

FILED

DEC 26 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ALLEN NORTH,)

Plaintiff-Appellant,)

vs.)

ARLO NORTH,)

Defendant-Appellee/
Cross-Appellant,)

**HART ELEVATOR CONSTRUCTION
COMPANY, WAYNE HART, SCHETTLER)**

**SEEDS, CRANE FEEDS, INC., DAN
CRANE, HAROLD McCOLLOUGH,)**

**AUD-EX FEED SERVICE, RICHARD
HEALY, and FARMER'S COOPERATIVE)
ELEVATOR,)**

Defendants-Appellees.

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4-353
83-1037

Appeal from the Iowa District Court for Crawford County - Richard F. Branco, Judge.

Plaintiff appeals and defendant North cross-appeals from judgment in a replevin action. AFFIRMED.

Robert Kohorst and Daniel J. Murtaugh of Louis, Moore, Kohorst, Louis, Murtaugh & Kohorst, Harlan, for plaintiff-appellant.

Thomas R. Eller of Nash, Eller, Brink & Claussen, Denison, for defendants-appellees North, Crane, and Crane Feeds, Inc.

William Q. Norelius of Norelius Law Offices, Denison, for defendant-appellee McCollough.

Raymond O. Snook of Snook Law Office, Glidden, for defendants-appellees Hart and Hart Elevator Construction Co.

William G. Polking, Carroll, for defendants-appellees Schettler Seeds, Healy, and Farmer's Cooperative Elevator.

James M. Richardson of Barron & Richardson, Coon Rapids, for defendant-appellee Aud-Ex Feed Service.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

SNELL, J.

In 1959, the plaintiff-appellant, Allen North, acquired property in Crawford County and in 1962 he hired Todd & Sargent, Inc. to build a mill on the property. In 1971, Todd & Sargent acquired the property by sheriff's deed and later conveyed it to plaintiff's aunt and uncle, Sears and Olive North.

Sears North died in 1978, and his son, defendant Arlo North, was appointed executor of his estate. In 1981, plaintiff brought a replevin action against Arlo North seeking recovery of property sold by Arlo. The property sought included mill equipment, molasses, alfalfa and salt stored on the mill premises, and an antique welder. Money damages were sought in the event that recovery of the specific personalty proved impossible, and punitive damages were also sought. Arlo was named as a defendant and his answer asserted as an affirmative defense that plaintiff had no ownership interest in the property.

Other defendants named in the suit include: Hart Elevator Construction Company, which actually dismantled the mill equipment; Wayne Hart, of Hart Elevator; Schettler Seeds, the purchaser of the dismantled mill equipment; Crane Feeds, Inc., the purchaser of the electrical equipment (sold prior to the dismantling of the mill); Dan Crane of Crane Feeds; Harold McCullough, the purchaser of the molasses; Aud-Ex Feed Services, the purchaser of some of the dismantled equipment from Schettler Seeds; Richard Healy, purchaser of the boiler removed during the dismantling; and the Farmer's Cooperative Elevator of Arcadia, the purchaser of the molasses.

At trial, Arlo North introduced the 1971 sheriff's deed showing ownership in the name of Sears and Olive North. The plaintiff's objections on the grounds of hearsay and dead man's statute were overruled and the deed was admitted to show Sears North's ownership of the mill property. Arlo North denied any knowledge of the deed prior to Sears North's death.

Following the introduction of the deed, plaintiff offered testimony by

himself and his wife and documentary evidence showing that the 1971 deed was intended to be an equitable mortgage rather than an absolute conveyance to his uncle. He claimed that because the deed was an equitable mortgage, Sears North did not own the property on which the mill was located. The trial court ultimately excluded all evidence offered by the plaintiff to show an equitable mortgage on the grounds that it was inadmissible under the dead man's statute and the plaintiff's failure to plead his theory of an equitable mortgage.

Evidence was admitted that shortly before filing suit the plaintiff offered to purchase some of the mill property as part of what he characterized as settlement offers. Defendants presented evidence that the plaintiff asserted no ownership interest in the mill property as he watched it being removed from the mill premises.

In entering judgment, the trial court found that the admissible evidence was insufficient to establish plaintiff's claim of equitable mortgage. The court concluded that the deed showed that Sears North owned the land on which the mill was located and that the mill equipment constituted fixtures that Arlo North had a right to sell. The court found that Arlo had no right to sell the molasses, the salt, or the antique welder and judgment was entered against him for the monetary value of those items. Judgment was also entered for the monetary value of certain electrical equipment that Arlo testified he had wrongfully sold through mistake. No punitive damages were awarded.

Judgment was entered in favor of all defendants other than Arlo. During trial, defendant McCollough offered to confess judgment for a specific sum but the offer was rejected. The trial court found that because the plaintiff rejected the offer, McCollough was entitled to any costs incurred subsequent to the offer. The court also found that no such costs had been incurred.

I. Scope of Review. Our standard of review is assigned error. Iowa R. App. P. 4. The court's findings of fact have the force of a special verdict and are

binding if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

II. Dead Man's Statute. A large portion of plaintiff-appellant's claim is based on the exclusion of testimony by the trial court under the dead man's statute and the exception to the dead man's statute found in Iowa Code § 622.4 and § 622.5. Plaintiff sought to introduce testimony by himself, his wife, and documentary evidence showing the existence of an equitable mortgage with decedent Sears North.

The dead man's statute provides:

622.4 Transaction with person since deceased or mentally ill. A party to an action or proceeding, or a person interested in an action or proceeding, or a person from, through, or under whom a party or interested person derives any interest or title by assignment or otherwise, and a husband or wife of a party or person, shall not be examined as a witness in regard to any personal transaction or communication between the witness and a person who, at the commencement of the examination, is deceased or mentally ill, in a case against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of the deceased person, or the assignee or guardian of the mentally ill person.

Iowa Code § 622.4 (1983) repealed 1983 Iowa Acts ch. 37, § 7.

The exception states:

622.5 Exceptions. This prohibition does not extend to a transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or guardian is examined on his or her own behalf, or as to which the testimony of the deceased or mentally ill person is given in evidence.

Iowa Code § 622.5 (1983) repealed 1983 Iowa Acts ch. 37, § 7.

Both of these statutes were repealed by the 1983 Iowa Acts, ch. 37, § 7 with the repeal effective July 1, 1983. The trial court's findings were filed on June 17, 1983. Therefore, the dead man's statute and the exception are applicable to this case.

We decline to discuss the constitutionality of the dead man's statute. First, because we have serious question whether error was preserved on the issue of the

constitutionality of the dead man's statute. This court has consistently held that matters not raised in the trial court cannot be effectively asserted for the first time on appeal. Peel v. Burk, 197 N.W.2d 617, 619 (Iowa 1972). Additionally, in a recent case, the supreme court refused to find the statute unconstitutional and held that because the dead man's statute was rationally related to its purpose, any changes should be deferred to the legislature. Adams v. Bonacci, 287 N.W.2d 154, 156 (Iowa 1980).

We also see no merit in the plaintiff's argument that the new Iowa Rule of Evidence 601, which became effective July 1, 1983, operates as a repeal of the dead man's statute and should be applied retroactively.

We find the exclusion of plaintiff's evidence on whether the deed was an equitable mortgage to be proper. Plaintiff sought to introduce testimony by Allen North, his wife, Emmy Lou, and documentary evidence showing that the deed which Sears North received was actually an equitable mortgage and did not convey true ownership.

The trial court ruling excluding this evidence was proper on two grounds. First, the plaintiff did not plead or raise this issue until proof was offered at trial. The court sustained all objections to any testimony involving conversations between Allen North and Sears North on whether the deed was an equitable mortgage. When parties proceed to try an issue, without objection, not presented by the pleadings, the issue is properly in the case. Matter of Guardianship of Collins, 327 N.W.2d 230, 233 (Iowa 1982). Such is not the case here. The issue of equitable mortgage was not raised in the pleadings and was objected to at trial. In fact, the plaintiff at no time in his pleadings challenged the ownership of the land by Sears North. Because the plaintiff failed to plead this claim, the exclusion was proper.

The plaintiff argues that the evidence of the equitable mortgage was offered as rebuttal evidence to the quit claim deed that was entered. He claims it was

not necessary to plead the equitable mortgage theory and that the testimony should be admitted under Iowa Code 622.19 and 622.20.

We reject the plaintiff's claim that this testimony was in the nature of rebuttal evidence. The trial court properly allowed the deed to be admitted under the testimony of Warren Sargent, one of the officers of Todd & Sargent. The deed was offered for the purpose of establishing ownership of the land by Sears North. Iowa Code sections 622.19 and 622.20 provide:

Whole of a writing or conversation. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given.

Iowa Code § 622.19 (1983) repealed 1983 Iowa Acts ch. 37, § 7.

Detached acts, declarations, or conversations. When a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

Iowa Code § 622.20 (1983) repealed 1983 Iowa Acts ch. 37, § 7.

These statutes allow for the introduction of evidence to explain the whole of an act, declaration, conversation, or writing. Here, no portion of the deed was omitted. The deed speaks for itself and the proffered testimony only presents an additional issue, whether Sears North owned the land, which was not raised until evidence was presented.

The exclusion of the testimony of Allen North, Emmy Lou North, and other documentary evidence was also proper under the dead man's statute. Allen North is a "party to an action or proceeding" and Emmy Lou is his wife. Thus, testimony of both was properly excluded under Iowa Code section 622.4. Appellant argues that because Emmy Lou's testimony would have covered conversations she overheard between Sears and Allen North, it should have been admissible under Carlson v. Bankers Trust Co., 242 Iowa 1207, 1212, 50 N.W.2d 1, 4 (1951) (spouse not

incompetent to testify to conversation he overheard between plaintiff and decedent in which he took no part). Nowhere in the record of testimony did Emmy Lou say she overheard a conversation in which she did not participate. Her testimony would not be admissible under this exception. The appellant also argues that her testimony should have been admitted because she was not plaintiff's spouse at the time of the alleged conversation. A reading of section 622.4 indicates that it is directed to the capacity of the witnesses at the time they are to testify. Since she is his spouse now, she is incompetent.

Appellant also argues that because Arlo North was allowed to testify in his capacity as executor, the dead man's statute was waived under Iowa Code section 622.5, set forth above.

The sole testimony of Arlo North with regard to the land ownership was that he had no knowledge of the deed prior to Sears North's death. His testimony did not touch on any conversations or transactions with Sears North which would allow for a waiver of the dead man's statute. See, Connell v. Hays, 255 Iowa 261, 270-71, 122 N.W.2d 341, 347 (1963) (when executor offered checks to negative claimed oral agreement, dead man's statute is waived allowing plaintiff to testify to source of checks); Solbrack v. Fosselman, 204 N.W.2d 891, 896 (1973) (executor offered cancelled checks entitling plaintiff to introduce evidence regarding nature of checks despite dead man's statute).

Appellant also argues that Allen North was acting as an agent for Sears North at the time of the transfer of the deed from Todd & Sargent to Sears North and that the dead man's statute does not apply to transactions and conversations with an agent. We find no evidence in the record to show that Allen North was acting as Sears North's agent and thus reject the claim.

Appellant also argues that the court erred in allowing Arlo North to testify that he sold the mill property for his mother, Olive North, whose interest was established through termination of Sears North's joint tenancy. They argue that

because she took by joint tenancy, she is not entitled to the protections of the dead man's statute (statute is effective in cases against "executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor").

We agree with the trial court and fail to see the pertinance of the status of Olive North, who is not a party to the action. The statute has been invoked to protect Arlo North, who is an heir at law, next of kin, and survivor.

In summary, we conclude that the trial court acted properly in excluding testimony by Allen North, Emmy Lou North, and documentary evidence offered to show that the deed conveying the property to Sears North actually was an equitable mortgage. Such testimony was properly excluded under the dead man's statute and on the grounds that the equitable mortgage theory was not raised in the pleadings. The sole admissible evidence to support the theory of an equitable mortgage was the testimony of Warren Sargent. Because this is not sufficient to establish an equitable mortgage by clear, satisfactory, and convincing evidence, the equitable mortgage theory was properly rejected. See Lovlie v. Plumb, 250 N.W.2d 56, 59 (Iowa 1977).

III. Mill Property as Fixtures. After concluding that Sears North had title to the land on which the mill was located, the trial court also found that the mill equipment constituted fixtures to the property. The three requirements of a fixture are: (1) the physical attachment to the property; (2) the adaptation to a particular use; and (3) the intent of the fixing party. The Ottumwa Woolen Mill Co. v. Howeley, 44 Iowa 57, 63 (1876). We agree with the trial court ruling that the mill equipment was a fixture. All of the mill equipment was designed to operate as a unit. Parts were attached by embedment in concrete. Testimony indicates that if the bins were removed, they would have to be cut apart with cutting torches. Allen's offer to purchase the land and the mill as a unit indicates his intent to treat it as a unit. The trial court's finding that the mill property constituted fixtures was proper.

IV. Settlement Offer. In February or March of 1981 and prior to the ultimate sale of the property to Schettler Seeds, the plaintiff offered to purchase the mill for \$3500. Plaintiff claims that this offer was in the nature of a settlement offer and that the trial court acted improperly in considering this. See Lewis v. Kennison, 278 N.W.2d 12, 14 (Iowa 1979) (offers to compromise are generally inadmissible). To be inadmissible there must be a showing that the offer was made in an attempt to settle a controversy or claim. Id. Plaintiff presented no testimony that he made the offer in order to settle a claim against Schettler Seeds or against Arlo North. Rather, this was an admission by Allen North and it supports other evidence showing his lack of interest in the property. Such other evidence includes: the rundown condition of the mill property; his failure to claim any of the mill property except a fifth wheel when he and Arlo North inspected the property; and his failure to make any claim to the property when Arlo North said to him: "I was selling everything down to — and I placed my hand on the east side of the concrete."

V. Damages. The trial court awarded Allen North damages for alfalfa pellets, molasses, electrical equipment, salt, and an antique welder which had belonged to the plaintiff and were wrongfully sold by Arlo North. Most of these items had been sold or disposed of and could not be physically returned. In the pretrial stipulation, the parties agreed that the molasses, alfalfa pellets, and salt had been destroyed and could not be returned. The trial court's findings as to the value of these items is supported by substantial evidence. Plaintiff complains that the court should have allowed him to choose between money damages or return of actual possession for those items which still could have been returned. In his petition, plaintiff sought replevin of the property (Count I) and if replevin could not be granted, the amount of the property's value (Count II). Because most of the property had been disposed of, we find the trial court's award proper.

The trial court also acted properly in dismissing plaintiff's claim for punitive

damages. There is no showing that Arlo North acted in a "malicious, oppressive, wanton, willful or reckless" manner.

Finally, the stipulation of the parties indicates they were aware before trial that the molasses, alfalfa pellets, and salt were missing and that a replevin of these items was not possible. In light of this, we affirm the trial court's award of costs to defendant McCullough, incurred after the plaintiff refused his offer to confess judgment presented at time of trial.

The findings of the trial court are affirmed.

AFFIRMED.