owners, while in the present case the fence had been maintained solely by the plaintiffs and their predecessor in title. A judgment for the plaintiffs, however, was reversed on the ground that the defendants' had acquired an easement in the road by prescription.

70. This case also involved a boundary dispute with the adjoining landowner to the west, the court holding that with respect to this dispute a fence had become the boundary by acquiescence; see § 26, supra.

Consult POCKET PART in this volume for later cases