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South Carolina Law on Boundary Disputes

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LAW NOTES

SOUTH CAROLINA LAW ON BOUNDARY DISPUTES

I. INTRODUCTION

Increasing land values continue to emphasize the importance of an accurate determination of a landowner's boundary. During the past few decades the value of land both in urban and rural areas has increased tremendously, and, consequently, people are becoming more conscious of the importance of knowing their true property boundary. It follows that litigation in this area is increasing because in many situations the court must decide the true boundary. Although the problem is practically the same in all jurisdictions, the decisions vary in law and effect.

The great majority of the decisions in South Carolina, and elsewhere, deal primarily with problems of conveyancing arising out of descriptions in deeds, plats, wills and other modes of conveyance, but this article will not encompass these problems. There are several reasons for this, but primarily the law in this area is fairly well settled in most jurisdictions, there is not a great deal of inconsistency in the decisions, and a treatment of the entire subject is not within the scope of this survey.

The difficult problems concerning boundaries, and the problems which will be discussed in this note, are the questions of adverse possession, acquiescence, and estoppel, mistake by the parties in claiming to a boundary line, written and oral agreements made concerning the boundary, procedural steps necessary in determining the true location of the boundary, and the types of relief sought by the parties. In these areas, the law concerning boundaries is in a confused state. Varying views exist among the jurisdictions, and sometimes a difference of opinion exists in the cases from the same State. This writing is an attempt to summarize the law in South Carolina by an analytical grouping of the more important cases and statutes. Where there is no authority in South Carolina, materials from other jurisdictions will be utilized in an effort to round out a consideration of the problems that have arisen or may arise in South Carolina. The purpose of the note, and, it is hoped, the end result is to consider the views of other jurisdictions as well as the

rules existing in this State in an attempt to arrive at some basic principles for the determination of a boundary when these problems arise. Developing trends in this area of law will also be discussed.

II. ADVERSE POSSESSION DUE TO IGNORANCE OR MISTAKE IN BOUNDARY

The authorities all agree that a reconciliation of the cases from the various jurisdictions on this subject is practically impossible. There is not, however, a mass of divergent views concerning the law in this area. In reality, there are only two basic views taken by the courts governing the question of adverse possession through the ignorance or mistake of a landowner.

A. *Minority View*

South Carolina is in accord with the minority rule which states that where one of two adjoining landowners possesses a piece of land through inadvertence, ignorance or mistake as to the true location of the boundary, but with the intention to possess only to the true boundary line, wherever that may be, the possession is not adverse in character. A vital element of adverse possession is wanting — possession with the intent to dispossess the adjoining landowner.[1] Primarily, *intention* is the test and each case must be analyzed on its own peculiar facts and circumstances.

In *Ouzts v. McKnight*[1a] the parties who owned 1000 acres of land as tenants in common sought to have a partition of the land whereby each party would take an equal share of 500 acres. A surveyor was employed, and commissioners of partition were appointed to effect the transaction. A plat was made correctly showing that each party owned 500 acres, but when the boundaries were laid out on the ground by the surveyor in 1908, he made a mistake resulting in the plaintiff obtaining 425 acres and the defendant 575 acres. More than 10 years later, but only one year before the action was commenced by the plaintiff, the defendant discovered the mistake. The plaintiff sued to rectify the mistake. The defendant set up 10 years adverse possession of the disputed area as a bar to the action.[2] The Court, speaking through Mr. Justice Gage, stated that the defendant's intention was clearly

1. See Annot., 97 A. L. R. 14 (1935).
1a. 114 S. C. 303, 103 S. E. 561 (1920).
2. The statute of limitations for the recovery of real estate in South Carolina is ten (10) years. CODE OF LAWS OF SOUTH CAROLINA § 10-2421 (1952).

not adverse because he testified that up until one year before the action was brought he supposed that the line as run was the true line. For this reason, the Court held that the statute of limitations would not apply, because, when the defendant stated that he only knew of the mistake one year before the action was brought, that amounted to saying that he was on the plaintiff's land, but did not know it and did not intend to be there.

This case followed the rule laid down in the earlier landmark case of *Preble v. Maine Cent. R. R. Co.*[3] which held that not only must the adjoining landowner claim the disputed area adversely, but in addition he must show an intention to claim the area as his own whether it is ultimately found to be his or the adjoining landowner's. In other words, the subjective test of intention is applied, *i.e.*, whether the occupancy was through a mistake as to the true boundary or whether it was an intentional occupancy to a supposed line irrespective of where the true line may be found to exist.

From this discussion it can be seen that a party claiming to a supposed line under the mistaken belief that it is the true line, when in fact it is not, cannot acquire title to the land by adverse possession in South Carolina because the possession is not hostile and with the intention to dispossess the owner.[4]

In a very early Maine decision,[5] the Court stated much to the same effect that "a disseisin cannot be committed by mistake because the intention of the possessor to claim adversely is an essential ingredient in a disseisin."

These cases following the minority rule illustrate the doctrine that mere possession is not alone a sufficient basis for adverse possession. Merely claiming land to a boundary, believing it to be the true line, is not sufficient to constitute the basis of a claim by adverse possession, since the claim of right must be as broad as the possession.[5a] Although the South Carolina law is clear in view of the *Ouzts* case, the rule has been criticized by authorities from other jurisdictions.[6] This criticism is based upon the common belief that, in most cases, it is practically impossible to determine the true motives of the landowner who claims title by adverse possession.

3. 85 Me. 260, 27 Atl. 149 (1893).
4. Ouzts v. McKnight, *supra* note 1a.
5. Ross v. Gould, 5 Me. 204 (1828).
5a. See Annot., 97 A. L. R. 14 (1935).
6. See, *e.g.*, Sullivan v. Groves, 42 S. D. 60, 172 N. W. 926 (1919).

The difficult problem is determining what his intention was. The minority view is also criticized on the grounds that it invites the witnesses to commit perjury.

B. *Majority View*

A leading case stating the majority view that intention is immaterial is *French v. Pierce*.[7] That case held that the mental attitude of the possessor is immaterial, and that an actual, open and notorious possession which is wrongful since it is without the consent of the owner is necessarily adverse and ripens into title in the usual way when the period of the statute of limitations has run. Proponents of this view contend that the abstract principles laid down in the *Ouzts* case,[8] and cases to the same effect, cannot be applied with certainty and uniformity because the secret workings of a man's mind are not open to public inspection or judicial determination or inquisition, and the ascertainment of intention or motive always involves an element of speculation. In the *Preble* case,[9] the Court stated that the question of intention "is neither subtle, recondite, nor refined, but simple, practical, and substantial. It involves sources of evidence and means of proof no more difficult or complex than many other inquiries of a similar character constantly arising in court." This statement is undoubtedly correct in cases where there is positive evidence of intention; however, it is of little or no assistance in the majority of cases where the evidence of intention is not positive but must be gathered from the general circumstances of occupation to a visible boundary.[10]

> Where there is an actual dispute over a boundary line, it can usually be determined whether a party intends to claim to a fixed and visible boundary at all events, or merely intends to claim provisionally, subject to the ascertainment of the true line. But perhaps the most frequent, and certainly the most meritorious, case is that of the landowner who, without any doubts on the matter, and without any question or dispute on the part of the adjoining landowner, enters into and holds possession to certain boundaries, on the assumption that such are the true lines and that his domain extends thereto. Such a person occupies and uses the land as his own,

7. 8 Conn. 439, 21 Am. Dec. 680 (1831).
8. 114 S. C. 303, 103 S. E. 561 (1920).
9. Preble v. Maine Cent. R. R. Co., 85 Me. 260, 27 Atl. 149 (1893).
10. See Annot., 97 A. L. R. 14 (1935).

> and his occupancy and use thereof are exclusive. Hence, properly speaking, his possession is adverse. Yet it cannot be truly said whether he intends to claim to the visible boundaries at all events, or merely to hold the property provided the lines are correct, and subject to the future ascertainment of the real boundary. He has no positive or conscious intention, one way or the other. It cannot any more be said that he intends to claim the property regardless of the location of the true boundary, than that he does not intend to appropriate the land of his neighbor. . . . If the adverse character of possession depends absolutely upon the intention of the occupants, the protection of the statute of limitations is limited to those who deliberately set out to steal the land of their neighbors and to cases where there has been an actual dispute as to the location of the boundary. In no other case does the occupant actually intend to claim the land adversely, regardless of legal title. And if this doctrine were followed out, the man who most needs and deserves the protection of the statute, *viz.*, he who innocently and inadvertently occupies and improves land beyond his true boundary, would be left without protection.[11]

C. *South Carolina Cases*

The trend of authority in this area of the law is that, when the claim is to a visible boundary, in all events, whether it be the true line or not, the possession is adverse.[12] Another South Carolina case[13] dealing with the problem of ignorance or mistake as to boundary was decided by our Court in 1951. In this case the Court applied the same rule that was announced in the *Ouzts* case and held that the evidence failed to show that there was any intention to claim adversely to the true owner.

The case of *Klapman v. Hook*[14] illustrates another method of dealing with this problem under a somewhat different factual situation from the *Ouzts* case.[15] The *Klapman* case held that a boundary line acquiesced in by the parties for a period of 32 years is conclusively presumed to be the true boundary. The Court stated that the decision did not conflict with the *Ouzts* case and distinguished the cases by saying that

11. See Annot., 80 A. L. R. 155 (1932).
12. See Annot., 97 A. L. R. 14 (1935).
13. Babb v. Harrison, 220 S. C. 20, 66 S. E. 2d 457 (1951).
14. 206 S. C. 51, 32 S. E. 2d 882 (1945).
15. 114 S. C. 303, 103 S. E. 561 (1920).

in the *Klapman* case the parties did not need to resort to the claim of title by adverse possession. The decision is based on the settled rules for determining a disputed boundary in South Carolina, the pertinent ones being: the rules for determining disputed boundaries are not inflexible, and are subject to modification depending upon the particular facts, and the vital question is the intent of the grantor at the time the deed is executed;[16] in locating a boundary the trees that the surveyor marked, the rocks that he set up and the fixed and permanent objects which he called for are more certain indications of intention than distances or even courses,[17] and in determining the true boundary the quantity of land named in the deed is ordinarily one of the lowest scale of importance.[18]

It is interesting to note that the facts of the *Ouzts* case and the *Klapman* case, although different, are analagous, yet the Court used entirely different principles of law in making each decision. By determining the *Klapman* case under the doctrine of acquiescence, our Court seems to have reached the same result that could have been reached under the *French v. Pierce* rule in a case involving adverse possession. Stated simply, the *Klapman* rule is: In South Carolina a boundary can be established by the acquiescence of the parties for the period of the statute of limitations applicable to adverse possession cases. The requisite acquiescence is evidence of the true line so conclusive that the parties are precluded from offering evidence to the contrary. This rule is called the "rule of repose", and is supported by the same reasoning that supports the doctrine of adverse possession.[19]

There are clear indications in several states, including South Carolina, of the acceptance of a more liberal acquiescence rule as an escape from the controversial proposition that possession to a boundary line in the mistaken belief that the line is the true line may prevent such possession from being adverse.[20] In one South Carolina case,[21] wherein the

16. Holden v. Cantrell, 100 S. C. 265, 84 S. E. 828 (1912); Conner v. Johnson, 59 S. C. 115, 37 S. E. 240 (1900). This rule deals particularly with the description in the deed as a fact to be considered in determining whether the description in the deed or the boundaries on the ground should control in a determination of the true boundary line.

17. Sturgeon v. Floyd, 3 Rich. L. 80 (S. C. 1846); Douglas v. Fernandis, 2 Bail. L. 78 (S. C. 1831); 8 AM. JUR. *Boundaries* § 791 (1937).

18. Holden v. Cantrell, *supra* note 16.

19. Browder, *The Practical Location of Boundaries*, 56 MICH. L. REV. 505, 511 (1958).

20. *Id.* at 512, 513.

21. Harrison v. Lanoway, 214 S. C. 294, 52 S. E. 2d 264 (1949).

defendant claimed title to a disputed strip of land by adverse possession because the strip was on defendant's side of a 30 year old hedge, the Court decided that the evidence did not sustain a finding of title by adverse possession, because there was no showing as to the origin of the hedge or that it was originally intended to mark a boundary line. It was also held that the evidence failed to establish title in the defendant under the doctrines of acquiescence or estoppel. By this decision the Court indicated that a hedge generally will be planted either on one side of the boundary or the other side, but not upon the correct boundary line. Hedges spread with growth and age and would soon constitute an encroachment if set on a boundary, requiring entry on the neighbor's premises to trim and cultivate. However, it should be noted that fences are generally placed upon the true boundary line, although the parties are allowed to prove, if they can, that a fence or hedge was erected only as a barrier or for convenience. Mere proof of the existence of a fence or hedge will not give rise to any presumptions, and a claim of acquiescence, adverse possession or estoppel will fail without other proof. A recent South Carolina case[22] held that where the grantor conveyed land to his son-in-law with whom he lived, and to the grantor's daughter and children, and planted hedges along the boundaries of the son-in-law's lot, the family relationship rebutted the presumption that the son-in-law's possession, perforce the hedges, was hostile to the grantor especially where the hedges were not planted in a straight line and no effort was made to plant them on the exact lines of the lot.

The recent trend of decisions is to give much weight to the fact of possession of the disputed area under an adverse claim. They hold that it is the open or visible possession of the land with the intention to hold it as his own that gives rise to the adverse character, and, as stated above, the remote belief of the claimant is immaterial.[23]

The case of *Crocker v. Town of Beaufort*[24] involved the question of adverse possession of a strip of land claimed by a municipality and a private person. The land was claimed as an alley by the defendant (town) and as a lot by the plaintiff. On the first appeal of the case,[25] the Court held that the

22. Metze v. Meetze, 231 S. C. 154, 97 S. E. 2d 514 (1957).
23. 1 AM. JUR. *Adverse Possession* § 215 (1936).
24. 45 S. C. 269, 22 S. E. 885 (1895).
25. 37 S. C. 327, 16 S. E. 95 (1891).

plaintiff should be allowed a perpetual injunction against the defendant as prayed for in his complaint. No question of estoppel was raised by this appeal, but the plaintiff based his hope of recovery upon the doctrine of adverse possession. Our Supreme Court found that the plaintiff had not established title to the land by adverse possession, but granted a new trial on the ground that the defendant might be estopped to claim the land where the plaintiff had erected buildings thereon. A second appeal resulted in a dismissal of the complaint on the ground that the requirements for an estoppel had not been met since the plaintiff had failed to show that he would suffer injury if the defendant were not estopped from claiming the area as an alley.[26]

A very early South Carolina case[27] laid down the rule that, even though a party has good title (by deed) to land, if he stands by and allows the adjoining landowner to mark out his boundaries by stakes, which stand for more than ten years, the adjoining landowner will acquire title by adverse possession to the extent of his possession marked by the stakes. No general rule can be stated as to adverse possession based on the projection or inclination of a wall or other structure, that is, as to instances where one, either in ignorance of the true location of his boundary line or through mistake or inadvertence, erects a building or a wall, or where a building leans over the boundary line. The difference of opinion as to the effect of having taken possession under a mistake as to boundaries, as stated above, is reflected to some degree in the cases dealing with projections of buildings over the line.[28] Inasmuch as the authorities on the subject are few and inconsistent, no general rule can be stated for determining this matter.[29] One case held that title to land by adverse possession may be based upon the fact that the wall of a building belonging to the one claiming by adverse possession leans over the portion of land so claimed;[30] however, it has also been expressed that the tipping of the wall of a building so as to encroach only upon the air space above the adjoining lot does not interrupt the continuity of possession of the owner of such lot so as to bring it within the provisions of the statute of limitations applicable to

26. Crocker v. Town of Beaufort, 45 S. C. 269, 22 S. E. 885 (1895).
27. Allen v. Johnson, 2 McMul. L. 495 (S. C. 1836).
28. See Annot., 49 A. L. R. 1015 (1927).
29. *Ibid.*
30. Baxter v. Girard Trust Co., 288 Pa. 256, 135 Atl. 620, 49 A. L. R. 1011 (1927).

cases of persons not in possession.[31] The majority rule in this area is that if the building is of a permanent nature and projects over the boundary line for the statutory period necessary to establish a title by adverse possession, the possessor of the building will acquire title by adverse possession even though the building was erected in ignorance of the location of the true boundary line and supposedly on land rightfully owned by the builder.[32] There are no South Carolina cases dealing with this problem, but presumably our Courts would treat such a situation under the doctrines of estoppel or acquiescence rather than allowing title to be acquired by adverse possession. This supposition is based upon the past decisions concerning the intention of the party where he was ignorant as to the true location of the boundary line.

It has been decided in other jurisdictions that even though the title may be acquired by adverse possession to that part of the adjoining lot upon which the permanent structure has been erected, the possessor of such a building does not acquire title to that part of the adjoining lot not covered by his building, but which would have been covered had his building been extended in line with the original wall for the full length of the lot.[33] The minority view is that there must be some evidence, other than the continuous and exclusive occupancy of a building which, through inadvertence and ignorance of the true boundary line, is erected so that it projects a few inches over the dividing line of a city lot upon an adjoining lot, of an *intention* to claim title to the strip encroached upon, before title thereto can be obtained by adverse possession.[34] The rule in Virginia is that an encroachment on adjoining property, through mistake, by one in the erection of his building, is not such possession as will ripen into title by lapse of time; the person who permits the erection of the building partly on his land is not thereby estopped from asserting his rights when he learns for the first time of the encroachment.[35] If the problem arises in South Carolina, it is reasonable to presume that our courts would be in accord with the minority view just expressed, making intention the test.

31. Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753, 29 A. L. R. 833 (1923).
32. See Annot., 49 A. L. R. 1015 (1927); Annot., 97 A. L. R. 14 (1935).
33. *Ibid.*
34. Winn v. Abeles, 35 Kan. 85, 10 Pac. 443 (1886); Wilson v. Hunter, 59 Ark. 626, 28 S. W. 419 (1894).
35. Davis v. Owen, 107 Va. 283, 58 S. E. 581 (1907).

III. ESTABLISHMENT OF BOUNDARIES BY ACTS OF THE PARTIES OTHER THAN THOSE ACTS NECESSARY TO ACQUIRE TITLE BY ADVERSE POSSESSION

A. *Oral Agreements*

It is a well settled principle of law that where the adjoining landowners are uncertain as to where the correct boundary lies, they can establish a true boundary by a written agreement. This is also true where the boundary line is in dispute.[36] An oral agreement fixing a boundary line is valid, (1) if intended to settle a bona fide dispute; (2) if possession is enjoyed thereunder; and especially (3) if acquiescence thereto has been manifested over a long period of time.[37] The latter statement represents the general rule regarding parol boundary agreements. The South Carolina rule is that a boundary line may be permanently established by parol agreement of the adjoining landowners when there is doubt or uncertainty or a dispute has arisen as to the true location of the boundary line. In such a situation, a parol agreement can be used to establish the line; and, where the agreement is executed and actual possession is taken under the agreement, it is conclusive against the owners and those claiming under them.[38] Mr. Chief Justice McIver stated in *Davis v. Elmore*:[39] "[s]urely there cannot be any doubt that where the dividing line between two co-terminous proprietors is doubtful, and for the purpose of solving such doubt they meet together and establish an agreed line, such agreed line must be regarded in all future controversies to be the true line."

When there is an honest dispute as to the location of a dividing boundary, an oral agreement between adjoining owners fixing a boundary is not within the Statute of Frauds and becomes enforceable when the agreed boundary has been marked, or has been recognized in the subsequent use of the tracts, or when other action has been taken by either party in reliance on the agreement.[40] One of the requirements for a valid parol agreement fixing the boundary is that there be a real dispute or uncertainty concerning the true location. When this requirement is met, in addition to the other re-

36. 8 AM. JUR. *Boundaries* § 83 (1937).
37. BURBY, REAL PROPERTY § 250 (2d ed. 1954).
38. Davis v. Elmore, 40 S. C. 533, 19 S. E. 204 (1894); Welch v. Carter, 151 S. C. 145, 148 S. E. 697 (1929).
39. 40 S. C. 533, 19 S. E. 204 (1894).
40. RESTATEMENT, CONTRACTS § 196 (1932).

quirements which will be discussed presently, the agreement is treated not as a parol transfer of land, but as a settlement of the dispute or problem of uncertainty between the contiguous tracts of land. It serves to locate the line to which the title of each landowner extends.[41]

Like other contracts, a parol agreement must be supported by a consideration,[42] but it is generally held that the mutual concessions by the parties in determining the disputed or uncertain boundary is sufficient.[43] Some cases have indicated, and it is probably the rule in South Carolina, that there must be some improvement or possession in the absence of some other valuable consideration.[44] In the *Slice* case the parties made a parol agreement to partition a certain tract of land, but neither party carried the agreement into effect by taking possession. The Court held that, since a mere parol agreement had been made without any occupation, possession or improvement, the parol partition was not binding upon either party to it. Another South Carolina case[45] held that a parol partition is binding upon the parties if there is sufficient proof of part performance to take it out of the Statute of Frauds. It was also stated that actual possession is the most satisfactory evidence of part performance. From a thorough search of the law in South Carolina regarding such parol agreements, the writer has found no rules regarding what our Court would do with a mere parol agreement to settle the disputed boundary unaccompanied by any acts of possession, improvement or occupation. It is believed that such an agreement would be treated as being within the Statute of Frauds.

Other problems that arise in the various jurisdictions are: whether there is a necessity that the line be definite, or a necessity for the parties to hold or acquiesce under the parol agreement for a specific period of time (as for the time required under the rules for acquiring title to a disputed strip by adverse possession), and the effect of mistake and the conclusiveness of the agreement.[46] Many of these problems have yet to arise in this State, but one case which deals primarily with the binding effect of a parol agreement may

41. See Annot., 69 A. L. R. 1430 (1930); Ann. Cas. 1912B 663; 8 Ann. Cas. 84 (1908); 102 Am. St. Rep. 246 (1905).
42. Wood v. Bapp, 41 S. D. 195, 169 N. W. 518 (1918).
43. Randleman v. Taylor, 94 Ark. 511, 127 S. W. 723 (1910).
44. Slice v. Derrick, 2 Rich. L. 627 (S. C. 1846).
45. Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. 881 (1886).
46. See Annot., 69 A. L. R. 1430 (1930).

shed some light on the subject.[47] The rule there stated is that where a disputed, uncertain, or unascertained boundary is settled by parol agreement, and such agreement is followed by occupation in accordance therewith, it is binding not only on the immediate parties to the agreement, but also on those claiming under them.

On principle it would seem that an oral contract for partition or fixing boundaries would be unenforceable on the ground that it is a conveyance or attempted conveyance of real estate which is in violation of the Statute of Frauds;[48] however, many states hold the agreement valid, at least if acted upon, and the requirements which are generally insisted upon in order to make executory oral contracts binding because of part performance are not always considered.[49] In *Rountree v. Lane*,[50] where the parties made an oral partition of the land, took possession and retained the land pursuant to the agreement for a period of 11 years, it was decided that the oral agreement was valid and would be upheld. It has been specifically held in this State that parol partitions are recognized, but they bind only the participants therein.[51] It is the general rule in the United States that such parol agreements are valid if there was a bona fide dispute existing between the parties as to the location of the boundary; however, if the actual boundary is known, an oral contract to substitute a new line is invalid.[52]

B. *Acquiescence*

The *Klapman* case[53] indicates that a disputed boundary line can be established between the parties by acquiescence of the parties for the period of the statute of limitations applicable to adverse possession cases, even though no actual parol agreement has been made. Mere acquiescence for the sufficient period of time is deemed adequate. Presumably this reasoning is based on public policy in an attempt to prevent vexatious litigation of a multiplicity of suits. The case holds that the requisite acquiescence is evidence of the true line

47. Davis v. Elmore, 40 S. C. 533, 19 S. E. 204 (1894).
48. Jones v. Reeves, 6 Rich. L. 132 (S. C. 1853); WILLISTON, CONTRACTS § 490 (Rev. ed. 1936).
49. WILLISTON, CONTRACTS § 494 (Rev. ed. 1936); Sparks v. Union Mfg. Co., 121 S. C. 220, 114 S. E. 805 (1922) (the oral partition was held to be binding only on the participants); Rountree v. Lane, 32 S. C. 160, 10 S. E. 941 (1890).
50. 32 S. C. 160, 10 S. E. 941 (1890).
51. Sparks v. Union Mfg. Co., *supra* note 49.
52. WILLISTON, CONTRACTS § 490 (Rev. ed. 1936).
53. Klapman v. Hook, 206 S. C. 51, 32 S. E. 2d 882 (1945).

so conclusive that the parties are precluded from offering evidence to the contrary. The rule (as stated earlier in the treatment of adverse possession) is called the "rule of repose", which is supported by the same reason as supports the doctrine of adverse possession.

There is a great deal of confusion in the cases from various jurisdictions dealing with the establishment of boundaries by agreement and/or acquiescence. The rules regarding the two methods of settling the boundary dispute have been considered separately by some jurisdictions and together by other jurisdictions.[54] Under the reasoning of the *Klapman* case,[55] our Court seems to treat the doctrine of parol agreements fixing boundaries separately from the doctrine of establishing the boundary by acquiescence, because the Court sets forth the rule that a boundary line acquiesced in by the parties for 32 years is *conclusively presumed* to be the true boundary line. There was no agreement existing as to a determination of the true boundary, and even if there had been, the same result would have been reached.

The general rule followed in South Carolina regarding acquiescence is stated as follows:

> It is well established that if adjoining landowners occupy their respective 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. In other words, 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.[56]

A recent South Carolina decision stated that where it was agreed between a prospective grantee of land and the adjoining landowner that the line which was run by the surveyor for the purpose of making a plat to be attached to the deed was tentative and subject to adjustment, the rule that an agreed line must be regarded in all future controversies to be the true line is inapplicable.[57]

54. 8 AM. JUR. *Boundaries* § 81 (1937).
55. Klapman v. Hook, *supra* note 53.
56. 8 AM. JUR. *Boundaries* § 80 (1937), quoted by Mr. Justice Oxner in Klapman v. Hook, *supra* note 53.
57. Richardson v. Register, 227 S. C. 81, 87 S. E. 2d 40 (1955).

C. *Location of Fences and Hedges*

Still another boundary problem is that of the practical location of the true boundary line by means of a fence erection or other markings such as the planting of hedges.[58] Again the authorities and cases are in conflict on the treatment of this problem. Some cases have said that a presumption of a prior agreement may arise where the adjoining landowners have definitely defined the line by erecting a fence thereon, and that both have treated it as fixing the boundary between them and should not be allowed to deny the correctness of its location.[59]

Other cases have found that the erection of a fence may be evidence of the true location of the boundary line which it was intended to make, and acquiescence in it for a reasonable length of time may possibly become binding on the adjacent landowners;[60] however, where the doctrine of simple acquiescence is recognized, no agreement need be recognized as to the erection of the fence.[61] A fence may be erected for convenience only, and without any intention of fixing a boundary; the fence may exist for only a short period of time or it may be erected by mistake by one party while the adjoining property owner had the means of knowing where the true line was.[62]

In *Harrison v. Lanoway*[63] our Court denied the defendant's claim to a disputed strip by adverse possession, acquiescence or estoppel because the evidence failed to show the origin of a hedge planted on or near the dividing line, and because no intention was indicated by the evidence that the hedge was supposed to mark the boundary line. The Court indicated that a claim of acquiescence would fail without proof other than the mere existence of the fence for a long time.

Another case involving the planting of hedges came before our Court recently on the issue of adverse possession.[64] It was held that since the hedges were not planted along the boundary in a straight line and no effort was made to do so, the planting of them did not amount to hostile possession as one of the requirements of title by adverse possession.

58. French v. Pierce, 8 Conn. 439, 69 A. L. R. 1515 (1831).
59. 8 AM. JUR. *Boundaries* § 82 (1937).
60. Bradley v. Burkhart, 139 Ia. 323, 115 N. W. 597 (1908).
61. Hanlon v. Ten Hove, 235 Mich. 227, 209 N. W. 169, 46 A. L. R. 788 (1926).
62. 8 AM. JUR. *Boundaries* § 82 (1937).
63. 214 S. C. 294, 52 S. E. 2d 264 (1949).
64. Metze v. Meetze, 231 S. C. 154, 97 S. E. 2d 514 (1957).

Another South Carolina case[65] stated that acquiescence in an adjoining owner's moving a fence would not work an estoppel to a denial that the fence as relocated was the true boundary as against the adjoining owner, although it might as to innocent purchasers. A discrepancy between the straight boundary fence shown in the plat and an existing irregular fence presented a question for the jury aside from the questions of estoppel by acquiescence.

"The doctrine of agreed boundaries rests somewhere between adverse possession and estoppel. Many cases of agreed boundaries involving the elements of adverse possession are referred to that principle for decision. In like manner, many such cases involving elements of estoppel are said to be referable to this doctrine."[66] There are very few cases in South Carolina on this topic.

D. *Expenditures*

A striking application of the doctrine of estoppel has been made in South Carolina in a case involving silence on the part of one landowner in the face of expenditures by his neighbor, which were made on certain assumptions by the latter as to the correct boundary.[67] In this case the Court applied the doctrine of estoppel in pais in settlement of the boundary dispute, and held that an estoppel may arise in less than the time required to acquire title by adverse possession.

In *Marchant v. Felder*[68] the rule was established that a party to a boundary agreement is estopped to deny it against a subsequent purchaser from him of his lot. The case also held that a purchaser is not estopped, as against his grantor, from insisting upon a true location of the boundary line by making a purchase price payment after a discovery of an error in the line; and, where a landowner makes a party wall agreement up to which the adjoining landowner constructed buildings, the landowner is thereby estopped to claim beyond the agreed line, even as against his own grantee. The rule is this area was stated in the case of *So. R. R. Co. v. Davis*:[69] "So, if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief.

65. Van Ness v. Schachte, 143 S. C. 429, 141 S. E. 721 (1928).
66. 8 AM. JUR. *Boundaries* § 83 (1937).
67. McClintic v. Davis, 228 S. C. 378, 90 S. E. 2d 364 (1955); Southern R. R. Co. v. Day, 140 S. C. 388, 138 S. E. 870 (1926).
68. 107 S. C. 516, 93 S. E. 179 (1917).
69. 140 S. C. 388, 138 S. E. 870 (1926).

His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence and it estops him."

Lord Hardwicke said: "There are several instances where a man has suffered another to go on with building upon his ground and not set up a right till afterwards, when he was all the time conversant of his right, and the person building had no notice of the other's right, in which the court would oblige the owner of the ground to permit the person building to enjoy quietly and without disturbance."[70] The earliest case in South Carolina dealing with the problem of estoppel in pais followed the rule set forth by Lord Hardwicke,[71] and the same rule has been applied to these situations ever since.[72] The same rule has applied where railroad property such as rights of way are involved.[73] In the case of *Piedmont & Northern Ry. v. Henderson,*[73a] the Court invoked the doctrine of estoppel in pais against the plaintiff railroad where it had originally acquired a lot for a right of way but during the ensuing years had permitted the defendant and others who owned the adjoining lot to build a house, erect a fence and plant a hedge on the unused portion of the plaintiff's lot. Not only did the defendants acquire title to that portion of the lot upon which the house was constructed, but they also acquired the unused portion of the lot including the hedge and the fence.

IV. Actions for Determination of Disputed Boundaries — How the Question is Raised

A. *Actions at Law and Equity*

The greatest amount of boundary litigation today involves the ascertainment of the boundary as it actually exists on the ground with reference to the description in a conveyance, *viz.*, the determination of the exact limits of the tract conveyed.[74] However, as stated earlier, this area of boundary problems is not dealt with at length by this article.

Aside from statutory proceedings, there is no proceeding at law by which one owner of land can obtain an adjudication

70. The East India Co. v. Vincent, 2 Atk. 83 (1740).
71. Lessee of Tarrant v. Terry, 1 Bay L. 239 (S. C. 1792).
72. McClintic v. Davis, 228 S. C. 378, 90 S. E. 2d 364 (1955); Marines v. Goblet, 31 S. C. 153, 9 S. E. 803 (1888).
73. Columbia, Newberry & Laurens R. R. Co. v. Laurens Cotton Mills, 82 S. C. 24, 61 S. E. 1089 (1908). See also Piedmont & Northern R. R. Co. v. Henderson, 216 S. C. 98, 56 S. E. 2d 740 (1949).
73a. 216 S. C. 98, 56 S. E. 2d 740 (1949).
74. Tiffany, Real Property §§ 670 — 676 (Abr. ed. 1940).

concerning the proper location of his boundary line, although he has a remedy by trespass or ejectment for a disregard of the proper line by the adjoining landowner.[75] Many states have enacted statutes which expressly confer jurisdiction on particular courts to ascertain and establish boundary lines which are uncertain or in dispute, by means of "processioners", who, after investigation, report to the court, which may or may not approve their finding.[76] In some states a court of equity may issue a commission to determine a boundary where there is some ground for equitable interference other than the mere uncertainty of the boundary, mainly where such a determination will avoid a multiplicity of suits by the parties.[77]

Generally speaking, there are various ways in which disputed boundary questions can arise, and they can be determined in South Carolina by bringing an action at law such as ejectment where title is in dispute, or trespass where the complainant has not been dispossessed. An action for damages may be brought based on negligence; an action will be entertained by a court of equity when the parties have no adequate remedy at law; or the parties may bring the matter of a disputed boundary under the Declaratory Judgment Act.[78]

A leading case in this area is *Uxbridge Co. v. Poppenheim.*[79] In this case the plaintiff claimed that he had previously made several attempts to get the defendant to aid him in ascertaining the true boundary line and to settle the matter amicably, but the defendant had refused to cooperate in any manner, thereby causing plaintiff's inability to use his land up to the correct boundary line. When the plaintiff failed to reach any agreement with the defendant, he sought equitable relief praying that the court appoint surveyors to establish the disputed lines. The trial court sustained a demurrer by the defendant on the ground that the complaint failed to state facts sufficient to constitute a cause of action either legal or equitable. The court held that there was nothing in the complaint to show a trespass or other wrong, neither were there any peculiar facts which would warrant equitable inter-

75. LEAKE, PROPERTY IN LAND § 10 (1874); SEDGEWICK & WAIT, TRIAL OF TITLE TO LAND § 865 (1882).
76. Amos v. Parker, 88 Ga. 754, 16 S. E. 200 (1892); Love v. Morrill, 19 Ore. 545, 24 Pac. 916 (1890).
77. TIFFANY, REAL PROPERTY § 452 (1940).
78. CODE OF LAWS OF SOUTH CAROLINA §§ 10-2001 — 10-2014 (1952).
79. 135 S. C. 26, 133 S. E. 461 (1926).

ference. On appeal, our Supreme Court laid down several rules of law which are the governing principles in this procedural area:

> It appears to be settled by the unanimous opinion of Judges and text writers that ordinarily the matter of settling disputed questions of boundaries is ancillary to actions at law of trespass to try title or ejectment (as indicated by Section 5308, Vol. 3, Code of 1922), and that equity will not entertain an action simply to settle and fix a boundary line between adjoining owners, unless the plaintiff's complaint discloses some feature of equitable cognizance, as, for instance, fraud or misconduct on the part of an adjoining landowner, by reason of which a confusion or obliteration of the boundary line has resulted; mutual mistake of the adjoining owners; the neglect of a duty founded upon the relationship of the parties; the practical certainty of a multiplicity of suits growing out of the confusion or uncertainty; and the inadequacy of a remedy at law (perhaps others), ...
>
> We cannot but be impressed with the well-known fact among our people, in whom the Anglo-Saxon tenacity to the ownership or claimed ownership of land is proverbial, that no more prolific source of misunderstandings, leading to altercations, breaches of friendly relations, and community and social obligations, and even to homicides, exists than disputes over boundary lines. It is difficult to conceive of a proceeding that would tend more readily to compose these differences than a suit in equity; to turn the energy of wranglers into a channel of usefulness and productiveness and peacefulness. As a matter of public policy, to settle disputes, to prevent lawsuits, and avoid altercations and bloodshed, the remedy in equity should not only be allowed but encouraged.

The Supreme Court reversed the decision of the lower court by saying that the plaintiff had no adequate remedy at law since he did not know where the boundary line was, that he could not successfully proceed at law unless he knew where the line was at one time or another, and that to refuse to give plaintiff the right to proceed in equity against the defendant would create a multiplicity of suits by the defendant if the plaintiff took steps such as attempting to fence or en-

close a part of the disputed territory. The Court reasoned that all of this could be avoided by allowing the court of equity to appoint surveyors, and that the matter could be handled expeditiously and with the protection of all parties concerned.

The respondent had relied strongly on the *McCreery* case[80] in which it was held:

> A mere confusion of boundaries of land is not sufficient to give a Court of Equity jurisdiction. There must be some equity in addition thereto. If the ordinary legal remedies are adequate, they must be resorted to. The legal remedies provided by our Code for the recovery of possession of land by one out of possession against another in possession claiming title, are ordinarily adequate to settle disputed boundaries.

The Court held that the rule announced was a correct one, but the case was distinguished from the *Uxbridge* case in that the complaint in the *McCreery* case was substantially an action to recover possession of a strip of land in the possession of the defendant who claimed title to the strip.

McRae v. Hamer[81] supports the rule laid down in the *Uxbridge* case. The *McRae* case was an action to define and have settled a boundary line between the parties. The plaintiff contended that the defendant had destroyed the original evidence of the line, such as marks, trees, and monuments. Plaintiff also contended that a court of equity should settle the matter in order to prevent a multiplicity of suits. Our Court followed the rules in other jurisdictions by saying that equity would entertain a suit involving a disputed boundary where there has been fraud or misconduct on the part of the defendant which results in the confusion of the boundary, where the relation between the adjoining landowners is such that there is a duty to protect and preserve the boundary, or where there will be a multiplicity of actions if equity does not entertain the action. The facts of the case showed that the defendant had mortgaged the tract of land in dispute and that if the plaintiff should succeed in an action at law to recover it, he would later have to reckon with the mortgagee and bring a similar action against him or one to remove a cloud upon his title. Although the Court held that a court of equity did have jurisdiction to settle the original boundary line as it had existed, it stated that such a decision would affect the questions of

80. McCreery v. Myers, 70 S. C. 282, 49 S. E. 848 (1904).
81. 148 S. C. 403, 146 S. E. 243 (1929).

title or right of possession. Therefore, it can be seen that if the defendant in such a case has been successful in the equity court, he may set up legal defenses such as adverse possession, estoppel, acquiescence, title by prescription, and perhaps others, to any law action later brought by the plaintiff. In such an action at law, the parties have a right to a trial by jury, whereas in the court of equity no such right exists.

By statute in South Carolina surveyors may be appointed to aid in determining the boundary line between the parties.[82] This statute applies only when a survey is necessary. In an action for damages, where the defendant's affidavit for order of survey does not show a necessity and the pleadings do not suggest a necessity, the court is not bound to issue an order of survey.[83] If a survey is necessary, the trial is postponed until it is made.[84] If the parties (either of them) refuse to nominate a surveyor, the court shall nominate two or more surveyors as it deems proper.[85] Our CIRCUIT COURT RULE 36 provides for a court order of survey in actions to recover land, but the rule does not *require* a survey.[86] A very recent South Carolina case[87] pointed out that the statute providing for a survey by order of the court was not mandatory.[88] In construing the statute, the Court stated, quoting from the case of *Cruikshanks v. Frean:*[89] "Either party may resort to it when for the want of other evidence of identity it becomes necessary; but when they think proper to put their rights upon other evidence, it would be a strange construction to compel them to provide more than was necessary."

B. *Actions Under the Uniform Declaratory Judgment Act*

An action involving the problems discussed herein may be brought under the Uniform Declaratory Judgment Act which was adopted in South Carolina in 1948.[90]

In general, it may be said that declaratory judgments

82. CODE OF LAWS OF SOUTH CAROLINA § 57-452 (1952).
83. Welsh v. Atlantic Coast Line R. R. Co., 107 S. C. 534, 93 S. E. 196 (1917); See also Cruikshanks v. Frean, 3 McC. L. 84 (S. C. 1825).
84. Gourdine v. Theus, 2 Brev. L. 35 (S. C. 1806).
85. CODE OF LAWS OF SOUTH CAROLINA § 57-452 (1952).
86. Lucius v. DuBose, 114 S. C. 375, 103 S. E. 759 (1920); Patterson v. Crenshaw, 32 S. C. 534, 11 S. E. 390 (1890). See also Little v. Little, 223 S. C. 322, 75 S. E. 2d 871 (1953) (gives the rule to follow in making the survey under a court order).
87. Rush v. Thigpen, 231 S. C. 230, 98 S. E. 2d 245 (1957).
88. CODE OF LAWS OF SOUTH CAROLINA § 57-452 (1952).
89. 3 McC. L. 84 (S. C. 1825).
90. CODE OF LAWS OF SOUTH CAROLINA §§ 10-2001 — 10-2014 (1952).

acts are designed to supply former deficiencies in legal procedure and to furnish a full and adequate remedy where none existed before, rather than to supplant or displace pre-existing and effective remedies or to provide a substitute for other regular actions. Their real value lies in the fact that in cases coming within their scope they enable parties to have their rights and obligations determined without either of them being obliged to assume the responsibility and the risk of acting upon his view of the matter and thus repudiating what may subsequently be held to be his obligations or violating what may be held to be the other party's rights. They are not intended to furnish a means by which the courts may be called upon for mere advisory opinions or required to decide moot or abstract questions.[91]

This Act has been used very sparingly since its adoption, but it provides a very efficient means of settling a dispute between the parties where there is uncertainty or insecurity respecting the legal rights of the parties. The Act is designed to give preventive justice by bringing about a complete and expedient determination of the rights of the parties. Its purpose is to settle a controversy between the parties before it reaches the litigable stage. Many times where the parties cannot obtain equitable relief, they may seek a declaratory judgment by the court. South Carolina has had a statutory provision permitting declaratory judgments since 1922;[92] however, the scope of this early statute was limited.[93] The Act of 1948 is to be liberally construed, and the granting of a declaratory judgment rests within the sound discretion of the trial judge.[94] Declaratory relief should not be accorded to try a controversy by piecemeal or to try particular issues without settling the entire controversy, and such relief will not be granted when remedy is invoked merely to try issues or determine the validity of defenses in pending cases.[95]

The Act is discussed very clearly by Judge Lide in 1 S. C. L. Q. 58, and, for the purposes of boundary disputes,

91. 16 AM. JUR. *Declaratory Judgements* § 7 (1938); noted in 1 S. C. L. Q. 58 (1948).
92. Act No. 542 of Acts and Joint Resolutions, 32 STAT. 967 (1922).
93. Daniel, Atty. Gen. v. Conestee Mills, 183 S. C. 337, 191 S. E. 176 (1937).
94. Southern R. R. Co. v. Order of R. R. Conductors of America, 210 S. C. 121, 41 S. E. 2d 744 (1947).
95. Williams Furn. Corp. v. Southern Coating & Chemical Co., 216 S. C. 1, 56 S. E. 2d 578 (1949); see also 11 S. C. L. Q. 110 (1958).

a complete summary of the cases involving the Act seems unnecessary. Suffice it to say that the Act is a proper means of raising the question of a boundary dispute in our State. The most recent case involving a boundary line which was brought under the Act is *Rush v. Thigpen.*[96] In that case the plaintiff sought injunctive relief against the defendant's trespass on the plaintiff's lands where the defendant was cutting and removing timber therefrom. The action was for determination of the boundary line and for a declaration of the rights of the parties. The Supreme Court held that even though the action was brought under the Declaratory Judgment Act, it was essentially an action of trespass to try title and the plaintiffs, therefore, must recover on the strength of their own title rather than on the weakness of the defendant's title.

ALLEN LEVERN RAY.

96. 231 S. C. 230, 98 S. E. 2d 245 (1957).