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Agreed Boundaries and Boundaries by Acquiescence: The Need for a Straight Line from the Courts

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AGREED BOUNDARIES AND BOUNDARIES BY ACQUIESCENCE: THE NEED FOR A STRAIGHT LINE FROM THE COURTS

As is usual, boundary disputes are generally between friends who become enemies and the facts are detailed and somewhat confusing, all of which give rise to the conflicting principles of law.[1]

I. INTRODUCTION

The resolution of boundary disputes in American property law has been a source of much confusion and dispute. Many jurists, therefore, have been prompted to either explain or excuse the state of the law in the area,[2] sometimes adding further to the confusion in the process. One particularly troublesome branch of the law dealing with boundary disputes is the doctrine of agreed boundaries and boundaries by acquiescence.[3] Succinctly stated, the doctrine of agreed boundaries and boundaries by acquiescence provides:

> Where the boundary line between two adjoining landowners is uncertain, they may agree on a division line between them, and when

1. Geduhn v. Kolar, 202 N.W.2d 272, 273 (Wis. 1972).

2. Other excuses, explanations, and reasons have been propounded though none have supplied a satisfactory answer. *See, e.g.*, Browder, *The Practical Location of Boundaries*, 56 MICH. L. REV. 487 (1958) [hereinafter cited as Browder]. Browder has observed:

> Not fully recognizing that the problem is probably *sui generis*, the courts have sought to adapt to their purpose several disparate existing doctrines. This has led to disagreement and misunderstanding of the nature of the problem or the legal theory or theories which would adequately explain or support judicial action. Vagueness of theory has led in turn to vagueness and disagreement on the facts which will merit judicial recognition.

Id. at 489.

3. These are two of the more common labels used in describing this legal phenomenon, but, like the scope of the doctrine, the titles used to identify it are broad and diverse. *E.g.*, Kincaid v. Peterson, 297 P. 333, 336 (Ore. 1931) ("practical location"); King v. Mabry, 71 Tenn. 237, 246 (1939) ("conventional line"). *See* Buza v. Wojtalewicz, 180 N.W.2d 556, 561 (Wis. 1970) ("estoppel"). Note that estoppel was often treated as a completely separate doctrine. *See, e.g.*, Biddle Boggs v. Merced Mining Co., 14 Cal. 279 (1859); Browder, *supra* note 2, at 519-25; Note, *Boundary Litigation in California*, 11 STAN. L. REV. 720, 728-32 (1959) [hereinafter cited as *Boundary Litigation*]. In other instances, in order to mask incomplete analysis, the courts applied estoppel though the full elements of the estoppel doctrine were lacking. *E.g.*, Browder, *supra* note 2, at 498. In California the doctrine is usually referred to as "agreed boundaries," although often the term "boundaries by acquiescence" is used as a substitute.

> executed each will own up to this line as if it were a natural boundary, or as if their deeds or grants call for it . . . . An agreement may be implied as well as expressed, and, although possession or acquiescence may be necessary, . . . it has been held that it becomes binding from the time it is made.[4]

When an agreed boundary is found to exist, it becomes the true line and is binding on the parties and their successors in interest.[5] The courts generally look with favor on these agreements[6] since they serve to "secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable."[7] The English common law recognized the doctrine from an early date,[8] and it has been utilized by American courts since their inception.[9]

Despite the age-old nature of the doctrine of agreed boundaries and boundaries by acquiescence, the many years of use did not lead to a refinement of the doctrine and its elements. Instead, the courts plunged into a judicial morass, attempting to resolve cases in a piecemeal fashion, and largely ignoring precedent as a result of either misperception[10] or equitable concerns.[11] Some appellate courts refused to confront the

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4. 11 C.J.S. *Boundaries* § 64 (1938).

5. *E.g.*, Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 708-09, 336 P.2d 525, 529 (1959), *citing* Young v. Blakeman, 153 Cal. 477, 482, 95 P. 888, 890 (1908); White v. Spreckels, 75 Cal. 610, 616, 17 P. 715, 717 (1888); Sneed v. Osborn, 25 Cal. 619, 630-31 (1864); Janes v. LeDeit, 228 Cal. App. 2d 474, 481-82, 39 Cal. Rptr. 559, 564-65 (1964).

6. *E.g.*, Loustalot v. McKeel, 157 Cal. 634, 642-43, 108 P. 707, 711 (1910); Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 941, 54 Cal. Rptr. 371, 373 (1966); Crook v. Leinenweaver, 100 Cal. App. 2d 790, 792, 224 P.2d 891, 892 (1950).

7. Young v. Blakeman, 153 Cal. 477, 482, 95 P. 880, 890 (1908); *accord*, Mello v. Weaver, 36 Cal. 2d 456, 460, 244 P.2d 691, 693 (1950); Minson Co. v. Aviation Finance, 38 Cal. App. 3d 489, 494, 113 Cal. Rptr. 223, 226 (1974); Janes v. LeDeit, 228 Cal. App. 2d 474, 481, 39 Cal. Rptr. 559, 564 (1964).

8. *E.g.*, Penn v. Lord Baltimore, 27 Eng. Rep. 1132 (Ch. 1750).

9. *See, e.g.*, Boyd v. Graves, 17 U.S. (4 Wheat.) 513 (1819); Brown v. Leete, 2 F. 440 (C.C.D. Nev. 1880); Smith v. Robarts, 2 Cal. Unrep. 604, 9 P. 104 (1885); Sneed v. Osborn, 25 Cal. 619 (1864); Sheldon v. Atkinson, 16 P. 68 (Kan. 1887); Lennox v. Hendricks, 4 P. 515 (Ore. 1884); Perkins v. Gary, 3 S. & R. 327 (Pa. 1817); Houston v. Matthews, 9 Tenn. 116 (1826).

10. *See, e.g.*, Buckner v. Russell, 331 P.2d 401 (Okla. 1958), which stated that Johnson v. Whelan, 98 P.2d 1103 (Okla. 1940), overruled Reynolds v. Wall, 72 P.2d 505 (Okla. 1937). Although the wording in *Johnson* was somewhat ambiguous, upon a careful reading it is clear that *Reynolds* was not overruled.

11. *See, e.g.*, Roman v. Ries, 259 Cal. App. 2d 65, 66 Cal. Rptr. 120 (1968), which stated:

> It is pointed out that there is no precedent for allowing a party the benefit of part, but not all, of an agreed boundary. Such is probably so; the case before us

confused nature of the law of agreed boundaries and boundaries by acquiescence, and automatically upheld the decisions made in the trial courts.[12] As a result, the doctrine that developed was confused, and the applications of its principles were varied and often irreconcilable.

The confusion was a result of many factors, but one which seemed to contribute heavily was the failure to adequately analyze the facts of each case. Factual situations determine the applicability of the doctrine of agreed boundaries and boundaries by acquiescence. Too often, however, courts allowed factual differences to blur a consistent application of the doctrine.[13] This, in turn, clouded the doctrine itself, making it all the more difficult for later uniform applications of its principles. Furthermore, the simplicity with which the doctrine often was stated contributed to the confusion. The definitions provided referred both to the agreement and the acquiescence; as will be noted subsequently,[14] these terms were variously interpreted as completely distinct, as interwoven, or as simply synonymous.

II. ERNIE v. TRINITY LUTHERAN CHURCH: THE BASIC CALIFORNIA DOCTRINE

The California courts were prime contributors to the confusion surrounding agreed boundaries and boundaries by acquiescence. Early settlement was erratic and frenzied[15] and often led to inaccuracies in surveys[16] and recordation. Such settlement produced an enormous

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is a novel one. But there are no fixed rules limiting the power of equity in dealing with subject matters coming generally within its jurisdiction . . . .

Id. at 70, 66 Cal. Rptr. at 123.

12. Fallert v. Hamilton, 109 Cal. App. 2d 399, 240 P.2d 1007 (1952), stated:

> It is not our duty to determine whether the evidence might have supported a finding contrary to the one reached by the trial court. It is our conclusion that it cannot be said, as a matter of law, that an agreed boundary line was conclusively established by the evidence. In view of the inferences and deductions that might be allowed to be drawn from the evidence produced, it cannot be said that there is not sufficient evidence to support the court's finding.

Id. at 404, 240 P.2d at 1010. *See Boundary Litigation, supra* note 3, at 726, *citing* Note, *Prescription: Presumption of Adverse User*, 34 CALIF. L. REV. 445 (1946).

13. *Cf.* note 2 *supra.*

14. *See generally* notes 76-88 *infra* and accompanying text.

15. Note that many problems were caused by the numerous Mexican land grants. *See, e.g.*, Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 143 P. 754 (1914); Columbet v. Pacheco, 48 Cal. 395 (1874); Ross v. Burkhard Investment Co., 90 Cal. App. 201, 265 P. 982 (1928).

16. *E.g.*, Hannah v. Pogue, 23 Cal. 2d 849, 147 P.2d 572 (1944), stated:

> The courts have recognized such boundaries because the early surveys in the state were most uncertain, and in later years the monuments and landmarks they described could not be found.

volume of boundary dispute cases, presenting California courts a prime opportunity to formulate a coherent doctrine of agreed boundaries and boundaries by acquiescence. Nevertheless, the courts initially abstained,[17] and the consequence was a murky and unsettled doctrine. Yet, not inaccurately, California now has gained a reputation for being judicially progressive. An analysis of its cases will reveal that the former confusion has all but died, and the California courts have established, and are continuing to promulgate, a definitive doctrine of agreed boundaries and boundaries by acquiescence.

The supreme court case of *Ernie v. Trinity Lutheran Church*[18] is the beginning point[19] for any analysis of the doctrine of agreed boundaries or boundaries by acquiescence in California. In *Ernie*, the parties owned adjacent lots which shared a common boundary, the defendant's lot located just west of the plaintiff's lot. In 1925, the defendant's predecessor purchased the lot and, as a result of a survey, erroneously went into possession of a strip of land legally part of the plaintiff's adjacent eastern lot. The defendant's predecessor later erected a building on the strip and placed a fence on what he believed was his eastern boundary. The defendant purchased the lot in the belief that the strip was included in it and he continuously used the land until the plaintiff discovered the boundary error and claimed title to the strip. Four years later, the plaintiff brought suit.[20] The lower court quieted title in the defendant on the basis of California Code of Civil Procedure sections 318 and 338(2)[21] and laches.[22]

Id. at 857, 147 P.2d at 576, *citing* Loeb, *The Establishment of Boundaries by Practical Location*, 4 CALIF. L. REV. 179 (1916).

17. *E.g.*, *Boundary Litigation, supra* note 3.

18. 51 Cal. 2d 702, 336 P.2d 525 (1959).

19. Actually, the most recent California Supreme Court case is French v. Brinkman, 60 Cal. 2d 547, 387 P.2d 1, 35 Cal. Rptr. 289 (1963). However, this was a minor case in terms of the solidification of the law in this area, as it dealt with only one element of boundaries by acquiescence. Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 336 P.2d (1951), on the other hand, contained an extensive discussion of the doctrine and various elements thereof.

20. 51 Cal. 2d 702, 705-06, 336 P.2d 525, 526-27 (1959). The construction on the strip by defendant's predecessor was quite substantial. It included a rectory with a concrete foundation and a sidewalk as well as a firmly embedded fence. The predecessor continuously and exclusively possessed the strip from 1926 to 1942; the defendant purchased it in 1942 and used the strip until 1952. Plaintiff purchased his lot in 1944 and the description in his deed included the land in dispute. Neither the defendant nor his predecessor ever used the strip although the plaintiff paid taxes on it.

21. CAL. CIV. PRO. CODE § 318 (West Supp. 1954) provides:

> No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predeces-

The supreme court affirmed, relying instead on the doctrine of agreed boundaries.[23] Initially, the court enumerated the judicially established[24] requirements for the application of this doctrine. The court stated that there must be

> an uncertainty as to the true boundary line, an agreement between the coterminous owners fixing the line, and acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position.[25]

The court then proceeded to discuss each element individually. In discussing the nature of "uncertainty" the court stated:

> It is not required that the true location be absolutely unascertainable; that an accurate survey from the calls in the deed is possible, [*sic*],[26] or that the uncertainty should appear from the deeds. The line may be founded on a mistake.[27]

The court further stated that the uncertainty does not have to be blatant, but can be inferred from the circumstances. This inference will arise if a definite line was designated and if such line was accepted for a considerable length of time. Additionally, the court approved the inference of uncertainty arising from construction of the improvements, and the owners subsequent agreement that the designated line would become the true boundary.[28]

Next the court discussed the concept of agreement, accepting, but not requiring, an express agreement. It broadened the scope of what constitutes an agreement, stating:

> The court may infer that there was an agreement between the coterminous owners ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between their lands.[29]

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sor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

CAL. CIV. PRO. CODE § 338(2) (West Supp. 1975) provides that "[a]n action for trespass upon or injury to real property" must be brought within three years.

22. 51 Cal. 2d at 706, 336 P.2d at 527.

23. *Id.* at 705-06, 336 P.2d at 526-27.

24. *Id.* at 707, 336 P.2d at 528.

25. *Id.*

26. It seems that the court intended to say "impossible" rather than "possible."

27. 51 Cal. 2d at 707-08, 336 P.2d at 528 (citations omitted).

28. *Id.* at 708, 336 P.2d at 528. Note that such inference was largely interwoven with the concept of substantial loss. *See generally* notes 107-27 *infra* and accompanying text.

29. 5 Cal. 2d at 708, 336 P.2d at 528.

Finally, the statute of limitations/"substantial loss" element was examined. The statute of limitations, five years in agreed boundaries actions,[30] was met in this case; therefore, substantial loss was not discussed extensively. However, the court implied that such loss would result if the defendant were required to give up possession of the disputed strip, due to the considerable improvements the defendant had made on the land.[31] Concluding that all of the elements had been established, the court found an agreed boundary.[32]

The importance of *Ernie* arises not from its ultimate disposition but from the discussion of the required elements and the types and degrees of proof found to be acceptable to prove them. In contrast to earlier confusion, the majority[33] delineated straightforward requirements which were supported by precedent.[34] As the court indicated, the equities usually favor maintaining a boundary line where located by the parties.[35] The court looked to the reality of the circumstances allowing reasonable inferences and not requiring direct evidence of agreement or uncertainty where such was impossible.[36] The existence of an agreed boundary under *Ernie* may be proved without direct evidence of occurrences which often transpired too far in the past to generate such evidence. Yet, the amount of evidence required is sufficient to show the existence of an agreed boundary and to prevent the unfair taking of land.

The elements set forth in *Ernie* are such that the rights of both parties to a boundary dispute are protected as much as is reasonably possible. According to *Ernie*, as long as minimum requirements are met, agreed boundaries will be upheld. The full import of this case, however, can be realized only in the context of an examination and comparison of the

30. CAL. CIV. PRO. CODE § 318 (West 1954); Kofl v. Dunn, 176 Cal. App. 2d 204, 1 Cal. Rptr. 278 (1959).

31. 51 Cal. 2d at 708, 336 P.2d at 528. The improvements included a rectory, a sidewalk, and a fence. *Id.* *See* note 20 *supra.*

32. *Id.* at 708, 336 P.2d at 529.

33. Justice Shenk wrote the opinion. Chief Justice Gibson and Justices Carter, Traynor, Spence and Schauer concurred, while only Justice McComb dissented.

34. See notes 25-27 *supra* and accompanying text.

35. 51 Cal. 2d 702, 709, 336 P.2d 525, 529 (1959).

36. If there was direct evidence to the contrary, then the use of inferences approved by the *Ernie* court would be improper; presumably future courts would allow the facts rather than the inferences to govern. Cottle v. Gibson, 200 Cal. App. 2d 1, 9, 19 Cal. Rptr. 82, 87 (1962); Kirkegaard v. McLain, 199 Cal. App. 2d 484, 491, 18 Cal. Rptr. 641, 643-44 (1962). *But see* Dooley's Hardware Mart v. Trigg, 270 Cal. App. 2d 337, 340, 75 Cal. Rptr. 745, 748 (1969), which questionably limited *Ernie* to its facts.

confusion in prior cases and the relative ease with which cases subsequent to *Ernie* have been decided.

III. The Elements of Agreed Boundaries and Boundaries by Acquiescence

A. Uncertainty

A prime requisite for the invocation and application of the doctrine of agreed boundaries and boundaries by acquiescence is that the boundary line be uncertain.[37] *Ernie* dealt extensively with uncertainty and sanctioned a liberal interpretation of it. In so doing it adhered to the basic meaning of uncertainty defined earlier by the court in *Nusbickel v. Stevens Ranch Co.*[38] which stated:

> The word "uncertainty" is used . . . to convey the idea that at the time of the location of the division line neither of the coterminous owners knew the true position of the line on the ground.[39]

According to the *Ernie* court, the basic criterion for uncertainty is lack of knowledge of the true line. This lack of knowledge may be founded on mistake. Further, the true location of the line need not be absolutely unascertainable, an accurate survey from the calls of the deed need not be impossible, nor does uncertainty even have to appear in the deed.[40] Thus *Ernie* clearly defined the scope of uncertainty.

Prior to *Ernie* there was no clear definition of uncertainty even though the very early cases set out a fairly consistent approach to this requirement. For instance, in *Sneed v. Osborn*,[41] the California Supreme Court stated that if the parties agreed to or acquiesced in a line for a proper length of time, it was irrelevant that they had acted as a result of mistake of ignorance as to the true line, or that the line agreed to was not correct as per the calls of the deed.[42] Thus the court established that it was the fact, not the nature and origin, of uncertainty that was important. For the next fifty years most courts continued to rely on this reasoning.[43]

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37. *See* notes 26-28 *supra* and accompanying text.
38. 187 Cal. 15, 200 P. at 651 (1921).
39. *Id.* at 19, 200 P. at 653.
40. *See* notes 24-25 *supra* and accompanying text.
41. 25 Cal. 619 (1864).
42. *Id.* at 626.
43. *E.g.*, Loustalot v. McKeel, 157 Cal. 634, 643, 108 P. 707, 711 (1910) (if parties mistaken in an agreement could invalidate established line, then no stability in such agreements); Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, 608 (1888) (dispute not element of doctrine); Cooper v. Vierra, 559 Cal. 282, 283 (1881) (line founded as result

The supreme court continued to refine the requirement of uncertainty in *Loustalot v. McKeel.*[44] There the court found that definite uncertainty between the parties was present because the respective deeds contained discrepancies in the description of the property.[45] Even if the line could have been ascertained, whether by survey or by some other acceptable method, the fact that the parties were uncertain about the true location of the line satisfied the requirement.[46] In effect the court held that the parties were under no duty to find the true boundary line. Further, following *Sneed,* the court stated that it was immaterial whether the parties were correct in believing that the line was exactly where they had established it.[47] Doubt and agreement based on such doubt were sufficient to satisfy the uncertainty requirement.[48] A year later, in *Price v. DeReyes,*[49] the court eliminated the requirement of a dispute as to the location of the true boundary, holding that uncertainty alone was sufficient.[50]

A final clarification, prior to *Ernie,* of the uncertainty requirement was provided in *Clapp v. Churchill,*[51] where, for the first time, the court specifically required that both parties be uncertain.[52] Additionally,

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of mistake as to true line upheld); Biggins v. Champlin, 59 Cal. 113, 116 (1881) (makes no difference parties erred as to true line).

Superficially, the early case of Smith v. Robarts, 2 Cal. Unrep. 604, 9 P. 104 (1885), appears to contradict the rule set out in *Sneed.* On careful examination, however, it squares with and cited *Sneed* as well as Biggins v. Champlin, 59 Cal. 113 (1881), as the authorities for the doctrine of agreed boundaries. The facts in *Smith* did not lend themselves to an application of the *Sneed* and *Biggins* doctrine. In *Smith,* both parties, though agreeing to the placement of a fence, recognized that the fence was not on the true boundary line and did not agree to establish a definite boundary by placement of the fence. Since there was no agreement to locate the boundary, the mistake doctrine was inapplicable. 2 Cal. Unrep. at 605-06, 9 P. at 105-06.

44. 157 Cal. 634, 108 P. 707 (1910).

45. *Id.* at 641, 108 P. at 710.

46. *Id.* at 641-42, 108 P. at 710-11.

47. *Id.* at 642, 108 P. at 711.

48. *Id.,* 108 P. at 710-11.

49. 161 Cal. 484, 119 P. 893 (1911).

50. *Id.* at 489, 119 P. at 895, *citing* Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, 608 (1888); *accord,* Schwab v. Donovan, 165 Cal. 360, 363-64, 132 P. 447 (1913).

51. 164 Cal. 741, 130 P. 1061 (1913).

52. *Id.* at 745, 130 P. at 1062. This was to prevent an illegal transfer of land. If one or both parties knew the true location of the boundary line, a transfer of land *not* pursuant to a written deed or contract was void under the Statute of Frauds. Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 459, 143 P. 754, 756 (1914); Lewis v. Ogram, 149 Cal. 505, 87 P. 60 (1906). Where both parties were uncertain, the courts avoided the Statute of Frauds problem by holding that such agreements were not transfers of land but only defined the land described in the deed. In Young v. Blakeman, 153 Cal. 477, 95 P. 888 (1908), the court stated:

anticipating *Ernie* by forty-six years, the court held that uncertainty could be inferred in the absence of "proved fact to the contrary—namely that there was no question or doubt or dispute between both parties over the boundary."[53] In a further extension, the court concluded that even though the uncertainty was inferred, it was nevertheless permissible to infer an agreement.[54]

These cases harmonized with each other, and stated principles later relied upon in *Ernie*. Yet in the very year that *Clapp* was decided, an appellate court wrote the first in a series of contrary and misleading cases, *Janke v. McMahon*.[55] Completely ignoring supreme court precedent, *Janke* directly contradicted *Sneed* and *Loustalot* and relied on Wisconsin law for authority for the ultimate disposition of the case.[56] The *Janke* court held that there was no uncertainty and hence no agreed boundary; it so held even though the parties were ignorant as to the true location of the boundary.[57] The court focused on the fact that the parties had the means of discovering the true line, *i.e.*, a survey based on the deed.[58] Thus the parties' ignorance of their error in determining the true location of the line negated a finding of uncertainty.[59] As a result neither party was estopped from claiming to the correct line.[60]

In light of prior California cases, the *Janke* court interpreted uncertainty too narrowly. Although the parties were unaware of the mistake, the absence of awareness did not negate the fact that there was actual

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> It is stated by the authorities that the line so agreed on becomes in legal effect the true line, that the agreement as to the line may be in parol and that it does not operate to convey title to the land which may lie between the agreed line and the true line, but that it fixes the line itself and the description [in the deed] carries title up to the agreed line, regardless of its accuracy; that the agreement as to the line is not in violation of the statute of frauds, [*sic*] because it does not transfer title; that the parties hold up to the agreed line by virtue of their original deeds and not by virtue of the parol agreement; that "the division line when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed," and that if more is thus given to one than the calls of his deed actually requires, he "holds the excess by the same tenure that he holds the main body of his lands."

Id. at 482-83, 95 P. at 890; *accord*, Loustalot v. McKeel, 157 Cal. 634, 643, 108 P. 707, 711 (1910); Dierssen v. Nelson, 138 Cal. 394, 398, 71 P. 456, 457 (1903); Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 P. 931, 932 (1891); Penn v. Lord Baltimore, 27 Eng. Rep. 1132, 1135 (Ch. 1750).

53. 164 Cal. 741, 746, 130 P. 1061, 1063 (1913).
54. *Id.*
55. 21 Cal. App. 781, 133 P. 21 (1913).
56. *Id.* at 788, 133 P. at 24.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

uncertainty.[61] The *Janke* decision, which retained its own peculiar following,[62] was unfortunate because it contributed significantly to the

61. *Sneed* and *Loustalot* specifically stated that mistake satisfied the requirement of uncertainty. *See* notes 41-43, 44-48 *supra* and accompanying text. A realistic appraisal of the facts in *Janke* demonstrates that uncertainty was present in that case. In *Janke*, the defendant's father obtained his lot in 1862 and built a house and fence thereon, both of which encroached on a strip of land adjacent to the east. There was no evidence that the defendant's father was aware of such encroachment. In 1890, the defendant became owner of this lot. The plaintiff never had possession of the disputed land. Though there was no specific agreement, the plaintiff did not claim the strip as her own until 1907. Further, there was no express uncertainty or dispute; however, without facts to the contrary, it must be assumed that the defendant's father was uncertain as to the true line when he made the improvements. Also, the plaintiff must have been uncertain since such a long time elapsed before she realized the discrepancies between her deed and the line up to which the defendant built.

62. *Janke* was primarily followed by the appellate courts. Many cases using the *Janke* rationale were decided solely on the issue of uncertainty, the erroneous principle being the turning point of the case. *E.g.*, Pra v. Bradshaw, 121 Cal. App. 2d 267, 263 P. 2d 52 (1953) (actual agreement present, but since true line properly described in deed, court found no uncertainty and therefore no agreed boundary); Rast v. Fischer, 107 Cal. App. 2d 129, 236 P.2d 393 (1951) (actual agreement, but because parties believed line agreed to was correct court found no uncertainty).

In Williams v. Barnett, 135 Cal. App. 2d 607, 612, 287 P.2d 789, 792 (1955), the court superficially appeared to base its decision on two findings: the line allegedly agreed to was not marked, and there was no uncertainty. However, the facts were that the plaintiff had occupied the land in dispute, building a garage on it, and that thirty to forty year old stakes, though of unknown origin, had marked the line up to where the plaintiff had occupied. *Id.* at 610-11, 287 P.2d at 791. Therefore, the court must have been persuaded by what it considered lack of uncertainty.

Contrary to *Loustalot* (*supra* note 55 and accompanying text) the *Williams* court believed that landowners had a duty to be familiar with the terms of their deeds. Citing *Janke*, 21 Cal. App. at 788, 133 P. at 24, the court stated that if a landowner "did not actually know the extent of his property and had the means of knowledge within reach, he would not be heard to say that a fence was located upon an accepted division line." 135 Cal. App. 2d at 612, 287 P.2d at 792. Following *Janke*, the court then stated that a boundary was certain when it could be made certain from the deed; a mistaken acquiescence in an incorrect boundary was a mistake binding neither party. *Id.*; *accord*, Meacci v. Kochergen, 141 Cal. App. 2d 207, 296 P.2d 573 (1956).

Other cases intoned the "*Janke* rule" without necessity as they could have been disposed of an alternative grounds. *E.g.*, Garret v. Cook, 89 Cal. App. 2d 98, 200 P.2d 21 (1948) (party claiming agreed boundary put on virtually no case, making only conclusory allegations in answer); Pedersen v. Reynolds, 31 Cal. App. 2d 18, 87 P.2d 51 (1939) (though court discussed lack of uncertainty due to mistake and possibility of determination of correct line from deed, there was direct testimony by party claiming agreed boundary that he built fence only as cattle barrier and neighbor accepted it as such); Agmar v. Solomon, 87 Cal. App. 127, 261 P. 1029 (1927) (no evidence of agreement). *Cf.* Pra v. Bradshaw, 121 Cal. App. 2d 267, 263 P.2d 52 (1953), where the court partially may have based its decision on the fact that one party to the agreement was 75 years old and "enfeebled by disease." *Id.* at 271, 263 P.2d at 54. Finally, there was one California Supreme Court case, Huddart v. McGirk, 186 Cal. 386, 199 P. 494 (1921), which although not citing to *Janke*, did adopt its rationale.

subsequent years of confusion in the California courts.[63]

Ernie did much to eliminate this confusion surrounding the uncertainty requirement. Its clear definition of the scope of uncertainty delineated a uniform standard which has been followed almost unanimously,[64] the few exceptions being easily distinguishable.[65] Post-*Ernie*

63. Although *Janke* was a primary cause of confusion in the California courts, many subsequent supreme court cases contradicted it. Mello v. Weaver, 36 Cal. 2d 456, 460, 224 P.2d 691, 693 (1950) (if only evidence of uncertainty is one party's assumption that certain location was true line, finding of uncertainty might not be supported; in case, more shown, and court approved inference of uncertainty from circumstances at time boundary placed); Park v. Powers, 2 Cal. 2d 540, 599, 42 P.2d 75, 79 (1935) (dictum); Moinz v. Peterman, 220 Cal. 429, 436, 31 P.2d 353, 365 (1934) (although coterminous owners believed they were locating fence on true boundary line, agreed boundary upheld as though owners uncertain). Some cases specifically attempted to refute the *Janke* argument that mistake vitiated uncertainty as did lack of knowledge. *E.g.*, Martin v. Lopes, 28 Cal. 2d 618, 170 P.2d 881 (1946), stated:

> [T]he intention of the parties not to claim except in accordance with the true line is entirely consistent with the doctrine of agreed boundaries. The application of the doctrine is not prevented by their belief that the fence was upon the line fixed by the deed, nor by the circumstance that the line of the deeds could be determined by a survey.
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> . . . [L]ack of knowledge by both parties of where the line is or should be drawn, is all that need be taken into consideration.

Id. at 626, 170 P.2d at 886. Note, however, that the court was somewhat hesitant about basing its holding on this rationale, since it added: "If it be assumed that some degree of uncertainty in ascertaining the true boundary by the calls of the deed is required, there is evidence of such uncertainty in the record." *Id.*; Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 19, 200 P. 651, 652-53 (1921); Silva v. Azevedo, 178 Cal. 495, 498, 173 P. 929, 930 (1918), *citing* Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893, 895 (1911).

Further, many appellate courts adhered to the precedent established by the supreme court. *E.g.*, Ball v. Harder, 167 Cal. App. 2d 168, 334, P.2d 84 (1959); Nutting v. Hulbert & Muffly, Inc., 155 Cal. App. 2d 464, 317 P.2d 1007 (1957); Cabellero v. Balamotis, 144 Cal. App. 2d 58, 300 P.2d 363 (1956); Morris v. Vossler, 110 Cal. App. 2d 678, 243 P.2d 43 (1952); Crook v. Leinenweaver, 100 Cal. App. 2d 790, 224 P.2d 891 (1950); Howatt v. Humboldt Milling Co., 61 Cal. App. 333, 214 P. 100 (1923); *see* York v. Horn, 154 Cal. App. 2d 209, 315 P.2d 912 (1957); Madera School Dist. v. Maggiorini, 146 Cal. App. 2d 390, 303 P.2d 803 (1956); Starry v. Lake, 135 Cal. App. 677, 28 P.2d 80 (1933); Raney v. Merritt, 73 Cal. App. 244, 238 P. 767 (1925).

64. Zachery v. McWilliams, 28 Cal. App. 3d 57, 61, 104 Cal. Rptr. 293, 295 (1972), discussed the inconsistencies in California cases, specifically noting the disagreement as to whether mistake is sufficient to meet the uncertainty requirement. This court expressly accepted *Ernie* as the conclusive authority. Janes v. LeDeit, 228 Cal. App. 2d 474, 39 Cal. Rptr. 559 (1964), stated that *Ernie*, "[a]s the latest expression by the Supreme Court, . . . appears to be the true and correct rule in California." *Id.* at 481 n.8, 39 Cal. Rptr. at 564 n.8.

65. *E.g.*, Schoenfeld v. Pritzker, 257 Cal. App. 2d 117, 64 Cal. Rptr. 592 (1967), in reliance on mediocre secondary authority (8 CAL. JUR. 2d, *Boundaries* § 38, at 761-63 (1963)) found that there was no uncertainty when a true location could be ascertained from monuments or notes. It may have been that the facts in the case were such that equity demanded the holding that there was acquiescence. There was a twenty-five year use of plaintiff's land by the defendant. Before the defendant began constructing

courts upheld uncertainty based on mistake[66] or lack of knowledge[67] and uncertainty proven by inference.[68] Further, although accurate surveys were possible, the courts held that uncertainty was not vitiated.[69]

B. Agreement, Acquiescence, or Acceptance

In delineating the elements of an agreed boundary, the *Ernie* court required both an agreement between owners and an acceptance or acquiescence in the line so agreed upon.[70] An agreement could be inferred based on long-standing acceptance of a marked boundary.[71] The *Ernie* court applied these principles when it inferred an agreement from an acquiescence which lasted twenty-six years. This was evidenced not only by fences "which might in and of themselves be of an

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permanent improvements on it, the plaintiff notified him of the error. Further, there was no agreement establishing a boundary, and the defendant never intended to claim beyond his own land. Theoretically, the court could have found a boundary by acquiescence, but since the occupation of the land was so nominal, the court may have believed that the equities were on the side of the true owner.

Kraus v. Griswold, 232 Cal. App. 2d 698, 43 Cal. Rptr. 139 (1965), was another maverick case. It cited *Ernie* in defining the extent of uncertainty, yet in direct opposition to *Ernie* it stated that there was no uncertainty when a survey from the deed would locate the boundary correctly. *Id.* at 706, 43 Cal. Rptr. at 148. The facts in this case indicate that the parties knew of the true line which had been determined by a survey made prior to their ownership of the land. This alone contravened a finding of uncertainty, without need for resort to suspect legal doctrines.

66. *E.g.*, Zachery v. McWilliams, 28 Cal. App. 3d 57, 62, 104 Cal. Rptr. 293, 296 (1972); Roman v. Ries, 259 Cal. App. 2d 65, 67-68, 66 Cal. Rptr. 120, 122 (1968); Janes v. LeDeit, 228 Cal. App. 2d 474, 482, 39 Cal. Rptr. 559, 566 (1964); *see* Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 942, 54 Cal. Rptr. 371, 373-74 (1966). *But see* Kraus v. Griswold, 232 Cal. App. 2d 698, 705, 711, 43 Cal. Rptr. 139, 145 (1965).

67. *E.g.*, Minson Co. v. Aviation Finance, 38 Cal. App. 3d 489, 495, 113 Cal. Rptr. 223, 227 (1974); Roman v. Ries, 259 Cal. App. 2d 65, 68, 66 Cal. Rptr. 120, 122 (1968); Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 942, 54 Cal. Rptr. 371, 373-74 (1966).

68. Zachery v. McWilliams, 28 Cal. App. 3d 57, 61-62, 104 Cal. Rptr. 293, 295 (1972); Vella v. Ratto, 17 Cal. App. 3d 737, 740-42, 95 Cal. Rptr. 72, 75 (1971) (follows *Ernie* although court did not cite); Kraemer v. Superior Oil Co., 240 Cal. App. 2d 642, 652, 49 Cal. Rptr. 869, 875 (1966); Kofl v. Dunn, 176 Cal. App. 2d 204, 211, 1 Cal. Rptr. 278, 283 (1959).

69. *E.g.*, Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 942, 54 Cal. Rptr. 371, 373 (1966); Janes v. LeDeit, 228 Cal. App. 2d 474, 481, 39 Cal. Rptr. 559, 566 (1964); *see* Kofl v. Dunn, 176 Cal. App. 2d 204, 209, 1 Cal. Rptr. 278, 283 (1959).

70. *See* note 24 *supra* and accompanying text.

71. *Id.*

uncertain, temporary or equivocal nature,"[72] but also by substantial structures firmly embedded in the ground.[73] While satisfying the requirement of acquiescence, these facts also met the requirement of agreement, the agreement being inferred from the acquiescence.[74] Thus the court's permissive language and its use of inference allowed the element of agreement to be satisfied not only by agreement implied by acquiescence but also by express agreement.[75]

Prior to *Ernie*, the courts often used inconsistent approaches in analyzing the elements of agreement and acquiescence.[76] Often distinctions were drawn between boundaries determined by agreement and those created by acquiescence.[77] Although the two were seen as closely, though never completely, interwoven, within that framework there were many variances.

In *Sneed v. Osborn*,[78] the supreme court held that as long as uncertainty was present and the statute of limitations was met,[79] a showing of either agreement or acquiescence would establish the boundary.[80] Similarly, many cases stated that acquiescence was evidence of an agreement, or that an agreement could be inferred from acquiescence in a specific line.[81] However, unlike *Sneed*, these cases did not weigh evidence of

72. 51 Cal. 2d 702, 708, 336 P.2d 525, 528 (1959).

73. *See* note 20 *supra.*

74. *Id.*

75. *Id.*

76. *See* notes 77-88 *infra* and accompanying text.

77. *See* Browder, *supra* note 2; *Boundary Litigation, supra* note 3.

78. 25 Cal. 619 (1864).

79. *Id.* at 626. Note that the court did not make the statute of limitations an absolute requirement but rather stated that it was called for only by "the better opinion." *Id.* This implied that a shorter length of time might be acceptable under certain circumstances.

80. *Id. See* Columbet v. Pacheco, 48 Cal. 395, 397 (1874).

81. Mello v. Weaver, 36 Cal. 2d 456, 462, 224 P.2d 691, 693 (1950); Hannah v. Pogue, 23 Cal. 2d 849, 856, 147 P.2d 572, 576 (1944); Roberts v. Brae, 5 Cal. 2d 356, 359, 54 P.2d 698, 699 (1936); Moniz v. Peterman, 220 Cal. 429, 435, 31 P.2d 353, 356 (1934); Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260, 18 P.2d 58, 59 (1933); Clapp v. Churchill, 164 Cal. 741, 745, 130 P. 1061, 1062-63 (1913); Ball v. Harder, 167 Cal. App. 2d 168, 172, 334 P.2d 84, 87 (1959); York v. Horn, 154 Cal. App. 2d 209, 211-12, 315 P.2d 912, 914 (1957); Madera School Dist. v. Maggiorini, 146 Cal. App. 2d 390, 392, 303 P.2d 803, 804 (1956); de Escobar v. Isom, 112 Cal. App. 2d 172, 176, 245 P.2d 1105, 1107 (1952); Copely v. Eade, 81 Cal. App. 2d 592, 593, 184 P.2d 698, 699 (1947); Swartzbaugh v. Sargent, 30 Cal. App. 2d 467, 474-76, 86 P.2d 895, 899-900 (1939); Southern Counties Gas Co. v. Eden, 118 Cal. App. 582, 586, 5 P.2d 654, 656 (1931); Raney v. Merritt, 73 Cal. App. 2d 790, 792, 224 P.2d 891, 893-94 (1925); Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921); Perich v. Maurer, 29 Cal. App. 293, 297-98, 155 P. 471, 472 (1915). *But see* Huddart v. McGirk,

acquiescence as conclusively as evidence of a direct agreement. But these cases did hold that without evidence to the contrary, acquiescence would be presumed to be based on an underlying agreement.[82]

Some courts, however, found that acquiescence alone was not sufficient to establish an agreement.[83] The majority of cases actually did not dispute that acquiescence could substitute for an express agreement,[84] though that was stated at least once.[85] Rather, they held that acquiescence without any other element was insufficient.[86] A few courts held that a boundary was not established by acquiescence in a fence or other physical manifestation creating the appearance of a boundary when such fence was not intended as a boundary marker.[87] Finally the courts often treated agreement and acquiescence as two separate elements of one single doctrine.[88]

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186 Cal. 386, 388-89, 199 P. 494, 495 (1921); Fallert v. Hamilton, 109 Cal. App. 2d 399, 402-03, 240 P.2d 1007, 1009-10 (1952). *See also* Drew v. Mumford, 160 Cal. App. 2d 271, 325 P.2d 240 (1958); Williams v. Barnett, 135 Cal. App. 2d 607, 287 P.2d 789 (1955).

82. Mello v. Weaver, 36 Cal. 2d 456, 461, 224 P.2d 691, 694 (1950); Hannah v. Pogue, 23 Cal. 2d 849, 857, 147 P.2d 572, 576 (1944); Roberts v. Brae, 5 Cal. 2d 356, 360, 54 P.2d 698, 700 (1936). *See also* Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921).

83. Dauberman v. Grant, 198 Cal. 586, 592, 246 P. 319, 321 (1926); Staniford v. Trombly, 181 Cal. 372, 375, 186 P. 599, 600 (1919); Garrett v. Cook, 89 Cal. App. 2d 98, 103, 200 P.2d 21, 24 (1948); Johnson v. Buck, 7 Cal. App. 2d 197, 200-01, 46 P.2d 771, 773 (1935); Dibirt v. Bopp, 4 Cal. App. 2d 541, 543, 41 P.2d 174, 175 (1935); Phelan v. Drescher, 92 Cal. App. 393, 397, 268 P. 464, 467 (1928); Agmar v. Solomon, 87 Cal. App. 127, 138, 261 P. 1029, 1034 (1927) (proof of agreed location should be clear); Hill v. Schumacher, 45 Cal. App. 362, 365, 187 P. 437, 438 (1919). *See, e.g.* Ross v. Burkhard Inv. Co., 90 Cal. App. 201, 208, 265 P. 982, 985 (1928).

84. *See* Dauberman v. Grant, 198 Cal. 586, 246 P. 319 (1926); Staniford v. Trombly, 181 Cal. 382, 186 P. 599 (1919); Johnson v. Buck, 7 Cal. App. 2d 197, 46 P.2d 771 (1935); Dibirt v. Bopp, 4 Cal. App. 2d 541, 41 P.2d 174 (1935); Phelan v. Drescher, 92 Cal. App. 393, 268 P. 465 (1928); Janke v. McMahon, 21 Cal. App. 781, 133 P. 21 (1813).

85. *See* Hill v. Schumacher, 45 Cal. App. 362, 187 P. 437 (1919).

86. *E.g.*, Johnson v. Buck, 7 Cal. App. 2d 197, 200-01, 46 P.2d 771, 773 (1935); Phelan v. Drescher, 92 Cal. App. 393, 397, 268 P. 465, 467 (1928). *See* Dauberman v. Grant, 198 Cal. 586, 592, 246 P. 319, 321 (1926); Garrett v. Cook, 89 Cal. App. 2d 98, 102-03, 200 P.2d 21, 24 (1948); Dibirt v. Bopp, 4 Cal. App. 2d 541, 543, 41 P.2d 174, 175 (1935).

87. *See, e.g.*, Staniford v. Trombly, 181 Cal. 372, 375, 186 P. 599, 600 (1919); Pilibos v. Gramas, 104 Cal. App. 2d 353, 356, 231 P.2d 502, 504-05 (1951); Hill v. Schumacher, 45 Cal. App. 362, 365, 187 P. 437, 438 (1919).

88. *E.g.*, Martin v. Lopes, 28 Cal. 2d 618, 625, 170 P.2d 881, 885 (1946); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651 (1921); Silva v. Azevedo, 178 Cal. 495, 499, 173 P. 929 (1918); Wheatley v. San Pedro, Los Angeles & Salt Lake R.R., 169 Cal. 505, 514, 147 P. 135, 138 (1915), *citing* Helm v. Wilson, 76 Cal. 476, 485, 18 P.

The distinctions created by these courts need not be viewed as completely exclusive, but they are indicative of the confusion which encompassed this doctrine. Yet in comparison with the confusion that surrounded the uncertainty factor, agreement received a relatively coherent interpretation and application. Thus the differences which did arise may be more easily reconciled. The bulk of the cases required both agreement and acquiescence.[89] Usually, long acquiescence raised an inference of an agreement.[90] Some cases seemed to modify the use of inference by only allowing it to arise when express uncertainty was present.[91] Upon a careful reading, however, it is apparent that the courts were not qualifying the use of an inference of agreement by acquiescence. Rather they stated only that acquiescence alone, however much it resembled agreement, was not enough to support a finding of an

604, 608 (1888); Schwab v. Donovan, 165 Cal. 360, 363, 132 P. 447, 449 (1913); Young v. Blakeman, 153 Cal. 477, 481, 95 P. 888, 889-90 (1903); Steele v. Schuler, 211 Cal. App. 2d 698, 704-05, 27 Cal. Rptr. 569, 579 (1963); Shelton v. Malette, 144 Cal. App. 2d 370, 374, 301 P.2d 18, 21 (1956); Morris v. Vossler, 110 Cal. App. 2d 678, 682, 243 P.2d 43, 46 (1952); *In re* Barlow, 89 Cal. App. 787, 789-90, 265 P. 394, 395 (1928). *See* Frericks v. Sorensen, 113 Cal. App. 2d 759, 761, 248 P.2d 949, 951 (1952).

89. *E.g.*, Martin v. Lopes, 28 Cal. 2d 618, 625, 170 P.2d 881, 885 (1946); Roberts v. Brae, 5 Cal. 2d 356, 358, 54 P.2d 698, 699 (1936); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651, 651-52 (1921); Young v. Blakeman, 153 Cal. 477, 481, 95 P. 888, 889-90 (1908); Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 P. 931; White v. Spreckels, 75 Cal. 610, 616, 17 P. 715, 717 (1888); Swartzbaugh v. Sargent, 30 Cal. App. 2d 467, 475, 86 P.2d 895, 899 (1939); Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921). It has been uniformly held that to satisfy the agreement requirement, acquiescence must be in a fence or other monument designating an actual boundary; acquiescence in a fence as a barrier or for some other purpose will not suffice. Staniford v. Trombly, 181 Cal. 372, 375, 186 P. 599, 600 (1919) (fence as cattle barrier); Lewis v. Ogram, 149 Cal. 505, 508-10, 87 P. 59, 61-62 (1906) (use of fence to pass title to land); Dierssen v. Nelson, 138 Cal. 394, 399, 71 P. 456, 457 (1903) (fence built for temporary purposes or as result of fraud did not establish agreed boundary); Smith v. Robarts, 2 Cal. Unrep. 604, 605, 9 P. 104, 105 (1885) (agreement to fence but both parties knew it was built on erroneous line and did not consider agreement binding); Quinn v. Windmiller, 67 Cal. 461, 464, 8 P. 14, 16 (1885) (fence never agreed to as boundary).

90. Mello v. Weaver, 36 Cal. 2d 456, 460, 224 P.2d 691, 694 (1950); Hannah v. Pogue, 23 Cal. 2d 849, 857, 147 P.2d 572, 576 (1944); Roberts v. Brae, 5 Cal. 2d 356, 359, 54 P.2d 698, 699-700 (1936); Moniz v. Peterman, 220 Cal. 429, 435, 31 P.2d 353, 356 (1934); Clapp v. Churchill, 164 Cal. 741, 745-46, 130 P. 1061, 1063 (1913); Morris v. Vossler, 110 Cal. App. 2d 678, 681, 243 P.2d 43, 45 (1952); Copely v. Eade, 81 Cal. App. 2d 592, 593, 184 P.2d 698, 699 (1947); Southern Counties Gas Co. v. Eden, 118 Cal. App. 582, 586, 5 P.2d 654, 656 (1931); Board of Trustees v. Miller, 54 Cal. App. 102, 104, 201 P. 952, 953 (1921).

91. *E.g.*, Drew v. Mumford, 160 Cal. App. 2d 271, 274, 325 P.2d 240, 242 (1958); Meacci v. Kochergen, 141 Cal. App. 2d 207, 212, 296 P.2d 573, 576 (1956); Williams v. Barnett, 135 Cal. App. 2d 607, 612, 287 P.2d 789, 792 (1955).

agreed boundary.[92] Thus, despite a few problem areas, the agreement requirement needed only clarification rather than a complete overhaul.

The *Ernie* court voiced this clarification. After *Ernie*, the results of a given case could be predicted with reasonable certainty. The majority of courts, relying on the elements enumerated and defined in *Ernie*,[93]

92. *See* note 91 *supra*. Almost every case permitting an inference of an agreement from long acquiescence also found express uncertainty. *E.g.*, Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353 (1934); Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58 (1933); Ball v. Harder, 167 Cal. App. 2d 168, 334 P.2d 84 (1959); York v. Horn, 154 Cal. App. 2d 209, 315 P.2d 912 (1957); Starry v. Lake, 135 Cal. App. 677, 28 P.2d 80 (1933); Raney v. Merritt, 73 Cal. App. 244, 238 P. 787 (1925). Where acquiescence was present, but actual uncertainty was lacking, the courts would not find an agreed boundary. *E.g.*, Clapp v. Churchill, 164 Cal. 741, 744, 746, 130 P. 1061, 1063 (1913); Fallert v. Hamilton, 109 Cal. App. 2d 399, 403, 240 P.2d 1007, 1010 (1952); Johnson v. Buck, 7 Cal. App. 2d 197, 201, 46 P.2d 771, 773 (1935); Phelan v. Drescher, 92 Cal. App. 393, 397-98, 268 P. 465, 467 (1928).

Some courts took a more liberal view, however, and were willing to infer uncertainty as well as agreement. *E.g.*, Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921); Perich v. Maurer, 29 Cal. App. 293, 297, 155 P. 471, 472 (1915); *see* Copely v. Eade, 81 Cal. App. 2d 592, 595, 184 P.2d 698, 699-700 (1947) (long acquiescence presumptive evidence of agreed boundary based on uncertainty; presumption overborne by direct evidence).

There is a line of cases which held, in essence, that mere acquiescence in a fence or other substantial structure did not satisfy the agreement requirement even when uncertainty and all other elements actually were present. *E.g.*, Garrett v. Cook, 89 Cal. App. 2d 98, 200 P.2d 21 (1948); Pedersen v. Reynolds, 31 Cal. App. 2d 18, 87 P.2d 51 (1939); Dibirt v. Bopp, 4 Cal. App. 2d 541, 41 P.2d 174 (1935); Agmar v. Solomon, 87 Cal. App. 127, 261 P. 1029 (1927); Hill v. Schumacher, 45 Cal. App. 362, 187 P. 437 (1919). This line of cases reflected only a minority position. It strongly conflicted with the majority view which held that long-standing acquiescence supported an adequate inference of agreement. Some courts had additional reasons for refusing to accept acquiescence as agreement, and these reasons may have been the true bases for the decisions. *E.g.*, Garrett v. Cook, 89 Cal. App. 2d 98, 103, 200 P.2d 21, 24 (1948) (mere acquiescence in undetermined boundary line insufficient); Pedersen v. Reynolds, 31 Cal. App. 2d 18, 25, 27, 87 P.2d 51, 55, 56 (1939) (acquiescence must be in fence as boundary and not simply as cattle barrier); Hill v. Schumacher, 45 Cal. App. 362, 365, 187 P. 437, 438 (1919) (no evidence of reason for building a fence; possibly built to avoid future disputes as to ownership of fence). Closely analogous to this minority position are the few cases in which the courts flatly refused to find or infer an agreement despite evidence to the contrary. *E.g.*, Janke v. McMahon, 21 Cal. App. 781, 788, 133 P. 21, 24 (1913). However, some apparently inconsistent cases can be reconciled with the majority position. For instance, in Pra v. Bradshaw, 121 Cal. App. 2d 267, 269, 263 P.2d 52, 53 (1953), the court may have been justified in holding that the agreement element was not established because the evidence was insufficient to support such a finding.

93. *But see* Vella v. Ratto, 17 Cal. App. 3d 737, 95 Cal. Rptr. 72 (1971); Kraemer v. Superior Oil Co., 240 Cal. App. 2d 642, 49 Cal. Rptr. 869 (1966); Link v. Cole Inv. Co., 199 Cal. App. 2d 180, 18 Cal. Rptr. 441 (1962); Lusk v. Krejci, 187 Cal. App. 2d 553, 9 Cal. Rptr. 703 (1960). These cases ignored or neglected to cite *Ernie*.

simply applied them to specific factual situations. Agreement was readily inferred from circumstantial evidence,[94] especially long acquiescence in a particular line.[95] Although no court directly contradicted or overlooked the *Ernie* principles, a few cases failed to cite *Ernie* as authority.[96] Thus far only one case, *Dooley's Hardware Mart v. Trigg*,[97] specifically distinguished and limited *Ernie* to its facts. There the court apparently did not approve of what it believed were relaxed standards set by the *Ernie* court.[98] It stated that it was not required to infer agreements in all cases and would do so only where two elements were present. First, that the period of acquiescence from which an agreement was inferred was very long, and second, that there was no specific evidence offered in rebuttal to the inference.[99] In *Dooley's* acquiescence was only for eight years, and one party testified that there had been no agreement.[100] Relying on the principles it had just pronounced, the court refused to allow an inference of an agreement, and thus no agreed boundary was found.[101]

Dooley's attempted limitation of *Ernie* was actually unnecessary. The facts in *Dooley's* were such that the doctrine set down in *Ernie* was applicable and would have prevented a finding of an agreed boundary. In *Dooley's*, although a fence had been built and acquiesced in for eight years, it was built not to mark a boundary, but only to comply with a city ordinance requiring a fence around parking lots.[102] The trial court correctly decided the case by finding there was no acquiescence in the fence as a boundary.[103] All prior cases required acquiescence in a fence

94. *E.g.*, Zachery v. McWilliams, 28 Cal. App. 3d 57, 60, 104 Cal. Rptr. 293, 294 (1972); Vella v. Ratto, 17 Cal. App. 3d 737, 742, 95 Cal. Rptr. 72, 75-76 (1971); Duncan v. Peterson, 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744, 747 (1970); Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 943, 54 Cal. Rptr. 371, 374 (1966); Kraemer v. Superior Oil Co., 240 Cal. App. 2d 642, 651-52, 49 Cal. Rptr. 869, 876 (1966); Janes v. LeDeit, 228 Cal. App. 2d 474, 484, 39 Cal. Rptr. 559, 566 (1964).

95. *E.g.*, Zachery v. McWilliams, 28 Cal. App. 3d 57, 60, 104 Cal. Rptr. 293, 294 (1922); Vella v. Ratto, 17 Cal. App. 3d 737, 742, 95 Cal. Rptr. 72, 75-76 (1971); Duncan v. Peterson, 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744, 747 (1970); Kraemer v. Superior Oil Co., 240 Cal. App. 2d 642, 651, 49 Cal. Rptr. 869, 876 (1966); Janes v. LeDeit, 228 Cal. App. 2d 474, 484, 39 Cal. Rptr. 559, 566 (1964).

96. *See* note 93 *supra* and accompanying text.

97. 270 Cal. App. 2d 337, 75 Cal. Rptr. 745 (1969).

98. *Id.* at 340, 75 Cal. Rptr. at 748.

99. *Id.*

100. *Id.*

101. *Id.* at 339-41, 75 Cal. Rptr. at 748-49.

102. *Id.* at 338, 75 Cal. Rptr. at 748.

103. *Id.*

as a boundary and not for some other purpose.[104] While not expressly discussed in *Ernie*, this requirement can be inferred from the case despite the liberality of the elements it announced. *Ernie* never intimated that acquiescence in a line for purposes other than a boundary would fulfill the agreement requirement.[105] It would be contravening all logic to so hold, for the very basis and purpose of this doctrine centers on the determination of *boundaries*. Thus, the *Dooley's* court should have relied on the decision in the trial court. Aside from *Dooley's*, however, the cases have followed *Ernie*.[106] If such concurrence continues, California will have a definitive doctrine of agreed boundaries.

C. *The Statute of Limitations and Substantial Loss*

One element enumerated but only superficially discussed in *Ernie* was that an agreed boundary or boundary by acquiescence must be fixed for a period equal to the statute of limitations or under such circumstances that change of its position would cause substantial loss.[107] Acquiescence for a period equal to the statute of limitations was not subject to interpretation since the period was fixed by Code of Civil Procedure section 318.[108] However, it was prudent that the court stated the substantial loss element in rather general terms. Substantial loss is an equitable concept which courts may apply in lieu of the statute of limitations.[109] Therefore, the circumstances requiring its application will be unique and should be left to the court's discretion. This generalization encouraged diversity. Yet in this instance, it provided a healthy accommodation for the equitable factors usually present in boundary dispute cases, and unlike earlier rulings, was not the result of legal misperceptions or changes in the doctrine itself.

There was no single, definite approach to the statute of limitations/substantial loss issue prior to *Ernie*, but it was seldom a serious problem. Cases rarely turned on this sole issue. Instead, most revolved around findings of uncertainty, agreement, or both.[110] In fact, a few cases

104. *See* note 89 *supra* and accompanying text.
105. 51 Cal. 2d 702, 708, 336 P.2d 525, 528-29 (1959).
106. *See* notes 93-95 *supra* and accompanying text.
107. *See* note 25 *supra* and accompanying text.
108. *See* note 21 *supra* and accompanying text.
109. Janes v. LeDeit, 228 Cal. App. 2d 474, 488, 39 Cal. Rptr. 559, 569 (1964).
110. *E.g.*, Mello v. Weaver, 36 Cal. 2d 456, 224 P.2d 691 (1950); Hannah v. Pogue, 23 Cal. 2d 849, 147 P.2d 572 (1944); Huddart v. McGirk, 186 Cal. 386, 199 P. 494 (1921); Clapp v. Churchill, 164 Cal. 741, 130 P. 1061 (1913); Agmar v. Solomon 87 Cal. App. 127, 261 P. 1029 (1927); Hill v. Schumacher, 45 Cal. App. 362, 187 P. 437 (1919).

never mentioned the statute of limitations or substantial loss[111] or its equivalent.[112] Nevertheless, it should be noted that the statute of limitations was met in each case where the court found an agreed boundary or boundary by acquiescence.[113]

As an alternative to the modern doctrine of agreed boundaries, some early courts used a general theory of estoppel which was established by "long acquiescence."[114] Similarly, later decisions, though not based on this estoppel theory, also used long acquiescence as the standard to be met.[115] In these cases acquiescence always was equal to at least the period required by the statute of limitations,[116] thus creating no anomalies in the outcome of the cases. Even if a court required the statute of limitations to be met, it still often independently used long acquiescence as strong evidence of the existence of an agreed boundary.[117]

Many cases did not allow a showing of substantial loss to substitute for the statute of limitations.[118] Such refusal, however, was of no

111. *E.g.*, Williams v. Barnett, 135 Cal. App. 2d 607, 287 P.2d 789 (1955); Talmadge v. Moore, 98 Cal. App. 2d 481, 220 P.2d 558 (1950).

112. Many early cases recognized concepts similar to substantial loss. *E.g.*, Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260-61, 18 P.2d 58, 59 (1933); *citing inter alia*, Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921) and Southern Counties Gas Co. v. Eden, 118 Cal. App. 582, 586, 5 P.2d 654, 656 (1931) ("for such length of time that neither ought to be allowed to deny the correctness of its location"); *accord*, Pilibos v. Gramas, 104 Cal. App. 2d 353, 356, 231 P.2d 502, 504 (1951); Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 P. 931, 932 (1891) ("for a considerable period").

113. *See* note 111 *supra* and accompanying text.

114. Burris v. Fitch, 76 Cal. 395, 398-99, 18 P. 864, 866 (1888); Biggins v. Champlin, 59 Cal. 113, 116-17 (1881). *See* Columbet v. Pacheco, 48 Cal. 395, 397 (1874). *See, e.g.*, Copely v. Eade, 81 Cal. App. 2d 592, 595, 184 P.2d 698, 699-700 (1947).

115. *E.g.*, Mello v. Weaver, 36 Cal. 2d 456, 461-62, 224 P.2d 691, 694 (1950) (30 years); de Escobar v. Isom, 112 Cal. App. 2d 172, 175-76, 245 P.2d 1105, 1107 (1952) (over 70 years); *see* Hannah v. Pogue, 23 Cal. 2d 849, 851, 147 P.2d 572, 576 (1944) (over 20 years); Moniz v. Peterman, 220 Cal. 429, 435, 31 P.2d 353, 356 (1934) (12 years); City of Alameda v. City of Oakland, 198 Cal. 566, 577-78, 246 P. 69, 73 (1926) (at least 35 years); Nutting v. Hulbert & Muffly Inc., 155 Cal. App. 2d 464, 468, 317 P.2d 1007, 1009 (1957) (over 30 years); Starry v. Lake, 135 Cal. App. 677, 682-83, 28 P.2d 80, 82 (1933) (over 60 years); Perich v. Maurer, 29 Cal. App. 293, 297, 155 P. 471, 472 (1915) (40 years).

116. *See* note 115 *supra* and accompanying text.

117. *E.g.*, Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, 608 (1888); Cooper v. Vierra, 59 Cal. 282, 283 (1881); York v. Horn, 154 Cal. App. 2d 209, 211, 315 P.2d 912, 915 (1957); Morris v. Vossler, 110 Cal. App. 2d 678, 681, 243 P.2d 43, 45 (1952); *see* Phelan v. Drescher, 92 Cal. App. 393, 397-98, 268 P. 465, 467 (1928).

118. *E.g.*, Wheatley v. San Pedro, Los Angeles & Salt Lake R.R., 169 Cal. 505, 514, 147 P. 135, 138 (1915), *citing* Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, 608 (1888); Loustalot v. McKeel, 157 Cal. 634, 641-42, 108 P. 707, 710 (1910); White v. Spreckels,

consequence as the statute of limitations in each case was met.[110] No case has been found in which the court held against a party solely due to failure to meet the statutory period.[120] An impressive number of pre-*Ernie* cases provided for use of either the statute of limitations or substantial loss.[121] These cases were precursors of *Ernie's* liberal and modern view.

The vast majority of the cases subsequent to *Ernie* recognize substantial loss as an alternative to the statute of limitations.[122] Only a few cases neglected to mention this alternative.[123] This omission is imma-

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75 Cal. 610, 616, 17 P. 715, 717 (1888); Morris v. Vossler, 110 Cal. App. 2d 678, 682, 243 P.2d 43, 46 (1952); Phelan v. Drescher, 92 Cal. App. 393, 397-98, 268 P. 465, 467 (1928); Raney v. Merritt, 73 Cal. App. 244, 250, 238 P. 767, 769 (1925); *see* Martin v. Lopes, 28 Cal. 2d 618, 170 P.2d 881 (1946) which stated:

> Whether the period of acquiescence may be shortened by the construction of valuable improvements on the theory of estoppel or otherwise . . . are not questions involved in this case.

Id. at 625, 170 P.2d at 885.

119. *See* note 117 *supra* and accompanying text.

120. *But cf.* Agmar v. Solomon, 87 Cal. App. 127, 261 P. 1029 (1927). The court, though recognizing substantial loss as an alternative to the statute of limitations, nevertheless neglected to discuss it. *Id.* at 137-38, 261 P. at 1033-34. Although the defendant had built a house on the land in dispute, the court found there was no agreed boundary since the statute of limitations had not been met. *Id.* at 136-37, 261 P. at 1033. This was not the sole basis for the decision. The court also found no agreement by the parties. *Id.* at 137, 261 P. at 1034.

121. *E.g.*, Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260-61, 18 P.2d 58, 59 (1933); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651, 652 (1921); Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 459, 143 P. 754, 756 (1914); Young v. Blakeman, 153 Cal. 477, 481, 95 P. 888, 890 (1908); Lewis v. Ogram, 149 Cal. 505, 508, 87 P. 60, 61 (1906); Sneed v. Osborn, 25 Cal. 619, 626-27 (1868); Steele v. Shuler, 211 Cal. App. 2d 698, 704-05, 27 Cal. Rptr. 569, 572 (1963); Shelton v. Malette, 144 Cal. App. 2d 370, 374, 301 P.2d 18, 21 (1956); Garrett v. Cook, 89 Cal. App. 2d 98, 108, 200 P.2d 21, 24 (1948); *see* Silva v. Azevedo, 178 Cal. 495, 499, 173 P. 929, (1918); Needham v. Collamer, 94 Cal. App. 2d 609, 611-12, 211 P.2d 308, 309 (1949); Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921). *But see* Draper v. Griffin, 61 Cal. App. 2d 281, 284, 142 P.2d 772, 774-75 (1943).

122. *E.g.*, French v. Brinkman, 60 Cal. 2d 547, 551, 35 Cal. Rptr. 289, 292, 387 P.2d 1, 4 (1963); Zachery v. McWilliams, 28 Cal. App. 3d 57, 60, 104 Cal. Rptr. 293, 294 (1972); Duncan v. Peterson, 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744, 746 (1970); Dalusio v. Boone, 269 Cal. App. 2d 253, 260, 75 Cal. Rptr. 287, 292 (1969); Roman v. Ries, 259 Cal. App. 2d 65, 67, 66 Cal. Rptr. 120, 121-22 (1960); Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 941, 54 Cal. Rptr. 371, 373 (1966); Janes v. LeDeit, 228 Cal. App. 2d 474, 480-81, 488-89, 39 Cal. Rptr. 559, 564, 569 (1964); McCormick v. Appleton, 225 Cal. App. 2d 591, 595, 37 Cal. Rptr. 544, 547 (1964); Fobbs v. Smith, 202 Cal. App. 2d 209, 214, 20 Cal. Rptr. 545, 548 (1962); Kirkegaard v. McLain, 199 Cal. App. 2d 484, 488-89, 18 Cal. Rptr. 641, 643 (1962); Kofl v. Dunn, 176 Cal. App. 2d 204, 209, 1 Cal. Rptr. 278, 281-82 (1949).

123. *E.g.*, Minson Co. v. Aviation Finance, 38 Cal. App. 3d 489, 495, 113 Cal. Rptr. 223, 226 (1974); Vella v. Ratto, 17 Cal. App. 3d 737, 739, 95 Cal. Rptr. 72, 73 (1971);

terial in those cases, since the statute of limitations was met. Yet such omission reflected judicial carelessness and could lead again to an era of confusion like that characterized by the pre-*Ernie* cases.

A few cases opted to use the "long acquiescence" theory[124] in lieu of the *Ernie* doctrine.[125] Although the theory did not directly conflict with *Ernie*, neither was it as broad since it failed to include the substantial loss concept. Substantial loss can be an important factor in an agreed boundary case, as demonstrated in *Roman v. Ries*.[126] There the court found an agreed boundary although the statute of limitations had not been met; the court's rationale was that the defendants "would suffer substantial loss if denied the benefit of the agreed boundary line."[127] As this case once again demonstrates, it is important that the courts faithfully adhere to the *Ernie* doctrine. *Ernie* delineated a clear set of requirements designed to settle boundary disputes in the most just fashion possible. Thus, it is essential that *Ernie* be followed.

IV. The Residue of Uncertainty

The court in *Ernie* substantially eliminated the confusion regarding agreed boundaries and boundaries by acquiescence. One omission, however, left a residue of the instability which formerly characterized the doctrine.[128] Although the *Ernie* court found that acquiescence in a fence led to the inference of agreement,[129] it neglected to deal with the issue of the necessity of physical designation of and possession or improvements up to the agreed line.

Prior to *Ernie*, many courts required that the agreed line be "speci-

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Kraemer v. Superior Oil Co., 240 Cal. App. 2d 642, 652, 49 Cal. Rptr. 869, 876 (1966). *Vella* and *Kraemer* cited to Morris v. Vossler, 110 Cal. App. 2d 678, 682, 243 P.2d 43, 46 (1952), a case prior to *Ernie*, for the agreed boundary requirements. *Minson* neglected to mention it, though it cited *Ernie* as authority.

124. *See* notes 114-16 *supra* and accompanying text.

125. Vella v. Ratto, 17 Cal. App. 3d 737, 740-42, 95 Cal. Rptr. 72, 75 (1971); Dooley's Hardware Mart v. Trigg, 270 Cal. App. 2d 337, 340-41, 75 Cal. Rptr. 745, 748 (1969); Cottle v. Gibbon, 200 Cal. App. 2d 1, 9, 19 Cal. Rptr. 82, 87 (1962); *see* Kraemer v. Superior Oil Co., 240 Cal. App. 2d 642, 653, 49 Cal. Rptr. 869, 876 (1966).

126. 259 Cal. App. 2d 65, 66 Cal. Rptr. 120 (1960). In this case, the defendants purchased land adjoining that of the plaintiff's predecessor. Because the defendants were uncertain as the location of the boundary, the predecessor, purporting to know the true line, pointed it out to them. The defendants made improvements up to this agreed line to which the predecessor acquiesced. *Id.*, 66 Cal. Rptr. at 121.

127. *Id.* at 70, 66 Cal. Rptr. at 123.

128. *E.g.*, Aborigine Lumber Co. v. Hyman, 245 Cal. App. 2d 938, 941-42, 54 Cal. Rptr. 371, 374 (1966). *See* notes 147-55 *infra* and accompanying text.

129. *See* notes 70-73 *supra* and accompanying text.

fied, definite and certain."[130] This often took the form of a physical manifestation or marking of the agreed line.[131] Some courts demanded that substantial improvements be made on the disputed land in order to find that an agreement had occurred.[132] Occasionally, building up to the agreed line was acceptable.[133] In other cases, building up to the agreed line was not specifically required;[134] rather, physical marking by

130. Williams v. Barnett, 135 Cal. App. 2d 607, 612, 287 P.2d 789, 792 (1955), *citing* Garrett v. Cook, 89 Cal. App. 2d 98, 103, 200 P.2d 21, 24 (1948); *accord,* Roberts v. Brae, 5 Cal. 2d 356, 359, 54 P.2d 698, 699 (1936); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651, 652 (1921); Loustalot v. McKeel, 157 Cal. 634, 640, 108 P. 707, 710 (1910); Young v. Blakeman, 153 Cal. 477, 481, 95 P. 888, 890 (1908); Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 P. 931 (1891); White v. Spreckels, 75 Cal. 610, 616, 17 P. 715, 717 (1888); Steele v. Shuler, 211 Cal. App. 2d 698, 704, 27 Cal. Rptr. 569, 572 (1963); Meacci v. Kochergen, 141 Cal. App. 2d 207, 212-13, 296 P.2d 573, 576 (1956); Phelan v. Drescher, 92 Cal. App. 393, 397, 268 P. 465, 467 (1928); *see* Moniz v. Peterman, 220 Cal. 429, 436, 31 P.2d 353, 356 (1934). *Cf.* Needham v. Collamer, 94 Cal. App. 2d 609, 612, 211 P.2d 308, 310 (1949). *But see* Carr v. Schomberg, 104 Cal. App. 2d 850, 859, 232 P.2d 597, 602 (1951).

131. *E.g.,* Martin v. Lopes, 28 Cal. 2d 618, 623, 626, 170 P.2d 881, 884 (1946); Roberts v. Brae, 5 Cal. 2d 356, 358, 54 P.2d 698, 699 (1936); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651 (1921), *citing* Young v. Blakeman, 153 Cal. 477, 481, 95 P. 883, 890 (1908); Silva v. Azevedo, 178 Cal. 495, 497, 173 P. 929, 930 (1918); Loustalot v. McKeel, 157 Cal. 634, 640, 108 P. 707, 710 (1910); Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, 608 (1888); Morris v. Vossler, 110 Cal. App. 2d 678, 682, 243 P.2d 43, 45 (1952); Pilibos v. Gramas, 104 Cal. App. 2d 353, 356, 231 P.2d 502, 504 (1951); Garrett v. Cook, 89 Cal. App. 2d 98, 103, 200 P.2d 21, 24 (1948). *See, e.g.,* Moniz v. Peterman, 220 Cal. 429, 436, 31 P.2d 353, 356 (1934); Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893, 895 (1911); White v. Spreckels, 75 Cal. 610, 616, 17 P. 710, 717 (1888); Williams v. Barnett, 135 Cal. App. 2d 608, 612, 287 P. 789, 792 (1955).

132. Pilibos v. Gramas, 104 Cal. App. 2d 353, 356, 231 P.2d 502, 504 (1951). The court stated that substantial improvements made in reliance on mutual agreements were sometimes considered, but were not controlling in the absence of the necessary agreement. Other courts stated that parties must build up to the line designated. What type and how much building was necessary was not elaborated upon. *E.g.,* Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651, 652 (1921) (in lieu of marking); Young v. Blakeman, 153 Cal. 477, 481, 95 P. 883, 890 (1908) (in lieu of marking); *see* Roberts v. Brae, 5 Cal. 2d 356, 359 (1944); Silva v. Azevedo, 178 Cal. 495, 499, 173 P. 929, 930 (1918); Williamson v. Pratt, 37 Cal. App. 363, 369, 174 P. 114, 116 (1918); Perich v. Maurer, 29 Cal. App. 293, 297, 155 P. 471, 472 (1915).

133. *E.g.,* Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651 (1921), *citing* Young v. Blakeman, 153 Cal. 477, 481, 95 P. 883, 890 (1908); Silva v. Azevedo, 178 Cal. 495, 497, 173 P. 929, 930 (1915); Morris v. Vossler, 110 Cal. App. 2d 678, 682, 243 P.2d 43, 45 (1952); Garrett v. Cook, 89 Cal. App. 2d 98, 103, 200 P.2d 21, 24 (1948).

134. *See, e.g.,* Loustalot v. McKeel, 157 Cal. 634, 640, 108 P. 707, 710 (1910); Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 P. 931 (1891); Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, 608 (1888); White v. Spreckels, 75 Cal. 610, 616, 17 P. 710, 717 (1888); Pilibos v. Gramas, 104 Cal. App. 2d 353, 356, 231 P.2d 502, 504 (1951).

occupancy of the land up to the line was sufficient.[135] The majority of cases, however, demanded both physical marking or building up to the agreed line and occupancy to the boundary.[136] Additionally, a number of cases prior to *Ernie* used marking, building, and occupancy as evidence of the establishment of a boundary line.[137]

There were two pre-*Ernie* cases which held that no physical marking of the agreed line was necessary.[138] In *Needham v. Collamer*[139] the court held that since the parties could determine the line from markers, no further specific designation was required.[140] The court failed to cite any authority for this proposition. Two years later, in *Carr v. Schomberg*,[141] the court, citing *Needham*, held that "there is no rigid requirement that the boundary must be physically marked on the surface of the ground."[142] Both cases stressed that the line be clear to the parties and able to be made clear to others.[143]

Although *Needham* and *Carr* seemed to conflict with a majority of pre-*Ernie* cases,[144] on closer examination the conflict was superficial. In essence, the function of marking, occupation, and improvements, whether or not specifically required, was evidence of an agreed bounda-

135. *E.g.*, Loustalot v. McKeel, 157 Cal. 634, 640, 108 P. 707, 710 (1910); Pilibos v. Gramas, 104 Cal. App. 2d 353, 356, 231 P.2d 502, 504 (1951).

136. *E.g.*, Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651, 651 (1921), *citing* Young v. Blakeman, 153 Cal. 473, 481, 95 P. 883, 890 (1908); Silva v. Azevedo, 178 Cal. 495, 497, 173 P. 929, 930 (1918); Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893, 894 (1911); Morris v. Vossler, 110 Cal. App. 2d 678, 682, 243 P.2d 43, 45 (1952); Garrett v. Cook, 89 Cal. App. 2d 98, 103, 200 P.2d 21, 24 (1948); *see* Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 P. 931, 931 (1891); White v. Spreckels, 75 Cal. 610, 616, 17 P. 710, 717 (1888) (required parties to "fix and establish a boundary line . . . under which they occupy . . . .").

137. *E.g.*, Mello v. Weaver, 36 Cal. 2d 456, 461, 224 P.2d 691, 692 (1950); Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260, 18 P.2d 58, 59 (1933); Whealtey v. San Pedro, Los Angeles & Salt Lake R.R., 169 Cal. 505, 514, 147 P. 135, 138 (1915); Burris v. Fitch, 76 Cal. 395, 398, 18 P. 864, 865-66 (1888); Swartzbaugh v. Sargent, 30 Cal. App. 2d 467, 476, 86 P.2d 895, 899 (1939); Board of Trustees v. Miller, 54 Cal. App. 102, 105, 201 P. 952, 953 (1921); Perich v. Maurer, 29 Cal. App. 293, 297, 155 P. 471, 472 (1915); *see* Columbet v. Pacheco, 48 Cal. 395, 397 (1874).

138. Carr v. Schomberg, 104 Cal. App. 2d 850, 232 P.2d 597 (1951); Needham v. Collamer, 94 Cal. App. 2d 609, 211 P.2d 308 (1949).

139. 94 Cal. App. 2d 609, 211 P.2d 308 (1949).

140. *Id.* at 612, 211 P.2d at 310.

141. 104 Cal. App. 2d 850, 232 P.2d 597 (1951).

142. *Id.* at 859, 232 P.2d at 602.

143. *Id.*; Needham v. Collamer, 94 Cal. App. 2d 609, 612, 211 P.2d 308, 310 (1949). Note that both cases involved agreed boundaries and not boundaries by acquiescence.

144. *See generally* notes 131-36 *supra* and accompanying text. *Cf.* note 137 *supra* and accompanying text.

ry.[145] In *Needham* and *Carr* the courts found ample evidence to establish the existence of agreed boundaries.[146] In light of such evidence, it seems those courts believed that physical designation was unnecessary. Therefore, *Needham* and *Carr*, though apparently relaxing the requirements, in reality simply recognized the true evidentiary character and value of marking, possession, and improvements. Thus these courts did not delineate physical marking as an element of the doctrine of agreed boundaries.

Since *Ernie* neglected to discuss or require marking, occupation, or improvements, most subsequent cases, citing *Ernie* as authority, followed suit.[147] A few cases, citing *Carr* and *Needham* as authority,[148] specifically held that marking of the line was unnecessary.[149] Some cases, however, did not cite *Ernie* and instead used older cases to justify the requirement of marking, occupation, or improvements.[150]

Aborigine Lumber Co. v. Hyman,[151] discussed the potential confusion caused by the omission in *Ernie*.[152] The court observed that some cases prior to *Ernie* demanded occupation,[153] though it expressed doubt that occupation was a requisite factor in every case.[154] It further noted that although *Ernie* and certain other cases did not require occupation, it was present in all those cases.[155] The court neatly dealt with its instant dilemma by pointing out that occupation was present in the case before it.[156]

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145. *See, e.g.*, note 137 *supra* and accompanying text.

146. Carr v. Schomberg, 104 Cal. App. 2d 850, 855, 232 P.2d 597, 602 (1951); Needham v. Coelamer, 94 Cal. App. 2d 609, 610-11, 211 P.2d 308, 310 (1949).

147. *E.g.*, Zachery v. McWilliams, 28 Cal. App. 3d 57, 60, 104 Cal. Rptr. 293, 294 (1972); Duncan v. Peterson, 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744, 746 (1970); McCormick v. Appleton, 225 Cal. App. 2d 591, 599, 37 Cal. Rptr. 544, 547 (1964); Fobbs v. Smith, 202 Cal. App. 2d 209, 214, 20 Cal. Rptr. 545, 548 (1962).

148. *See generally* notes 138-46 *supra* and accompanying text.

149. Draus v. Griswold, 232 Cal. App. 2d 698, 711, 43 Cal. Rptr. 139, 146 (1965); Rose v. Silva, 189 Cal. App. 2d 760, 767, 11 Cal. Rptr. 492, 496 (1961).

150. *E.g.*, Vella v. Ratto, 17 Cal. App. 3d 737, 739, 95 Cal. Rptr. 72, 73 (1971); Draemer v. Superior Oil Co., 240 Cal. App. 2d 642, 652, 49 Cal. Rptr. 869, 874 (1966); Steele v. Shuler, 211 Cal. App. 2d 698, 704-05, 27 Cal. Rptr. 569, 572 (1963). *But see* Minson Co. v. Aviation Finance, 38 Cal. App. 3d 489, 113 Cal. Rptr. 223 (1974), which, though citing to *Ernie*, stated that the boundary "must be identifiable on the ground." *Id.* at 495, 113 Cal. Rptr. at 226.

151. 245 Cal. App. 2d 938, 54 Cal. Rptr. 371 (1966).

152. *Id.* at 941-42, 54 Cal. Rptr. at 374.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

The discussion in *Aborigine* did little to solve the long-range problem. To eliminate this last remnant of confusion, the California Supreme Court should articulate what standard, if any, must be met with respect to marking, possession or improvements. The court has a substantial line of California cases on which to rely for guidance[157] and, for further assistance, could examine out of state cases.

A majority of states agree that at least one of the following elements must exist: physical designation of the agreed line, occupancy or possession to such line, or improvements up to the line.[158] Seldom does a state demand that all three elements be met,[159] and at times only one is essential.[160] A substantial number of states agree as to physical designation of the agreed line.[161] A larger number require possession or occupation to the agreed line.[162] Relatively few states insist upon

157. *See generally* notes 131-56 *supra* and accompanying text.

158. *See* notes 161-64 *infra* and accompanying text.

159. *But see* Humble Oil & Ref. Co. v. Patton, 344 S.W.2d 234 (Tex. Civ. App. 1961).

160. *E.g.*, Salter v. Cobb, 88 So. 2d 845, 849 (Ala. 1956) (possession); Kerrigan v. Thomas, 281 So. 2d 410, 412-13 (Fla. App. 1973) (occupation); Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974) (marking); Wagner v. Thompson, 186 P.2d 278, 281 (Kan. 1947) (possession); Bemis v. Bradley, 139 A. 593, 594 (Me. 1927) (possession); Natchez v. Vandervelde, 31 Miss. (2 Geo.) 706, 720 (1856) (actual possession); Rautenberg v. Munnis, 226 A.2d 770, 772 (N.H. 1967) (occupation); Mazzucco v. Eastman, 236 N.Y.S.2d 986, 990 (1960) (marking); LaFreniere v. Sprague, 271 A.2d 819, 821 (R.I. 1970) (actual possession); Klapman v. Hook, 32 S.E.2d 882, 884 (S.C. 1945) (occupation); Carstensen v. Brown, 236 P. 517, 520-21 (Wyo. 1925) (occupation). *Cf.* Osberg v. Murphy, 221 N.W.2d 4, 8 (S.D. 1974) (stated Wood v. Bapp, 169 N.W. 518, 522 (S.D. 1918) (dicta).

161. Edgeller v. Johnston, 262 P.2d 1006, 1010 (Idaho 1953); Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974); Turner v. Bowens, 203 S.W. 749, 751 (Ky. App. 1918); Booker v. Wever, 202 N.W.2d 439, 442 (Mich. App. 1972); Townsend v. Koukol, 416 P.2d 523, 535 (Mont. 1966), *citing inter alia*, Roberts v. Brae, 5 Cal. 2d 356, 54 P.2d 698 (1936); Mazzucco v. Eastman, 236 N.Y.S.2d 986, 990 (1960); Beckman v. Metzger, 299 P.2d 152, 154 (Okla. 1956); Ogilvie v. Stackland, 179 P. 669, 670 (Ore. 1919); Miles v. Pennsylvania Coal Co., 91 A. 211, 212 (Pa. 1914); Humble Oil & Ref. Co. v. Patton, 344 S.W.2d 234, 235 (Tex. Civ. App. 1961); Baum v. Defa, 525 P.2d 725, 726 (Utah 1974); Lamm v. McTighe, 434 P.2d 565, 569 (Wash. 1967). *See, e.g.*, Rabjohn v. Ashcraft, 480 S.W.2d 138, 141 (Ark. 1972); Hartley v. Ruybal, 414 P.2d 114, 116 (Colo. 1966); Peacock v. Boatright, 146 S.E.2d 745, 747 (Ga. 1966); Amato v. Haraden, 159 N.W.2d 907, 910 (Minn. 1968); Klaar v. Lemperis, 303 S.W.2d 55, 59 (Mo. 1947); Sceirine v. Densmore, 479 P.2d 779, 780 (Nev. 1971); Rodriguez v. La Cueva Ranch Co., 134 P. 228, 233 (N.M. 1912); Trautman v. Ahlert, 147 N.W.2d 407, 411-12 (N.D. 1966); Nagel v. Philipsen, 90 N.W.2d 151, 153 (Wis. 1958) and cases cited therein.

162. *E.g.*, Peterson v. Hamilton, 237 So. 2d 100, 102 (Ala. 1970); Rabjohn v. Ashcraft, 480 S.W.2d 138, 141 (Ark. 1972); Kerrigan v. Thomas, 281 So. 2d 410, 412-

improvement or building up to the line.[163] Those states which do not specifically require one or all of these elements almost unanimously use them as evidence of agreed boundaries.[164] In only one state, Kentucky, is the requirement of one of these elements eliminated.[165]

This was done in *Faulkner v. Lloyd*[166] where the court attempted to distinguish adverse possession, estoppel, and agreed boundaries.[167] It stated that possession up to the line was required only in adverse possession cases,[168] but to establish an agreed boundary, it was "immaterial whether there has been any possession to the agreed line."[169] At least one older Kentucky case, however, used possession to support a

13 (Fla. App. 1973); Hartley v. Ruybal, 414 P.2d 114, 116 (Colo. 1966); Peacock v. Boatright, 146 S.E.2d 745, 747 (Ga. 1966); Downing v. Boehringer, 349 P.2d 306, 308 (Idaho 1960); McLeod v. Lambdin, 174 N.E.2d 869, 871 (Ill. 1961); Bubacz v. Kirk, 171 N.E. 492, 494 (Ind. App. 1930); Steinhilber v. Holmes, 75 P. 1019, 1021 (Kan. 1904), *citing* Burris v. Fitch, 76 Cal. 395, 18 P. 864 (1888); Garvin v. Threlkeld, 190 S.W. 1092, 1093 (Ky. App. 1917); Faulkner v. Lloyd, 253 S.W.2d 972, 974 (Ky. App. 1952) (possession immaterial in agreed boundaries and relevant only as to adverse possession) (*see* notes 166-72 *infra* and accompanying text); Bemis v. Bradley, 139 A. 593, 594 (Me. 1927); Amato v. Haraden, 159 N.W.2d 907, 910 (Minn. 1968); Natchez v. Vandervelde, 31 Miss. (2 Geo.) 706, 720 (1856); Klaar v. Lemperis, 303 S.W.2d 55, 59 (Mo. 1957); Townsend v. Koukol, 416 P.2d 532, 535 (Mont. 1966); Sceirine v. Densmore, 479 P.2d 779, 780 (Nev. 1971); Rodriguez v. La Cueva Ranch Co., 134 P. 228, 233 (N.M. 1912); Rautenberg v. Munnis, 226 A.2d 770, 772 (N.H. 1967); Lewis v. Smith, 103 P.2d 512, 514 (Okla. 1940); Thiessen v. Worthington, 68 P. 424, 424 (Ore. 1902); La Freniere v. Sprague, 271 A.2d 819, 821 (R.I. 1970); Klapman v. Hook, 32 S.E.2d 882, 884 (S.C. 1945); Wood v. Bapp, 169 N.W.2d 4, 8 (S.D. 1974) (dicta); Humble Oil & Ref. Co. v. Patton, 344 S.W.2d 234, 236 (Tex. Civ. App. 1961) (in lieu of improvements); Baum v. Defa, 525 P.2d 725, 726 (Utah 1974); Amey v. Hall, 181 A.2d 69, 72-73 (Vt. 1962) (constructive possession enough); Lamm v. McTighe, 434 P.2d 565, 569 (Wash. 1967) (for boundary by acquiescence); Gwynn v. Schwartz, 9 S.E. 880, 885 (W. Va. 1889); Beduhn v. Kolar, 202 N.W.2d 272, 276 (Wis. 1972); Carstensen v. Brown, 236 P. 517, 520-21 (Wyo. 1925); *see* Smith v. McKay, 30 Ohio St. 409, 417-18 (1876); Dimura v. Williams, 286 A.2d 370, 371 (Pa. 1972); Winborn v. Alexander, 279 S.W.2d 718, 26-27 (Tenn. App. 1955). *But cf.* Houston v. Matthews, 9 Tenn. 105, 107-08 (1826).

163. *E.g.*, German v. Wilken, 37 N.E.2d 155, 158 (Ill. 1941); Humble Oil & Ref. Co. v. Patton, 344 S.W.2d 234, 236 (Tex. Civ. App. 1961) (in lieu of actual possession or use); Lamm v. McTighe, 434 P.2d 565, 569 (Wash. 1967) (for boundary by acquiescence); *see* Kiker v. Anderson, 172 S.E.2d 835, 837 (Ga. 1970) (acquiescence by "acts and declarations" of landowners); Bubacz v. Kirk, 171 N.E. 492, 494 (Ind. App. 1930); Burt v. Creppel, 5 Ohio Dec. Reprint, 330, 331 (Superior Ct. 1875).

164. *See, e.g.*, Rambeau v. Barrows, 225 A.2d 175, 178 (Vt. 1969).

165. *See* notes 166-69 *infra* and accompanying text.

166. 253 S.W.2d 972 (Ky. App. 1952).

167. *Id.* at 974.

168. *Id.*

169. *Id., citing* Howard v. Howard, 113 S.W.2d 434 (Ky. 1938).

finding of an agreed boundary.[170] Thus, though it is clearly in the minority,[171] *Faulkner* may evidence the genesis of a more modern law.[172]

Such a modern approach to the issue of marking, possession, and improvements is the best approach for the California courts to follow: that is, marking, possession, and improvements should not be required to be met as essential elements of the doctrine. Rather they should be given the weight they merit and be used solely as evidence of an agreed boundary. The most reasonable approach was taken by the court in *Carr* which stated: "The test is whether the parties have agreed upon a dividing line that is clear to them, and that can be made clear to others."[173] Although supported by slim case authority,[174] the logic of this case cannot be denied. The very purpose of the doctrine of agreed boundaries and boundaries by acquiescence is to facilitate the settlement of boundary disputes. To accomplish this goal, as a minimum basic requirement the court must find that the parties have agreed to a line. If that line is evident or able to be made evident without marking, occupation, or improvement, a requirement of such would be excessive and senseless. Although marking, occupation, and improvement up to such line on the ground are common and simple means of evidencing such agreement, they are not the only means.

The *Ernie* court appeared to recognize the exclusively evidentiary value of physical manifestation of the agreed line. The court did not require marking, occupation, or improvement as an element of the doctrine it delineated but merely used their existence as persuasive evidence of an agreed boundary.[175] Thus it implicitly held that as long as the essential elements were satisfied,[176] and if the agreed line was clear to all concerned, even without marking, possession, or improvement, it should become the boundary.

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170. Garvin v. Threlkeld, 190 S.W. 1092, 1093 (Ky. App. 1917).

171. *See* notes 158-64 *supra* and accompanying text. Note that most of the states not listed above have no cases dealing with this area.

172. Since no cases subsequently cited *Faulkner*, it is possible that it was a fluke, especially as it was decided by an appellate court rather than by the Kentucky Supreme Court.

173. 104 Cal. App. 2d 850, 859, 232 P.2d 597, 602 (1951). *See* notes 142-43 *supra* and accompanying text.

174. *Id., citing* Needham v. Collamer, 94 Cal. App. 2d 609, 211 P.2d 308 (1949). *See* notes 139-42 *supra* and accompanying text.

175. 51 Cal. 2d 702, 708, 336 P.2d 525, 528-29 (1959).

176. *Id.* at 707, 336 P.2d at 528. *See* note 25 *supra* and accompanying text.

V. CONCLUSION

Generally, the doctrine of agreed boundaries led a confused existence. It was variously misapplied, misinterpreted, or ignored. It was used to justify both equitable and inequitable decisions.[177] It baffled courts and commentators alike.[178]

The California Supreme Court recognized the futility of propogating a doctrine so confusing that its value was almost nil. Thus in *Ernie v. Trinity Lutheran Church*, the court tried to create order from the chaos. Basing its decision on solid authority,[179] the court clearly enunciated the requirements by which an agreed boundary or boundary by acquiescence is to be determined.[180] There must be uncertainty between coterminous owners as to the true location of the boundary,[181] an agreement to settle such uncertainty,[182] and an acquiescence in the line for the period required by the statute of limitation or under such circumstances that substantial loss would result if the boundary were not upheld.[183]

Though not specifically overruling past cases to the contrary, the inference from *Ernie* is that those cases are no longer valid. Subsequently, almost all California cases have used *Ernie* as a basis for decision.[184] There are a minority of cases, however, which did not.[185]

Although *Ernie* substantially delineated a logical and practical doctrine, it left a small residue of ambiguity in its wake[186] by neglecting to discuss whether marking, possession, or improvement were essential

177. *E.g.*, Roman v. Ries, 259 Cal. App. 2d 65, 70, 66 Cal. Rptr. 120, 123 (1960); Buza v. Wojtalewicz, 180 N.W.2d 556, 561 (Wis. 1970).

178. *E.g.*, Janes v. LeDeit, 228 Cal. App. 2d 474, 39 Cal. Rptr. 559 (1964); Lewis v. Smith, 103 P.2d 512, 513 (Okla. 1940). *See generally* Kirkegaard v. McLain, 199 Cal. App. 2d 484, 18 Cal. Rptr. 641 (1962); Browder, *supra* note 2; *Boundary Litigation*, *supra* note 3.

179. *Ernie* based its decision almost exclusively on California Supreme Court cases. *E.g.*, Mello v. Weaver, 36 Cal. 2d 456, 459, 224 P.2d 691, 693 (1950); Martin v. Lopes, 28 Cal. 2d 618, 622-27, 170 P.2d 881, 884-86 (1946); Hannah v. Pogue, 23 Cal. 2d 849, 856-57, 147 P.2d 572, 576 (1944); Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 19, 200 P. 651, 651-52 (1921); Silva v. Azevedo, 178 Cal. 495, 173 P. 292, 292 (1918); Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893, 894 (1911); Young v. Blakeman, 153 Cal. 477, 481-83, 95 P. 888, 890 (1908).

180. 51 Cal. 2d 702, 707, 336 P.2d 525, 528 (1959). *See* notes 23 and 154 *supra* and accompanying text.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* notes 64, 93 and 122 *supra* and accompanying text.

185. *See generally* notes 65, 97-105 and 150 *supra* and accompanying text.

186. *See* note 128 *supra* and accompanying text.

elements or merely evidentiary tools.[187] This is the last bastion of agreed boundaries.[188] When the California Supreme Court is presented the opportunity to resolve this question, ideally it will continue to permit the *Ernie* flexibility and hold that such acts, though acceptable as evidence, are not essential to create an agreed boundary. Until such decision, *Ernie* is the most recent and authoritative statement of the doctrine in California. In order to justly resolve boundary disputes, *Ernie* must be followed by the California courts.

Janice Patronite

187. *Id.*

188. *See, e.g.*, notes 150-52 *supra* and accompanying text.