FILED
FEB 28 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PATRICIA STROMMEN and DIXIE RAUK,

Appellees,

v.

UNKNOWN CLAIMANTS OF

A tract of land located in the Southwest Quarter of the Southeast Quarter of Section 35, Township 98, North, Range 24 West of the 5th P.M., Winnebago County, Iowa, more particularly described in petition filed herein, and

PAUL SEVERSON, ZELLA SEVERSON, CLARA WERNETTE, RUBY WERNETTE WALKER, DON WALKER, HERBERT WERNETTE, DELORES WERNETTE, MARIE WERNETTE SEYLLER, CHARLES SEYLLER, AND ALL UNKNOWN SPOUSE, HEIRS, DEVISEES, GRANTEES OR ASSIGNEES OF, OR CLAIMANTS UNDER ANY OF SAID DEFENDANTS,

Appellants.

Filed February 28, 1978

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2-59904

Appeal from Winnebago District Court - J. W. Frye, Judge.

Defendants appeal trial court decree finding of mutual acquiescence in a boundary line. Affirmed.

James M. Stanton, of Boyle, Schuler & Stanton, of Clear Lake, for appellants.

Branstad & Bakke, of Forest City, for appellees.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

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PER CURIAM

Defendants appeal from a trial court decree which found that plaintiffs had established acquiescence in a fence as boundary line between their properties. We affirm the trial court.

The plaintiffs' petition was in two divisions, the first an equitable action to quiet title to the contested land and the second an acquiescence action at law under ch. 650.6, The Code 1975. However, with full understanding the parties and court agreed that both divisions would be tried in equity. That being the case, our review is de novo. Rule 4, Rules of Appellate Procedure; Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499 (Iowa 1975); Schauland v. Schmaltz, 252 Iowa 426, 428, 107 N.W.2d 68 (1961).

Plaintiffs and defendants are adjoining property owners. Plaintiffs' property is bordered on the northwest by the property of defendants Paul and Zella Severson, and on the northeast by the property of the remaining defendants. The plaintiffs' property is a northern part of a larger tract which was previously owned by Lenus Hanson and was bordered by defendants' predecessors in interest. Lenus Hanson inherited the land from his mother in 1932 and his parents had owned and lived on the land since at least 1905. In about 1940 Lenus moved a second house onto the northern portion of his tract. The family of his hired man, Bert Benson, lived in it. In 1959 Lenus deeded the house and a small parcel of land surrounding it to Benson. Plaintiffs are the daughters of Bert Benson and inherited the house and land from their parents. In 1968, Paul Severson, owner of the land to the northwest of the plaintiffs' land, commissioned a survey of his property. He was contemplating mortgaging his land to a local bank. In 1974 Severson began constructing a new fence along the line he believed to mark the southeast boundary of his property. The fence line was halted by the Benson house which, in view of the 1968 survey, Severson felt encroached upon his property. Shortly thereafter, the plaintiffs commenced their action.

A boundary by acquiescence may be established where two or more adjoining owners or their predecessors in interest, for ten or more consecutive years, have mutually acquiesced in a line definitely marked by a fence or in some other manner, as a true boundary although a survey may show otherwise and neither party intended to claim more than called for by his or her deed. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974); Dart v. Thompson, 261 Iowa 237, 154 N.W.2d 82 (1967). The burden is upon the

party claiming a boundary line by acquiescence to do so by clear proof. Hansen, supra; Ivener v. Cowan, 175 N.W.2d 121, 122 (Iowa 1970). We agree with the trial court that plaintiffs have satisfied their burden.

The plaintiffs sought to establish that a fence which separated their property from that of the defendants marked the boundary. Although the fence no longer existed at the time of trial, having been removed in sections during the period from 1955 to 1974, the plaintiffs established the existence and line of the fence by means of their own testimony, that of Lenus Hanson, as well as by a surveyor's testimony and the use of old photographs. The fence was removed over the years as the land in question changed from agricultural to residential.

Lenus Hanson testified that he lived on the land in question from the date of his birth 73 years ago, that the fence was on the property at the location alleged at that time, that his father and he considered it a boundary, that they used the land up to the fence continually, and that none of the defendants' predecessors, whom Lenus knew, ever spoke or acted in a manner which would indicate a contrary belief. The plaintiffs' testimony established that no one challenged their belief that the fence line was the northern boundary of their land until defendant Severson began building his fence in 1974.

While there was no express agreement between the parties or their predecessors that the old fence marked a boundary, the silence of the defendants and their predecessors for decades, in view of the actions thereon by the plaintiffs and their predecessors, is sufficient to establish mutual acquiescence. Leeka v. Chambers, 232 Iowa 1043, 1047, 6 N.W.2d 837 (1942); Miller v. Mills County, 111 Iowa 654, 658-59, 82 N.W. 1038 (1900).

The defendants rely almost entirely upon the 1968 survey ordered by defendant Severson. The record shows the several surveys in evidence to be based upon descriptions in very old deeds. Their lines overlap and one description is internally inconsistent. The cumulative effect of the survey evidence is ultimately unpersuasive. See Leeka, supra; Mills, supra. The nature of the survey evidence reinforces our view that plaintiffs have established acquiescence. The decree of the trial court is affirmed.

AFFIRMED.