FILED
SEP 24 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CECIL F. ROOKS, JR.,	)	**Filed September 24, 1985** 316
Plaintiff-Appellee,	)	
vs.	)	5-289 84-1295
BEULAH GRAY,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Hardin County, Carl E. Peterson, Judge.

Defendant appeals from judgment for plaintiff in a quiet title action, asserting that the evidence was sufficient to establish a hedge line boundary on theories of acquiescence or easement by prescription. **AFFIRMED.**

Carl R. Letz of the Letz Law Firm, Eldora, for defendant-appellant.

John L. Butler of Lundy, Butler & Lundy, Eldora, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

OXBERGER, C.J.

A dispute between the parties regarding boundaries was resolved by the trial court in favor of the plaintiff. Defendant appeals from the trial court's decisions that she did not prove an easement by prescription nor that the parties acquiesced in the boundary in question. We affirm.

The plaintiff, Cecil Rooks, Jr., purchased land adjacent to and west of that owned by the defendant, Beulah Gray, in 1978 by a quit claim deed from the Chicago and Northwestern Transportation Company. Part of a driveway and garage owned by defendant encroached onto this land. The garage extends eight feet onto the Rooks' property. Defendant says that plaintiff was aware of the encroachment prior to his purchase, and the abstract presented to him before he bought the land refers to the encroachment.

The defendant says in 1916 she recalls the driveway being in the same place it is now located and pine trees planted where the hedge to the west of the property is now located. She says she always thought the area where the pine trees were growing was the boundary. In 1953 concrete was placed over the driveway. In 1950 she purchased the land and moved the garage from behind the house to its present location. The pine trees were cut and in 1955 replaced with hedges. She has cared for the property since 1950.

Plaintiff brought this action to quiet title in himself. After the action was brought, he caused another abstract to be made, this one a Forty Year Marketable Title Abstract. The court held that the Marketable Title Act at sections 614.29, .33 cut off all interests adverse to plaintiff's claims that occurred prior to his root of title. The exception to this occurs when there is an easement or interest in the nature of an easement adverse to the plaintiff. Iowa Code § 614.36 (1985). Defendant claimed that by the doctrine of acquiescent boundaries she was entitled to keep the line where she had thought it was located. The

court disagreed with this and also denied her claim as set out in a motion to enlarge the court's findings of fact and conclusions of law that a prescriptive easement was created. The court made other fact findings and applications of law, but the defendant appeals from only these two decisions by the court.

Our review in this equitable action is de novo. Iowa R. App. P. 4.

I. Prescriptive Easement

A prescriptive easement occurs when the claimant establishes continuous, notorious, hostile, and open use of the land in question for ten years or more under claim of right or color of title. Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977).

We find it unnecessary to discuss the other elements of prescriptive easement, since we agree with the trial court there is a failure of proof that the use of the land was made under claim of right or color of title. The burden was on defendant to prove the elements of prescriptive easement. Id. at 861. There are no equities in favor of one who claims property of another by adverse possession and that person's acts are to be construed strictly. Roberts v. Walker, 238 Iowa 1330, 1335, 30 N.W.2d 314, 317 (1947). The defendant here must prove more than use of the land:

> In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

Iowa Code § 564.1 (1985); accord, Anderson, at 861. Use of the land is presumed to be permissive. Paul v. Mead, 234 Iowa 1, 11, 11 N.W.2d 706, 711 (1943).

Defendant presented no evidence at trial to show color of title. The only evidence of claim of right by her was the following testimony by her son of a conversation between himself and railroad workers:

> Q. Now, this line between you or between your mother's property and the Rooks' property, the boundary line, is that the same line that existed between your mother and the North Western Railroad Company? A. Approximately. The railroad never questioned what we had there.
>
> Q. You never questioned the railroad? A. I didn't question the railroad. They said they'd be happy if I would clean it all up at one time.
>
> Q. Who was that? A. Well, some of the railroad people, section crew probably.
>
> Q. Tell me about that talk. A. Oh, they were just whacking bushes down that grow up along the railroad right-of-way and I happened to be in there cleaning up or mowing the yard. And they were cleaning up and they said if you want to clean it all, we won't have to do it. But I didn't want to clean up any more. We had to clean up just the yard there and that was enough for me.
>
> Q. Where was it that you were cleaning up at this time? A. Where?
>
> Q. Yes, sir. A It was just west of mother's driveway over the the hedge.
>
> Q. Did you have any talks with anyone else at any time with respect to this boundary line? A. No.

This discussion concerning the clearing of brush did not touch on ownership of the land and does not overcome the presumption of permissive use. Therefore, defendant did not sustain her burden to show she was using the land under claim of right or color of title.

II. Boundaries

Boundaries may become fixed when recognized and acquiesced in by the parties or the grantors for ten years or more. Iowa Code § 650.6(1985). The plaintiff notes cases which indicate that no one can acquiesce in a line until it is shown that person had notice or knowledge of the claimed line. Griffin v. Brown, 167 Iowa 599, 611-12, 149 N.W. 833, 939 (1914). Knowledge particularly will not be drawn from silence of the absentee owner of an unimproved lot. Boyle v. D-X Sunray Oil Co., 191 F. Supp. 263, 272 (N.D. Iowa 1961). The defendant says, however, that the first abstract completed for the plaintiff shows no titleholder of his land. Therefore, defendant argues, there was no

one to give notice to of the boundary until 1978 when plaintiff purchased the land. Plaintiff responds by saying this issue was not properly raised at trial by defendant.

Whether properly raised or not, we agree with the trial court that defendant's proof falls short. In Griffin v. Brown, 167 Iowa, 599, 601, 613, 149 N.W. 833, 834, 838 (1914), the court also was faced with a situation, where the chain of title was unknown and the lot in question unoccupied. The court held:

> Upon examination of the record in this case, we find that there is no basis for the contention that the defendant Cora Nisbit Brown, or her grantor, Marcus E. Brown, or his grantor, E. F. Leland, ever knew of plaintiff's contention until the purchase by Brown from Leland, which was in 1905. Prior to that time, the land appears to have been unoccupied by any one. There is nothing to show that Leland ever knew of plaintiff's claim, or did anything to indicate that he acquiesced in the same. It does not apear that he resided in Sioux City, or had ever seen the land in controversy. There is no basis for claiming, then, that the Browns or their immediate grantors ever acquiesced in anything that the defendant did in the way of establishing a line. The chain of title from the government does not appear in this record.

Id. at 613, 149 N.W. at 838. It appears from the record here that the property continued to be held by the railway company until purchased by the plaintiff. The conversation with the railway workers is also insufficient here to show acquiescence in the boundary established by defendant. As in Griffin, we find there is insufficient proof to establish the doctrine.

We affirm the trial court ruling.

AFFIRMED.