



IN THE COURT OF APPEALS OF IOWA

DONALD SLAATS and)
DELPHINE SLAATS,)
Husband and Wife,)

Plaintiffs - Appellants,)

Filed June 28, 1979

vs.)

JOHN J. POWERS and)
SUSAN M. POWERS,)
Husband and Wife, and)
THOMAS WINNE and)
NANCY WINNE,)
Husband and Wife,)

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2-62592

Defendants - Appellees.)

Appeal from Jackson District Court - A. L. Keck, Judge.

Plaintiffs appeal dismissal of their claim which sought to establish a certain fence line as the boundary by acquiescence between their property and that of defendants. - Affirmed.

William C. Fuerste, of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque,
for Plaintiffs - Appellants.

Leo A. McCarthy and Michael D. Holt, of Reynolds, Kenline, Breitbach, McCarthy,
Clemens, McKay & Naughton, Dubuque, for Defendants - Appellees.

Heard by Oxberger, C. J., and Donielson, Snell, and Johnson, JJ. Carter, J., takes
no part.

PER CURIAM

Plaintiffs, Donald and Delphine Slaats, brought action under chapter 650, The Code 1977, claiming that a certain fence line between their property and that of defendants, Powers and Winne, had become the established boundary by acquiescence. Trial court held that plaintiffs failed to prove acquiescence on the part of defendants or their predecessors in title and dismissed the claim. We affirm.

Plaintiffs have owned and occupied their farm since 1947. From 1939 to 1947 the property was owned by LaVern Willmes and prior thereto by his father, John Willmes. The land to the north of plaintiffs' tract was anciently owned by one Pierret. In the late 1950's, this property was sold to Neil and Rose Weber who in turn sold it to defendant Powers in 1975. Powers has since subdivided the tract and sold one of the lots to defendant Winne. According to the testimony of plaintiff Donald Slaats, he has continuously maintained a fence between his property and that of defendants in the belief that said fence marked the northern boundary of his farm. He stated that this fence was in the same location as an older fence which was on the property when he purchased it. The fence traverses an area of dense trees and underbrush unsuitable for farming. Slaats used the land up to the fence for grazing his cows and occasionally extracted firewood therefrom.

A suit under chapter 650 is a special proceeding, and on appeal it is reviewed as an ordinary action. Section 650.4; Dart v. Thompson, 261 Iowa 237, 240, 154 N.W.2d 82, 84 (1967). Accordingly, trial court's findings of fact are binding on us if supported by substantial evidence. Id. at 240, 154 N.W.2d at 84. In Mahrenholz v. Alff, 253 Iowa 446, 112 N.W.2d 847 (1962), the court set out the following guiding principles:

The rule we have many times announced for establishing a boundary by acquiescence is that where two adjoining owners for ten years or more mutually acquiesce in a line, definitely marked by a fence or in some other manner as the dividing line between them, such line becomes the true boundary. . . . Our decisions on the question require the parties or their predecessors in ownership to recognize as the boundary the line contended for. Such recognition may be by conduct or by claims asserted, but it must be by both parties. It involves a claim by one party, known to the other, and failure by him to take any step to the contrary for the statutory period. (citations)

Acquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as the true line. (citations).

Mahrenholz, 253 Iowa at 450-51, 112 N.W.2d at 849. The question of acquiescence is generally one of fact. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974).

Plaintiffs initially contend trial court erroneously excluded certain testimony of LaVern Willmes as inadmissible hearsay. They argue that Willmes' testimony would have established an actual, honest belief on the part of Willmes and plaintiffs that they owned the land up to the fence. Defendants now concede that said testimony was admissible but argue that its exclusion did not constitute reversible error. We agree. It is harmless error to exclude admissible evidence which could not have changed the result if it had been received. In re Estate of Lewman, 239 Iowa 563, 569, 30 N.W.2d 737, 740 (1948). Trial court's dismissal of plaintiffs' claim was based on a failure of proof as to defendants' or their predecessors' acquiescence in the alleged boundary fence; the excluded testimony went to the question of plaintiffs' and their predecessor's belief. Thus, we conclude that even if this evidence had been admitted, it would not have effected the outcome, and no reversible error occurred.

Next, plaintiffs assert trial court erred when it found that plaintiffs failed to prove acquiescence by defendants or their predecessors in title. We may reverse the court's finding on this issue only if it can be said that acquiescence was established as a matter of law. We think the evidence falls far short of meeting such a high standard of proof. Plaintiffs do not contend that the present defendants have acquiesced in plaintiffs' fence as the boundary between their respective properties. The only evidence tending to show acquiescence on the part of defendants' predecessors in title was supplied by plaintiff Donald Slaats and his predecessor, LaVern Willmes. Willmes testified that prior to his ownership of the Slaats farm, there had been a dispute between his father and Pierret over who should maintain the fence. Slaats testified that sometime in the late 1960's, Neil Weber offered to allow Slaats to move his fence northward along a county road which dissected Weber's farm because Weber was not using his land south of the road. On the other hand, defendant Powers testified that because Weber did not know where the true boundaries were. Other evidence suggests that the Slaats fence was not installed as a boundary line but as a barrier to contain Slaats' cattle. Slaats admitted that he never conversed with Pierret or Weber about the boundary line between their farms or who should maintain the fence.

Although plaintiffs rely heavily on Olson v. Clark, 252 Iowa 1133, 109 N.W.2d 441 (1961), we find it distinguishable from the case at bar. In Olson, the starting point of the disputed boundary fence was readily discernable from a nearby road and plaintiffs' farming operation was similarly discernable. 252 Iowa at 1138, 109 N.W.2d at 445. Under these circumstances, the court held that defendants were chargeable with such knowledge as to put them on notice of plaintiffs' claim. Id. In the instant case, however, the fence was located in an area of heavy timber and underbrush and could not be seen from the road which crosses defendants' property. This land was of so little use to defendants' predecessor, Weber, that he purportedly offered to give it away to Slaats.

Our review of the record leads us to conclude that trial court's judgment should be affirmed. The evidence was not sufficient to establish, as a matter of law, acquiescence by defendants or their predecessors in title in the boundary line contended for by plaintiffs.

AFFIRMED.