

FILED

JUN 28 1979

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JOHN GORDON, JR., and
MARION M. GORDON,

Appellees,

vs.

MELVIN SCHONE and PATRICIA
SCHONE, ENGLE VANDER VEER
and HAZEL VANDER VEER,

Appellants.

Filed June 28, 1979

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2-62448

Appeal from Marion District Court - Robert O. Frederick, Judge.

Defendants appeal trial court's judgment quieting title to property in plaintiff's alleging trial court erred in finding plaintiffs had met their burden of proof that the boundary line between the parties' adjoining lots had been established by acquiescence. Affirmed. Further, all parties claim error in trial court's legal description of the subject property. Remanded to trial court for entry of Order Nunc Pro Tunc stating correct legal description.

Robert A. Hutehison and Philip E. Harris of Swift, Brown, Winick & Graves, Des Moines, Iowa, for appellants.

Bert A. Bandstra of Knoxville, Iowa, for appellees.

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

PER CURIAM

Defendants Engle and Hazel VanderVeer and Melvin and Patricia Schone appeal trial court's judgment quieting title to a triangular piece of property¹ in plaintiffs John and Marion Gordon. Defendants assert trial court erred in finding plaintiffs had met their burden of proof that the boundary line between the parties' adjoining lots had been established by acquiescence for a period of ten years or greater. Further, all parties claim that the legal description of the subject property is in error and pray that it be corrected. We affirm the judgment of the trial court and remand to that court for entry of an Order Nunc Pro Tunc stating the correct legal description of the subject property.

1. The parties to this dispute own adjoining lots in the Rietveld and Emmel's Factory Sites Addition to the town of Harvey. Plaintiffs purchased their land in the fall of 1968, with actual conveyance in April, 1969. Their predecessors in interest were Garth McConnell (June, 1959 until conveyance to the Gordons) and Floyd Baumgarten (May, 1948-June, 1959). The adjacent lot was owned by defendants Engle and Hazel VanderVeer throughout this period, until conveyance to their daughter and son-in-law, defendants Patricia and Melvin Schone, in March, 1977.

In July, 1970, plaintiff John Gordon and defendant Engle VanderVeer orally agreed to construct a common driveway between their properties. That driveway replaced a fence which had been erected by Engle VanderVeer in 1950, after he and Floyd Baumgarten made an oral agreement whereby Baumgarten gave 10 feet of the south end of his lot to VanderVeer and, in return, VanderVeer gave Baumgarten the use of Tract 1 which lay between Baumgarten's lot and the Wabash Railroad right-of-way.

The present dispute arose after defendants-Schones took title and constructed a house near the common driveway. They maintain the Gordons obstructed their use of the driveway and as a result, constructed a barb-wire fence blocking plaintiffs' use of the driveway. Plaintiffs filed a petition in equity, seeking to enjoin the Schones from interfering with their use of the common driveway. This petition was amended to pray that title to the disputed property be quieted in plaintiffs and that the boundary between the two properties be declared established by acquiescence. Defendants appeal from trial court's judgment granting plaintiffs' prayer for relief.

¹ Hereinafter referred to as Tract 1.

II. Section 650.6, The Code 1977, provides that "[e]ither the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years" Although actions under chapter 650 are special proceedings, and on appeal are viewed as ordinary actions,² this dispute began as an action in equity and, as such, is reviewable de novo. Iowa R. App. P. 4; Mahrenholz v. Alff, 253 Iowa 446, 450, 112 N.W.2d 847, 849 (1962). Accordingly, we give weight to the fact findings of trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

In order to prevail, plaintiffs must establish by clear proof that the parties (and their predecessors in interest if the parties have not held an interest in the property for ten consecutive years) have mutually acquiesced in the claimed boundary for a period of ten or more consecutive years. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974). A boundary is defined as a line or object which indicates the limit or furthest extent of a tract of land. Eggers v. Mitchem, 239 Iowa 1211, 1215, 34 N.W.2d 603, 606 (1948). Acquiescence, as used in this context, means recognition of the contended boundary line by claims asserted or conduct by both parties. Dart v. Thompson, 261 Iowa 237, 241, 154 N.W.2d 82, 84-85 (1967). It is "consent inferred from silence—a tacit encouragement." Eggers v. Mitchem, 239 Iowa at 1216, 34 N.W.2d at 606, quoting Dwight v. City of Des Moines, 174 Iowa 178, 183, 156 N.W. 336, 338 (1916). Further, when the right claimed by acquiescence is predicated upon an agreement, the agreement as to the intention of the parties and the purpose of any fence which has been erected to mark the boundary line is of paramount importance. Eggers v. Mitchem, 239 Iowa at 1216, 34 N.W.2d at 606.

The record in this case clearly shows that in 1950 Floyd Baumgarten, plaintiff's predecessor in interest, and defendants-VanderVeers agreed to an arrangement beneficial to both parties and that the arrangement apparently was at the instigation of Engle VanderVeer who wished to "square up the properties."³ Further, the record

² §§ 605.04 and 605.15, The Code 1977. Dart v. Thompson, 261 Iowa 237, 240, 154 N.W.2d 82, 84 (1967); Trimpl v. Meyer, 246 Iowa 1245, 1247-48, 71 N.W.2d 437, 438 (1955).

³ Tr. p. 20.

indicates a fence was erected by VanderVeer along the new boundary line he suggested, which was understood to be 10 feet further into Baumgarten's lot than the original line.⁴

At the time the driveway was mutually agreed upon in 1970, the fence had remained in place some 20 years and had been treated as the boundary line by the adjoining lot owners.⁵ Additionally, from 1950 to the present, Tract 1 has been used by plaintiffs and their predecessors with the knowledge of the defendants.⁶ Thus, a conclusive inference has been raised of an agreement upon the line so marked as the boundary. Brown v. Bergman, 204 Iowa 1006, 1011, 216 N.W. 731, 733 (1927); Miller v. Mills Company, 111 Iowa 654, 660, 82 N.W. 1038, 1040 (1900). Further, defendants-VanderVeers, by silence, and certainly by conduct, are shown by the record to have acquiesced in the boundary line established as claimed by plaintiffs. Defendants-Schones, as purchasers of property, cannot question a boundary line acquiesced in by their predecessors in title for more than ten years. Dart v. Thompson, 261 Iowa 237, 241, 154 N.W.2d 82, 84 (1967). We find the plaintiffs have met their burden of showing acquiescence by clear proof. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974); Brown v. McDaniel, 261 Iowa 730, 733, 156 N.W.2d 349, 351 (1968). Trial court, therefore, was correct in quieting title to Tract 1 in plaintiffs and finding that a new boundary line between the adjoining properties had been established by acquiescence.

III. On appeal, all parties agree that there is an error in the legal description of the disputed property, although defendants maintain only that the description "does not close" and plaintiffs recommend the insertion of an additional line of description. We conclude the proper procedure is to remand the case to trial court with directions to that court to enter an Order Nunc Pro Tunc stating the correct legal description of the property.

Judgment of trial court is affirmed with directions to remand for entry of Order Nunc Pro Tunc.

AFFIRMED WITH REMAND FOR ENTRY OF ORDER NUNC PRO TUNC.

⁴ Defendant now asserts that a mistake as to 2-1/2 feet was made when the 1950 fence was erected. Such a mistake, if actually made, does not now defeat plaintiff's claim that a new boundary line was established and that the driveway was built with the boundary at its center. See Miller v. Mills Company, 111 Iowa 654, 659, 82 N.W. 1038, 1040 (1900).

⁵ Although plaintiffs' immediate predecessor in interest, McConnell, testified he "never had occasion to treat it in any way" (Tr. p. 12), he further testified he constructed a garage to within a small space of the fence and that no one ever came over onto his side of the fence for any reason. (Tr. p. 12).

⁶ Baumgarten planted a garden on Tract 1. The Gordons cleared the tract, built a decorative fence, put in a drain line, built a clothesline, and buried a fuel tank on the triangular piece of land.