

FILED

JUN 30 1978

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

HAROLD H. HENSAL and
RACHEL L. HENSAL,

Appellees,

vs.

H. W. BALDWIN and
INA V. BALDWIN,

Appellants.

Filed June 30, 1978

530

2-60334

Appeal from Guthrie District Court - M. C. Herrick, Judge.

Defendants appeal trial court decree which apportioned six foot excess land equally between the parties in action to locate a disputed boundary. - Affirmed.

John A. Gerken, of Cudahy, Wilcox, Handley, Magee & Polking, P.C.,
Jefferson, for Appellants.

John E. Donahey, Panora, for Appellees.

Heard by Allbee, C.J., and Donielson, Shell, Oxberger and Carter, JJ.

PER CURIAM

Defendants H. W. and Ina Baldwin appeal an adverse ruling of the trial court decreeing that a disputed six-foot excess between defendants' and plaintiffs Harold and Rachel Hensels' property be apportioned equally between the parties in an action brought by plaintiffs to locate a disputed boundary. See chapter 650, The Code. An action under chapter 650 is a special proceeding. Section 650.4, The Code. On appeal, it is "heard as in an action by ordinary proceedings." Section 650.15, The Code. Accordingly, our review is not de novo; the judgment of the trial court, having the effect of a jury verdict, is binding on us if supported by substantial evidence. *Dart v. Thompson*, 261 Iowa 237, 240, 154 N.W.2d 82 (1967); *Allen v. Melson*, 260 Iowa 689, 690, 150 N.W.2d 292 (1967).

Defendants' first assignment of error is whether the oral evidence by Spieker of an alleged agreement regarding the disputed boundary line and the location of a fence is violative of the statute of frauds, section 622.32, The Code. In the instant case, no conveyance of land is involved. Cf. *Brandt v. Schucha*, 250 Iowa 679, 691-2, 96 N.W.2d 179, 186 (1959). The testimony centered on the conversations which occurred at the time the fence was installed. This is relevant to the location of the true boundary line and where the parties believed it was. Further, parol evidence is always admissible to show whether the parties have reached a private agreement, which if followed, is conclusive even if possession is not for the full statutory period. *Kitchen v. Chantland*, 130 Iowa 618, 623-4, 105 N.W. 367 (1906).

Defendants' second contention is that the trial court erred in finding the alleged oral agreement was proven by clear, satisfactory and convincing evidence. We need only determine whether there is substantial evidence to support the trial court's finding. *Dart, supra*.

Crucial to this point is the testimony of Tom Spieker, the individual who was to install the fence. Spieker testified that he would never have installed the fence where there was a boundary line dispute had the parties not reached an agreement as to the location of the fence. Evidence of this is the fact that on the first scheduled day for installation, Spieker left without installing the fence when he learned of a dispute. Our review of the evidence discloses there is substantial

evidence to support the trial court's finding.

The third assignment of error is that the trial court erred in finding sufficient evidence to establish a boundary line by adverse possession. Because the trial court did not base its decision on the establishment of adverse possession, but only stated that the evidence was sufficient to establish a boundary under such a theory, we need not reach defendants' claim of error.

The final issues raised by defendants concern the boundary line as fixed by the trial court. Defendants argue the trial court erred in applying the more general surveying apportionment theory where occupational use lines dictated a different result. They also argue the court erred in not establishing the boundary line as determined by the Hillhouse survey.

Our review convinces us that the trial court did not err in using general apportionment rules as opposed to occupational use lines or in fixing the boundary by using the Angove survey instead of the Hillhouse survey. The disputed excess involved only the parties to this lawsuit. When measurements were made in both directions from the plaintiffs' and defendants' properties, additional excesses were found. The general reasons for favoring the occupational use line approach over the apportionment rule, the disturbing of long recognized boundaries such as fences, buildings, walls, driveways and hedges, was not at issue between defendants and plaintiffs.

There is nothing in the record which dictated why either party was entitled to the entire excess. Since at least 1942, the parties' predecessors had recognized as the true boundary line the middle of a group of three walnut trees, with each owner responsible for the walnuts falling on their own side of the recognized line. Finally, this generally recognized line also happens to be the midpoint of the disputed excess.

The trial court did not err in applying the general apportionment rule and in fixing the boundary as contained in the Angove survey.

AFFIRMED.