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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

MILDRED VALDER,	)	
Plaintiff-Appellant,	)	Filed September 20, 1979
vs.	)	
SARAH K. WALLIS, A Widow; **SARAH D. BRYCESON,** and **LARRY BRYCESON,** Her Husband; **DEANNA WALLIS DAVIS,** a/k/a **DEANNA P. WALLIS** and **TIM DAVIS,** Her Husband; **DOUGLAS PEARLEY WALLIS** and **GENEVIEVE WALLIS,** His Wife; **HARRISON COUNTY, IOWA: THE STATE OF IOWA: AND ALL OTHER PERSONS HAVING OR CLAIMING ANY INTEREST IN AND TO CERTAIN REAL ESTATE,**	)	149 2-61925
Defendants-Appellees.	)	

Appeal from Harrison District Court - E. F. Hanson, Judge.

Plaintiff appeals from a judgment quieting title to certain accretion land in defendants. - Reversed and remanded.

Robert G. Scoville, of Ryan, Scoville & Uhlir, So. Sioux City, Nebraska, and David S. Lathrop, of Lathrop & Albracht, Omaha, Nebraska, for Plaintiff-Appellant.

Patrick C. McCormick, Sioux City, for Defendants-Appellees.

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

SNELL, J.

Plaintiff appeals from a judgment quieting title to certain accretion land in defendants, alleging insufficiency of the evidence to support the findings that the disputed land accreted to defendants' property, and, in the alternative, was adversely possessed by defendants for the requisite period of time. Plaintiff also alleges that the trial court erred in refusing to allow her to make an offer of proof consisting of the prior recorded testimony of an unavailable witness. We reverse the judgment of the trial court and remand for further proceedings in accordance with this decision.

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). Since questions of accretion and adverse possession are largely questions of fact, we engage in a brief excursion into the facts of this case as derived from the record before us.

This case is yet another land dispute arising out of the wanderings of the Missouri River. Both parties claim that the land in dispute was accretion to property already in their possession. Plaintiff claims that the land in dispute was accretion to an island to which plaintiff has title. Title to a section of property adjoining the land in dispute was quieted in plaintiff in prior Nebraska litigation. Valder v. Wallis, 196 Neb. 222, 225-26, 242 N.W.2d 112, 114-15 (1976). Defendants claim that the property was accretion to their property on the Iowa mainland side of the river.

Plaintiff's expert witness concluded from an examination of aerial photographs taken at various points in time between 1940 and 1971 that a shift in the river's direction eroded away defendants' land along the river, and, after a period of time, islands formed by accretion had joined together and moved into the same position where defendants' land had formerly been, separated from defendants' property by a narrow chute or offshoot of the river. Subsequent construction of dikes across this chute caused further accretion and the ultimate dissipation of the water in the chute.

Plaintiff sought to introduce the testimony of a witness who testified in the prior Nebraska proceedings regarding the navigability of the chute prior to the construction

of the dikes. The witness was unavailable for testimony at the trial of this case due to his imprisonment in a Nebraska county jail. The trial court sustained defendants' hearsay objection to the admission of that evidence and refused to allow plaintiff to make an offer of proof consisting of the transcript of the witness' prior testimony.

Defendants also claim that even if the land in dispute was not accretion to their property, they are still entitled to the land under the doctrine of adverse possession. Defendants' witnesses testified that cattle owned by certain of the defendants were seen roaming around the property in dispute. However, the testimony was inconsistent on whether those sightings were before or after July 29, 1960, the point in time ten years prior to the commencement of this action. Defendants' witnesses also testified that defendants had cleared and seeded land on the property in dispute, and had extended their north boundary fence across the chute. On the basis of the evidence submitted, the trial court quieted title to the land in defendants, finding that the land accreted to defendants' property, and, in the alternative, that defendants were entitled to the property under the doctrine of adverse possession.

I. Accretion is defined as the gradual and imperceptible formation of land by the action of water. Mather v. State, 200 N.W.2d 498, 500 (Iowa 1972); Dartmouth College v. Rose, 257 Iowa 533, 536, 133 N.W.2d 687, 689 (1965); Wilcox v. Pinney, 250 Iowa 1378, 1383, 98 N.W.2d 720, 723 (1959). Land may accrete to an island or to the riverbed itself, as well as along the shoreline of a river. Mather, 200 N.W.2d at 500; State v. Raymond, 254 Iowa 828, 830, 119 N.W.2d 135, 137 (1963); Meeker v. Kautz, 213 Iowa 370, 372, 239 N.W.27, 28 (1931). Under Iowa law, one who owns land fronting on a navigable stream owns the frontage up to the ordinary high water mark, Mather, 200 N.W.2d at 500, and the State owns the river bed from the ordinary high water mark to the center or thread of the stream. Id.; Raymond, 254 Iowa at 831, 119 N.W.2d at 137. Land that accretes at or above the ordinary high water mark becomes the property of the landowner to whose shore it attaches. Mather, 200 N.W.2d at 500. Consequently, land that accretes to an island in a navigable stream or to the bed of the stream itself becomes the property of the State. Id.; Raymond, 254 Iowa at 831, 119 N.W.2d at 137. It is also well established that lands of a riparian owner are as subject to being lost by erosion as they are of being added to by accretion. Wilcox, 250 Iowa at 1382, 98 N.W.2d at 723; Payne v. Hall, 192 Iowa 780, 783-84; 185 N.W. 912, 914-15 (1921).

The question of accretion is a factual question resolved after a consideration of all of the relevant testimony. Mather, 200 N.W.2d at 501; Sieck v. Godsey, 254 Iowa 624, 629-30, 118 N.W.2d 555, 557 (1962). The quantity of proof required to establish that land has accreted to a particular piece of property is a preponderance of the evidence. Rand v. Miller, 250 Iowa 699, 702, 95 N.W.2d 916, 918 (1959); Morrow v. Mutz, 159 Iowa 652, 658, 140 N.W. 896, 898 (1913).

Plaintiff's claim rests on the assertion that the land in dispute was part of an island or group of accretion-formed islands joined together. In Iowa, an island is defined as a body of land surrounded by water if it is shown that the body of land has some characteristics of permanence, and that it is surrounded by water at all times, as opposed to being surrounded by water only during times when the water is high. Mather, 200 N.W.2d at 501-02.

Our review of the record leads us to the conclusion that plaintiff has established by a preponderance of the evidence that the land in dispute was part of an island or combination of islands formed by accretion. Plaintiff made a prima facie case for that assertion through the testimony of her expert witness, who was the only expert witness to testify, as well as the only witness who was not a named party or related to a named party. Defendants' witnesses offered no testimony to refute plaintiff's prima facie case. In fact, defendants' witnesses' testimony supported the contention that the chute separated defendants' property from the land in dispute until the time that the dikes across the chute were constructed. Consequently, we conclude that plaintiff's theory of accretion was supported by a preponderance of the evidence and that the trial court erred in deciding that the land in dispute accreted to defendants' property.

Plaintiff's expert witness testified that by further accretion, the accretion-formed islands joined plaintiff's land upstream, title to which had been established by the Nebraska litigation of these parties. Valder v. Wallis, 196 Neb. 222, 225-26, 242 N.W.2d 112, 114-15 (1976). Since we conclude that the land in dispute formed initially as islands by accretion, some claim thereto might arguably be asserted by the State of Iowa. The State, however, after having been served with notice of this quiet title action, made no claim thereto by failing to answer and default was entered against it. We conclude that the disputed land accreted to plaintiff's land to which title was quieted by the Nebraska

litigation and title thereto under Iowa law should be quieted in plaintiff.

A further problem arises by reason of the construction of the dikes across the chute. The dikes have caused further accretion within the chute resulting in the attachment of the island to the mainland. We believe that the proper rule to be followed with regard to the dividing line between accretions to plaintiff's island and defendants' mainland property is that the line at which the respective accretions meet is the boundary line. 4 H. Tiffany, The Law of Real Property § 1228, at 1096-97 (3d ed. 1975); 65 C.J.S. Navigable Waters § 82(b), at 261-62 (1966); Comment, 45 Iowa L. Rev. 945, 946 n.2 (1960) (citing Holman v. Hodges, 112 Iowa 714, 84 N.W. 950 (1901)). We reverse the judgment of the trial court and remand for a determination of the boundary between plaintiff's and defendants' land in accordance with the above-stated rule.

II. In light of the foregoing, we do not reach the question of whether the trial court erred in refusing to allow plaintiff to make an offer of proof consisting of the prior recorded testimony of an unavailable witness. We find that the evidence submitted was sufficient to establish plaintiff's title by a preponderance of the evidence. It is thus unnecessary for us to rule on the admissibility of additional evidence on plaintiff's behalf.

III. Defendants claim, and the trial court decreed, that even if the land in dispute was not accretion to defendants' property, defendants are still entitled to the property under the doctrine of adverse possession. In Iowa, establishment of title by adverse possession requires proof of open, exclusive, continuous, actual, and hostile possession under claim of right or color of title for at least ten years. Council Bluffs Savings Bank v. Simmons, 243 N.W.2d 634, 636 (Iowa 1976); I-80 Associates, Inc. v. Chicago, Rock Island & Pacific Railroad, 224 N.W.2d 8, 10 (Iowa 1974); Grosvenor v. Olson, 199 N.W.2d 50, 51 (Iowa 1972). All of these elements must be proved by the adverse claimant by clear and convincing evidence. Moffitt v. Future Assurance Associates, Inc., 258 Iowa 1160, 1170, 140 N.W.2d 108, 114, modified, 141 N.W.2d 776 (1966); Lawse v. Glaha, 253 Iowa 1040, 1046, 114 N.W.2d 900, 903 (1962). Usually no equities exist in favor of one who claims property of another by adverse possession, and his or her acts are to be strictly construed. Grosvenor, 199 N.W.2d at 51; Shives v. Niewoehner, 191 N.W.2d 633, 636 (Iowa 1971); Lawse, 253 Iowa at 1046, 114 N.W.2d at 903. Every presumption is against the

adverse claimant. Meyers v. Canutt, 242 Iowa 692, 696, 46 N.W.2d 72, 75 (1951). To establish a claim under the doctrine of adverse possession, it is not necessary for the claimant to live on the land, or to enclose it with fences, however, the claimant must at least take and maintain such possession and exercise such open dominion as an owner in general ordinarily would in holding, managing, and caring for property of like nature and condition. Moffitt, 258 Iowa at 1171, 140 N.W.2d at 114 (quoting Whalen v. Smith, 183 Iowa 949, 953, 167 N.W. 646, 647 (1918)). In other words, to start the statute running in his or her favor, the adverse claimant must enter the land under such conditions as give rise to a cause of action in favor of the true owner. Moffitt, 258 Iowa at 1171, 140 N.W.2d at 114.

From our review of the record, we conclude that defendants have not proved by clear and convincing evidence a valid claim of adverse possession for the requisite ten-year period. Testimony by defendants' witnesses indicated only that cattle owned by defendants were present on the land west of the chute prior to 1960. However, Larry Bryceson, the defendant who was regularly farming the area to the east of the chute, testified that he witnessed no such presence of cattle on the land west of the chute prior to the early 1960's, and testified that he had placed no cattle on that land until 1961. Evidence of unfenced stock wandering onto property is insufficient to establish a claim of right to that property; and unless color of title can be shown, such use of property does not amount to adverse possession. Hafner v. Chase, 146 Iowa 231, 232, 124 N.W. 1087, 1087 (1910).

Assuming arguendo that defendants did have color of title to the land in dispute by reason of their deed which established the Missouri River as the western boundary of their property, defendants' claim of adverse possession still fails for an absence of clear and convincing evidence of actual, open, hostile, exclusive, and continuous possession for ten years prior to the commencement of this quiet title action. The evidence presented by defendants was not clear and convincing in showing that the cattle were sighted on the land in dispute in this case as opposed to the land immediately to the north, to which title was quieted in plaintiff in the prior Nebraska litigation. Furthermore, Larry Bryceson's testimony that he did not place any cattle on the west side of the chute prior to 1961 indicates that any cattle seen on the disputed land prior

to 1961 were not on that land by reason of defendants' intent to exercise an open and hostile dominion over the land. Since this action was commenced on July 29, 1970, the placing of cattle on the land in dispute in 1961 would not suffice to establish a claim of adverse possession for the requisite ten-year period.

There was evidence that defendants had extended their north boundary fence across the chute and onto the land west of the chute. However, the evidence shows that the fence was extended onto property to which title was quieted in plaintiff in the Nebraska litigation and not onto the property in dispute in this case. Testimony also revealed that Larry Bryceson had cleared and seeded land on the property in dispute. However, Larry Bryceson testified that he had cleared and seeded the land in 1962, which is not a sufficient time prior to the commencement of this action to support a claim of adverse possession.

Finding that the evidence was not clear and convincing in support of defendants' claim of adverse possession, we reverse the judgment of the trial court awarding title to defendants on that ground.

We note from the record that defendants have made certain improvements on the land to which we now quiet title in plaintiff. Our reversal of the trial court, awarding title to the property in dispute to plaintiff, does not foreclose defendants from seeking some form of relief for those improvements, such as that provided in chapter 560, The Code 1979.

The judgment of the trial court is reversed; title to the property in dispute is hereby quieted in plaintiff; and the case is remanded for a determination of the boundary line between defendants' property and the property now awarded to plaintiff in a manner consistent with this decision.

REVERSED AND REMANDED.