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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LYLE G. CLARK and
ELAINE H. CLARK,

Plaintiffs-Appellees,

vs.

RICHARD A. MOHR, JEANETTE A.
MOHR, ALYN RITTMER, GARY O.
PENNINGROTH and MARIBETH J.
PENNINGROTH,

Defendants-Appellants.)

Filed October 21, 1980

0-245

2-64394

Appeal from Clinton District Court - Nathan Grant, Judge.

Defendants appeal from judgment quieting title to strip of land in plaintiffs on theories of acquiescence and adverse possession. - AFFIRMED.

Stephen D. Haufe, of Jurgemeyer, Frey & Haufe, Clinton, for defendants-appellants.

Donald G. Senneff & Richard W. Farwell, of Shaff, Farwell & Senneff, Clinton, for plaintiffs-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendants appeal from a judgment quieting title to a strip of land in plaintiffs on theories of acquiescence and adverse possession. Defendants claim the judgment is erroneous because plaintiffs did not prove a certain fenceline was on defendants' title property, the location of the fenceline was not adequately described, plaintiffs did not establish the necessary elements of adverse possession or acquiescence and the strip of land in question was condemned by the state in prior proceedings. Since this action was tried in equity, our review is de novo. Iowa R. App. P. 4. We affirm the judgment.

Plaintiffs filed a petition on September 24, 1978 seeking to quiet title to a five foot strip of land. This strip is located on the eastern edge of their property—east of the right-of-way of a north-south paved road and west of a fenceline running north and south along the entire length of the road. Plaintiffs allege the government survey line is the record boundary line separating their property from that of defendants, but that the parties and their predecessors in interest have mutually acquiesced in the fenceline (which lies approximately five feet east of the survey line) as the true boundary for more than ten years. See section 650.6, The Code. Defendants denied these allegations and pleaded various affirmative defenses including condemnation of the disputed land by the State in the early 1970's in order to build the paved road.

On November 14, 1979, the trial court issued its findings, conclusions and decree. It found that the fenceline had been recognized as the true boundary by plaintiffs, defendants and their predecessors in interest for more than the required ten-year period. It also found that plaintiffs had established their theories of acquiescence and adverse possession which entitled them to the five-foot strip and title thereto was quieted in them. Regarding the State's prior condemnation, the court said the State Highway Commission did not condemn all the way east to the fenceline because it did not want to pay for the trees and shrubs that were part of the fenceline. Instead, the court found, the Commission condemned up to a line five feet west of the fenceline and running parallel to it. Although we are not bound by these findings, we give them some weight, especially regarding the credibility of the various witnesses. Iowa R. App. P. 14(f)(7).

1. Defendants argue the judgment is erroneous because plaintiffs did not prove

that the fenceline was located on defendants' record property. More generally, they argue that plaintiffs did not adequately establish the location of the fenceline, thereby precluding their title to the disputed land.

We do not agree. First of all, contrary to defendants' assertions, plaintiffs' primary duty in this action is to establish the true boundary between the properties, not to establish the location of the survey line and indicate the difference between it and the alleged true boundary. Miller v. Mills County, 111 Iowa 654, 657, 82 N.W. 1038, 1039 (1900). The following language is found in Hughes v. Rhinehart, 190 Iowa 560, 562, 180 N.W. 643 (1920):

To establish a line by acquiescence, it is not necessary that a claim to land beyond that fixed in the deed should be shown. What is essential is that the attitude of the respective owners toward the line marked as a division line be in harmony with it as such for a sufficient time to warrant the inference that it has been adopted as such.

It is therefore sufficient that plaintiffs allege and prove the true boundary line as established by acquiescence. Whether this was done is discussed below. They need not prove the location of the survey line and how it differs from the true boundary, nor must they prove the fenceline is located on defendants' land.

Defendants' claim regarding plaintiffs' failure to establish the exact location of the fenceline is also without merit. Section 650.5, The Code (regarding the petition in an action to settle a disputed corner or boundary) provides in part: "the interest of the respective parties, and ... certain corners and boundaries therein described, as accurately as may be, shall be established" (emphasis added). The statute does not require that a full legal description be given of the alleged true boundary. In this case there was much testimony given concerning the location of the fence, especially with respect to the paved road. The evidence also included various photographs and diagrams illustrating plaintiffs' and defendants' properties in general and the disputed five-foot strip in particular. From the entire record, the trial court could and did find sufficient and adequate evidence by which to describe the disputed land and quiet title therein in plaintiffs. We find no basis for reversal as to these issues.

II. Defendants next argue plaintiffs failed to establish their ownership of the strip by acquiescence or adverse possession as a matter of law. We find the evidence

supports plaintiffs' claim of acquiescence and therefore we need not decide the adverse possession issue. The principles relating to acquiescence are firmly established:

... in the absence of other controlling circumstances, the inference is conclusive that the division line between adjoining tracts, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years, - the statutory period of limitations, - is the true boundary between them.

Miller, 111 Iowa at 660, 82 N.W. at 1040. See also Mullahey v. Serra, 220 Iowa 1177, 1179, 264 N.W. 63, 64 (1935). Acquiescence may be established even though neither party intends to claim more than the property described in their respective deeds. Brown v. McDaniel, 261 Iowa 730, 733, 156 N.W.2d 349, 351 (1968); Bradley v. Brukhart, 139 Iowa 323, 326, 115 N.W. 597, 598 (1908). It will not, however, be established where a fence is mutually recognized merely as a barrier and not a boundary. Petrus v. Chicago, Rock Island & Pacific Railroad Co., 245 Iowa 222, 228, 61 N.W.2d 439, 442 (1953). See Sille v. Shaffer, No. 64290, slip op. at 5 (Iowa Sup. Ct. October 15, 1980) (fenceline held recognized as boundary and not merely as barrier). The burden is on the party claiming acquiescence to establish the true boundary by clear proof. Brown, 261 Iowa at 733, 156 N.W.2d at 351.

Defendants claim they had no notice that plaintiffs considered the fenceline to be the boundary line. That such notice is an element of acquiescence is made clear in Griffin v. Brown, 167 Iowa 599, 611-12, 149 N.W. 833, 838 (1914):

Acquiescence involves more than a mere establishment of a line by one party, and the taking of possession by him. It involves the idea that the other, with the knowledge of the line so established and the possession taken, asserts thereto, and this may be shown by his conduct, by his words, or even by his silence. There must, however, be something in the record to show that the party, charged with acquiescence, consented to the act of the other in establishing the line and assuming possession. Acquiescence means a consent to the conditions, and involves knowledge of the conditions. (emphasis added)

See also Sille, slip op. at 5.

We cannot agree, however, that defendants had no notice that plaintiffs considered the fenceline to be the boundary line. As Griffin indicates above, such notice may be implied by defendants' silence in the face of plaintiffs' conduct. George Blumer, plaintiffs' predecessor in interest, testified there was no question between him

and defendant Rittmer's father (predecessor in interest) that the fenceline was the boundary. He also said that he had continually farmed up to the fenceline, that hedges had grown in the fenceline and that Rittmer's father farmed west to the hedges and no further. Mrs. Blumer testified that, when they sold their property to plaintiffs in 1960, they told plaintiffs that the fenceline was the boundary. Lyle Clark, one of the plaintiffs, testified that defendant Rittmer never contended that the fenceline was not the boundary. Tim Clark, plaintiff's son, helped his father farm and testified they farmed up to the fence. Defendant Mohr testified that he did not do any hunting west of the fence because he did not want to trespass. The entire record indicates that plaintiffs' dominion over the land in question was well known by defendants. Sille, slip op. at 6. Although defendants produced some evidence to the contrary, we agree with the trial court that the parties and their predecessors in interest acquiesced in the fenceline as the true boundary between their respective properties for more than the required ten years. See section 650.6, The Code. Since plaintiffs established acquiescence by clear proof, we affirm the trial court in this respect.

III. Finally, defendants claim the judgment is erroneous because the State condemned the land in question in 1972 or 1973; consequently, there is nothing left for plaintiffs to assert title to. We disagree.

In 1972-73, the State of Iowa condemned a highway right-of-way along the eastern edge of plaintiffs' property. The eastern edge of the right-of-way coincided with the government survey line separating plaintiffs' and defendants' properties as shown in the land records. There was some evidence from defendants' witnesses that the State thought it was condemning up to the fenceline, thinking the fenceline coincided with the survey line. They also testified that, in any event, they did not intend to leave a five-foot strip between the right-of-way and the fenceline since such small strips are generally worthless to the property owner.

Plaintiffs' witnesses, however, indicated the State deliberately refused to condemn all the way to the fenceline. Plaintiff Lyle Clark testified that the State condemned up to the section line and refused to tell him why condemnation did not occur up to the fenceline despite his efforts to convince the State to do so. George Pillars, a lawyer who represented the Clarks in the condemnation proceedings, testified

that the condemnation lines were established four to six feet west of the fenceline. He also said the State did not go to the fenceline because it did not want to pay for any more trees and shrubs that were in and near the fenceline than it had to. William Johnson, who lives on nearby land purchased by Clark, testified that he saw the stakes marking the land to be condemned--they were located four to six feet west of the fenceline. From this evidence, the trial court found, and we agree, that the State did not condemn to the fenceline but instead condemned to the survey line which was located five feet west of the fenceline. Since the five foot strip was not condemned by the State, trial court properly quieted title to the strip in plaintiffs.

We have considered all of defendants' arguments and find no reason to disturb the trial court's findings, conclusions or judgment. We therefore affirm.

AFFIRMED.