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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BLANCHE KUHL, et al,
Plaintiffs-Appellants,
vs.
DEAN C. LINCOLN, et al,
Defendants-Appellees.

November 26, 1980

0-156
2-63681

Appeal from Mills District Court - Harold L. Martin, Judge.

Petitioners appeal from judgment quieting title in respondents to accretion land. Respondents cross-appeal for damages resulting from petitioners' removal of respondents' fences. - AFFIRMED IN PART; REVERSED IN PART.

Raymond Pogge, of Pogge, Root & Steege, Council Bluffs, for plaintiffs-appellants.

Roderick Pearson, of Thomas & Pearson, Glenwood, for defendants-appellees.

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

PER CURIAM

Petitioners appeal from a judgment quieting title in respondents to certain accretion land alleging several grounds of error. Respondents cross-appeal, alleging error for the trial court's failure to award damages caused by petitioners' removal of respondents' fences. We affirm in part and reverse in part.

Our review of this equitable quiet title action is de novo. Council Bluffs Savings Bank v. Simmons, 243 N.W.2d 634, 635 (Iowa), cert. denied, 429 U.S. 1001, 97 S. Ct. 532, 50 L.Ed.2d 613 (1976); Grosvenor v. Olson, 199 N.W.2d 50, 51 (Iowa 1972); Iowa R. App. P. 4. We give weight to the fact findings of the trial court, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Petitioners are owners of record title of government lot 1 in section 36-72-44 in Mills County, Iowa, also known as the northwest fractional quarter of the northwest quarter, except 1 1/4 acres in the northwest corner thereof, including all accretions belonging thereto and containing in all 38 2/5 acres, more or less. Respondents are owners of record title to government lot 2 in section 36-72-44 in Mills County, Iowa, including all accretions belonging thereto. The disputed land is accretion land located south and west of government lot 1.

I. In a 1930 action Blanche Kuhl quieted title to government lot 1, which contained 38 2/5 acres, more or less. Petitioners contend that after 1930 the disputed land accreted to the land to which Blanche established record title in 1930. Since ownership in accretion land vests in the owner of the riparian land to which it is accreted, Council Bluffs Savings Bank v. Simmons, 243 N.W.2d 634, 635 (Iowa 1976); Mather v. State, 200 N.W.2d 498, 500 (Iowa 1972), petitioners contend that they gained title to the disputed land when it accreted. Petitioners have the burden of proving by a preponderance of the evidence that they acquired the disputed land by accretion, see Rand v. Miller, 250 Iowa 699, 702, 95 N.W.2d 916, 918 (1959), Morrow v. Mutz, 159 Iowa 652, 658, 140 N.W.2d 896, 898 (1913), and, therefore, must prove that the disputed land accreted after 1930.

Although both parties agree that the disputed land is accretion land, evidence that the disputed land fully accreted before 1930 is stronger than the evidence that it accreted after 1930. Petitioners therefore fail in their burden of proving they acquired

title to the disputed land by accretion.

II. A rebuttable presumption of ownership arises out of record title. Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 535 (Iowa 1973). A rebuttable presumption of ownership arises from possession of property. In re Cornish's Estate, 233 Iowa 596, 599, 10 N.W.2d 85, 87 (1943).

Respondents have record title to the disputed land. The chain of title includes an executor's deed filed in 1947 that describes respondents' land as:

> Lot Number Two (2) of the Official Plat of Section Thirty-six (36) in Township Seventy-two (72), Range Forty-four (44), including therewith any and all accretions, at any time thereto belonging, being the South Half of the North West Quarter of Section Thirty-six (36). . . .

"[T]he South Half of the North West Quarter" includes the land in dispute. The occurrence of this language in the 1947 executor's deed and in subsequent documents in respondents' chain of title establishes respondents as record titleowners of the disputed land.

Respondents and their predecessors in title have farmed the disputed land for many years. Petitioners have never had possession. Respondents are now in possession under a record title. Petitioners have neither possession nor muniment of title. Petitioners have failed to rebut the presumption that respondents own the disputed land. Additionally, respondents have established by a preponderance of evidence title to the disputed land superior to that of petitioners. Cf. Cheney v. Womans Baptist Foreign Missionary Society of the West, 243 Iowa 134, 137, 50 N.W.2d 651, 652-53 (1952) (appellee in possession of land under record title sustains burden of proof in demonstrating superior title to that of appellants who have neither possession nor muniment of title). We therefore affirm the trial court's decree quieting title in respondents.

III. Respondents seek damages for fences removed by petitioners from the boundary line dividing petitioners' and respondents' land. The fence fracas started when the Kuhls erected a fence cutting through the Lincolns' land. The Lincolns removed the fence and erected their own fence along the true boundary between the parties' land. The Kuhls then removed the Lincoln fence and built a second fence cutting through the Lincolns' land. The Lincolns removed the second Kuhl fence and built their own second

fence along the true boundary between the parties' land. The Kuhls then removed the second Lincoln fence and built a third fence cutting through the Lincolns' land. The Lincolns removed the third Kuhl fence.

In denying respondents damages for their two removed fences the trial court concluded that the parties were equally at fault in removing the other's fences. However, we find that each time the Kuhls erected a fence on property owned by the Lincolns, they did so wrongfully. See Sieck v. Anderson, 231 Iowa 490, 499, 1 N.W.2d 647, 649 (1942). The Lincolns were within their rights in removing the wrongfully erected fences from their property, see 35 Am. Jur. 2d Fences § 34, and in building a fence along the true boundary line, see 35 Am. Jur. 2d Fences, § 2. We therefore reverse the trial court's denial of damages to respondents. Finding that each of the two fences wrongfully removed by the Kuhls had a value of $250, we hereby order petitioners to pay respondents $500 in damages.

AFFIRMED IN PART; REVERSED IN PART.