

IN THE COURT OF APPEALS OF IOWA

LLOYD HEIAR and MARY C. HEIAR,)

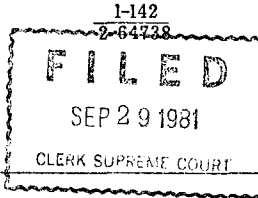
Plaintiffs-Appellants,)

vs.)

Filed September 29, 1981

LAWRENCE J. HEIAR and GLORIA)
 HEIAR; MARY CLARE HANRAHAN;)
 HELEN M. PRESNELL; ELEANOR)
 HANSEN; ROBERT J. EBERHART and)
 AGNES M. EBERHART,)

Defendants-Appellees.)



Appeal from Clinton District Court - L. D. Carstensen, Judge.

Plaintiffs appeal from judgment for defendants in an action seeking to establish a boundary line by acquiescence. Defendants cross appeal an order nunc pro tunc for plaintiffs correcting the decree entering judgment for plaintiffs with regard to a portion of the disputed boundary lines. REVERSED IN PART AND AFFIRMED IN PART.

Richard T. Jellinger of Petersen, Petersen & Eddy, Clinton, Iowa, for plaintiffs-appellants.

James E. Bennett, of Keyes, Bennett & Kucera, Cedar Rapids, Iowa, for defendants-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Plaintiffs appeal from judgment for defendants in an action seeking to establish a boundary line by acquiescence. Defendants cross appeal an order *nunc pro tunc* for plaintiffs correcting the decree entering judgment for plaintiffs with regard to a portion of the disputed boundary lines. We reverse in part and affirm in part.

In order to facilitate a concise statement of the facts of this case, reference will be made to a sketch attached to this opinion, which is a combination of the trial court's sketch included in its judgment and other exhibits in the record indicating the pertinent property holdings of plaintiffs and defendants.

Plaintiff Lloyd Heiar is the owner of record of the property referred to as "Parcel A" by the trial court. Parcel A, comprised of parcels A1, A2, A3, and A4, is circumscribed by points 2 to 19 to 20 to 21 to 7 to 25 to 10 to 1 to 2 on the trial court's reference sketch. Defendant Hanrahan is the owner of record of the property labelled "Parcel B2" by the trial court. Parcel B2 is circumscribed by points 26 to 27 to 20 to 4 to 26. Defendant Lawrence Heiar is the owner of record of "Parcel B1." Parcel B1 is circumscribed by points 2 to 19 to 27 to 26 to 2. Defendants Presnell and Hansen are the owners of record of the parcel of property circumscribed by points 4 to 5 to 7 to 21 to 4.

The fence line, as it now stands, running from point 24 to 23 to 22 to 17 to 16, is the product of several discrete incidents. In 1962, plaintiff Lloyd Heiar erected a fence running south from point 24, on the north boundary of defendant Hansen's property, through defendant Presnell's property and through defendant Hanrahan's property to point 14 on the reference sketch. The second incident occurred in 1965 when defendant Hanrahan sold a portion of her land (parcel B1) to nonparty Kaczinski. Kaczinski refused to finalize the transaction until plaintiff Lloyd Heiar moved a portion of the fence west to the agreed upon property line. Plaintiff Heiar moved the fence, creating a jog in the otherwise straight fence line. The jog is represented by points 23 to 22 to 17 to 16 on the reference sketch. The final segment of the fence in dispute, which ran from point 16 to point 28, is no longer standing. That segment of the fence was erected by Kaczinski's successor in 1969.

The trial court held that plaintiff Heiar failed to prove by clear and convincing evidence that the fence running from point 24 to 23 to 22 to 17 to 16, and then the line continuing from point 16 to the northern line of block 13 and terminating at point 2

established the boundary by acquiescence of adjoining landowners.

The trial court amended its original decree by an order nunc pro tunc entered on February 14, 1980. The order established points 15 to 16 then to point 28 as the boundary by acquiescence between plaintiff Lloyd Heiar and defendant Lawrence Heiar. Plaintiff appeals the trial court's judgment for defendants and defendants cross appeal the order nunc pro tunc for plaintiffs.

L. Scope of Review We must first determine the scope of review of this action to have a disputed boundary line established. An action brought pursuant to chapter 650, The Code 1979, is a special proceeding, not reviewable here de novo. §650.4, The Code 1979. The judgment in such a case has the effect of a jury verdict, which will not be disturbed unless it is unsupported by substantial evidence. §650.15, The Code 1979. On the other hand, an action to establish boundaries not brought under the authority of chapter 650 is reviewable by us de novo. Thus, to define the appropriate scope of our review of the trial court's decision, we must determine the nature of the proceeding that was before the trial court.

Plaintiffs have not brought their action to establish disputed boundary lines under chapter 650. Plaintiffs make no mention of chapter 650 in their petition. Only general equitable relief was requested by plaintiffs to establish that the defendants have acquiesced in treating the fence lines as the boundaries between plaintiffs' property and defendants' properties. Plaintiffs did not request the court to establish the boundaries in the event the court found insufficient evidence of acquiescence by the defendants, which incidentally, would be the relief requested under a chapter 650 proceeding. The court did not appoint a commission, nor was there any request for a commission to assist in this case. The language of chapter 650 literally requires the court to appoint a commission, which has the responsibility of finding the true boundary lines or the location of the boundary established through acquiescence of the parties. §§650.7, .9, The Code 1979. In the present controversy, plaintiffs and defendants agreed with the court that the sole purpose of the proceeding was to determine the issue of acquiescence to the fence line as the boundary line. The court elicited the parties' agreement to the narrow statement of the issue of whether there was acquiescence to the fence line as the boundary, rather than undertaking a general determination of boundary lines, which is the purpose contemplated by a special proceeding under chapter 650 and not the common law of acquiescence. The plaintiffs originally brought this

action in equity, as evidenced by the original notice to the defendants. We are guided by the principle that the essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is at law or equity, Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa App. 1979), and conclude based on the foregoing facts that this cause is an equitable action brought outside the scope of chapter 650.

As an equitable proceeding, our review is de novo. Marenholz v. Alff, 112 N.W.2d 847, 849 (1962); Iowa R. App. P. 4. We will give weight to the trial court's decision, especially when considering the credibility of witnesses, but we are not bound by its findings. Iowa R. App. P. 14(f)(7). We now address the substantive issues presented on this appeal.

II. Boundary Acquiescence The dispositive issue in this case is whether the plaintiffs and defendants have mutually recognized the fence represented by points 24 to 23 to 22 to 17 to 16 to the north edge of block 13 then to point 2 as the boundary line separating their properties. In addressing that issue, we will divide the whole fence into appropriate segments representing plaintiffs' claims against separate defendants.

A. Hansen-Presnell fence (the segment of fence running north from the intersection of lines 21 to 4 and 23 to 24 to point 24).

There is testimony that plaintiff Lloyd Heiar and defendant Hansen did not recognize the Hansen-Presnell portion of the fence as boundary line separating Heiar's property from the Hansen-Presnell property. Undisputed testimony shows that plaintiff Lloyd Heiar did not erect the fence where he thought the boundary was located. Instead, plaintiff Heiar located the fence in a place further onto the defendant's property at the defendant's request. Testimony shows that defendant's interest in having the fence erected further onto her property was not altruistic, as her request was motivated by her lack of desire to maintain a large yard. Further, defendant Lawrence Heiar testified that he approached plaintiff Lloyd Heiar for permission to enclose a portion of the land directly west of the Hansen-Presnell fence, indicating defendant Lawrence Heiar considered plaintiff Heiar the owner. Lawrence Heiar testified that Lloyd Heiar gave his permission to Lawrence to enclose the area circumscribed by points 24 to 23 to 22 to 6, stating that he (Lloyd) did not own the land anyway.

There was also testimony indicating that plaintiff Heiar and defendant Hansen

recognized the fence as the boundary line. Plaintiff Heiar purchased a tract of property from Hansen in 1962. The tract, represented by points 21 to 9 to 25 to 7 to 21, lies directly west of where the Hansen-Presnell fence was to be finally located. Testimony showed that the true boundary line between the property sold and the property retained by Hansen was not established at the time of the sale of the land to plaintiff Heiar. According to plaintiff Lloyd Heiar's testimony, the Hansen-Heiar line and the description of the land in the deed from Hansen to Heiar was to be established by measuring from the location of the fence once the fence was erected. Lloyd Heiar testified that before he could build any fence line, he had to have the area west of the then established fence line (24 to 23 to 16) cleared of underbrush with a bulldozer. He cleared the land bordering on both the Hansen property and the Hanrahan property to the south of the Hansen property. Plaintiff Heiar then, with the assistance and encouragement of defendant Hansen erected what is now referred to as the Hansen-Presnell fence line. Supra p. 3. Since erection of the fence, plaintiff Lloyd Heiar maintained the property west of the fence (except for the portion he allowed defendant Lawrence Heiar to enclose) and defendant Hansen maintained the property east of the fence.

The issue is thus neatly joined: Did defendant Hansen's desire to have the fence placed so as to minimize the amount of yard required to be maintained negate plaintiff's assertion that defendant recognized the fence line as the boundary line and not merely as a barrier or convenience fence?

The issue of acquiescence is factually based and is to be determined by an objective standard; is it reasonable to infer acquiescence from the conduct of the parties. Olson v. Clark, 109 N.W.2d 441, 444 (Iowa 1961). In Olson v. Clark, the court stated "[a]cquiescence which will establish a boundary line is consent inferred from silence, a tacit agreement involving notice or knowledge of the other party's claim, it exists when a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances the other party may fairly infer that he has waived or abandoned his right." Id. at 444. Acquiescence exists when both parties acknowledge and treat the line as the boundary. Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980). It is sufficient knowledge if both parties are aware of the existence of the fence and of the fact that both adjoining landowners are treating the fence as a boundary. Id. In Sille v. Shaffer, the court held that the plaintiff

treated the property on her side of the fence as her own when she improved and maintained the property. Id at 381. In the instant case both parties were aware of the fence line and each maintained their property on their respective sides of the fence for at least ten years. Plaintiff Lloyd Heiar had the land on his side of the fence cleared and has cultivated parts of the land since the erection of the fence. Although mere erection of a fence line is insufficient to establish acquiescence to it as a boundary, U.S. v. Wilcox, 258 F. Supp. 944 (S.D. Iowa 1966), the parties seem to have treated the property on their respective sides of the fence in the same manner as would an actual landowner. On an objective basis, each party acted as though he or she owned only up to the fence. That conclusion is consistent with plaintiff Lloyd Heiar's testimony that he considered all of the land west of the Hansen-Presnell fence line as his own when the fence was erected. The conclusion that plaintiff Heiar and defendant Hansen treated the fence as the property line is further supported by testimony that the description of the property to be included in the deed transferred by Hansen to Heiar was to be based upon measurements from the fence.

The contention that the fence was merely a convenience line or barrier is not persuasive. We recognize that in locating the fence on her property, defendant Hansen was sensitive to her desire to maintain only a small yard. The fact is, however, that plaintiff was locating the boundary line between the two pieces of property. Defendant must have realized that fact if the uncontroverted testimony of plaintiff Heiar, to the effect that defendant Hansen knew and agreed that the description of the land conveyed from Hansen to Heiar was to come from the fence line to be erected by Lloyd Heiar, is to be given any weight.

We feel that clear and convincing evidence tends to show that defendant Hansen claimed as her property only the land to the east of the fence erected by plaintiff Heiar. It is our opinion that a reasonable person confronted with the circumstances that defendant Hansen faced would have considered the fence line as acting as a dividing line between the property of adjoining owners which would consequently delineate the area over which she was to maintain responsibility and dominion. We conclude, therefore, that by defendant Hansen's actions the fence line was treated as the boundary by acquiescence for the statutory period.

B. The Hanrahan-Heiar fence (the segment of fence running south from the intersection of lines 21 to 4 and 23 to 24, to point 23 to 22 to 17 to 16 to the northern

edge of block 13 then east of point 2).

The issue again, is whether plaintiff Heiar has established by clear and convincing evidence that the defendant has acquiesced to the fence line as being the boundary line between plaintiffs' and defendant's properties. Resolution of this issue is more involved than the previous issue given the multiple and successive owners of property along Hanrahan-Heiar portion of the fence line.

Defendant Hanrahan was the owner of the tract of land circumscribed by points 2 to 4 to 20 to 19 to 2. In 1965, defendant Hanrahan sold a parcel of that tract, Parcel B1, to nonparty Kaczinski. Parcel B1's perimeter ran from point 2 to 26 to 27 to 19 to 2. In 1967, or thereabouts, Kaczinski sold the property to nonparty Smith. In 1970, Smith sold the property to the present owner, defendant Lawrence Heiar.

A fence runs through the original tract once owned by Hanrahan, Parcels B1 and B2. The fence when first erected followed a straight path from point 24 through Hanrahan's property to 14. In 1965, before Kaczinski would finalize his purchase of Parcel B1, he demanded that the existing fence line be moved to what was considered the true boundary, at a point 215 feet west of Broadway Street. Plaintiff Lloyd Heiar complied with the request and moved the fence, creating a jog in the otherwise straight fence line, represented by points 23 to 22 to 17 to 16 to 14. That is the present location of the fence line through defendant Hanrahan's and defendant Heiar's property.

Testimony shows that defendant Hanrahan's brother, Urban Hanrahan, as executor of their father's estate, agreed to convey Parcel A4 to plaintiff Heiar in 1959, which is circumscribed by points 19 to 20 to 9 to 10 to 11 to 12 to 19. The deed was not received by plaintiff Heiar until one or two years later. Plaintiff Heiar's testimony indicates that in 1959, two years before the fence was built by plaintiff Heiar, Urban Hanrahan and plaintiff Heiar measured 215 feet in (west) from the west side of Broadway Street in an attempt to locate the boundary line.¹ Further evidence shows that the fence line, when first constructed in 1962, was not placed by plaintiff Heiar on the line he believed

¹ The significance of the 215 foot measurement is as follows. The plat of Charlotte shows that the original Hanrahan property extends in a generally westerly direction 215 feet from Broadway Street. The Broadway Street on the plat, however, is not located where the actual Broadway street is located in Charlotte. Had Urban Hanrahan and plaintiff Heiar measured 215 feet from platted Broadway Street, there probably would not have been any boundary dispute. Since however, Urban Hanrahan and plaintiff Heiar measured 215 feet west from the existing Broadway Street rather than the platted Broadway Street, in preparation for locating the fence line, and ultimately located the Hanrahan portion of the fence approximately 190 feet west of Broadway at the urging of defendant Hanrahan, the seeds for the present dispute were sown.

to be the boundary line. Instead, the fence was located approximately 28 feet east of the line measured out by Urban Hanrahan and plaintiff Heiar, so it was in line with the Hansen-Presnell fence. The agreement to extend the Hansen-Presnell fence line in a straight line through defendant Hanrahan's property was made at least partially at defendant Hanrahan's urging. The testimony on that point, however, is somewhat contradictory. Defendant Hanrahan asserts that she merely allowed the fence to continue in a straight line through her property for two reasons: (a) so she would not, like defendant Hansen, have too large of a yard to maintain, and (b) for the aesthetic value of having a straight fence line. She also contends that she never intended to relinquish any property to the west of the fence as erected and that she allowed the erection of the fence on her land only out of deference to her friendship with, and at the request of, defendant Hansen and plaintiff Heiar. Later in the trial, however, she stated that she made the offer to Heiar to have Heiar line the fence up with the Hansen-Presnell fence.

On the other hand, there is evidence that the fence was to serve as a boundary line. Plaintiff Heiar stated that he was reluctant to move the fence east so it would be in a straight line with the Hansen-Presnell fence. Heiar also stated he never intended to claim any land east of the 215 foot line, but that he did intend to claim up to the 215 foot line established by Urban Hanrahan and Heiar. Defendant Hanrahan testified that when she sold Parcel B1 to Kaczinski, she did not realize there was a discrepancy between the description included in the Kaczinski deed and the property by the fence erected by plaintiff Heiar. Although Hanrahan stated she did not intend to relinquish land west of the fence, she was surprised by the fact that Parcel B1 included land west of the fence erected by Heiar. *A fortiori, had she sold her entire tract of land (Parcels B1 and B2), she would have been equally surprised to learn she conveyed land west of the fence and running north to Hansen's property line.* Implicitly, defendant Hanrahan's surprise indicated that she accepted or considered the fence as the division line between her property and her neighbor's adjoining property to the west.

Be that as it may, however, we have testimony by plaintiff Heiar admitting he did not intend to claim the land up to the fence line in Hanrahan's property and that he did not treat that fence as a boundary line. Heiar knew that the land east of the 215 foot mark and west of the fence belonged to Hanrahan and then Kaczinski. On those facts we have little trouble in finding no acquiescence up to the fence line running south from

the intersection of lines 21 to 4 and 24 to 23, to point 23.

Our conclusion regarding the Hanrahan portion of the fence line is noticeably different than our conclusion on the Hansen-Presnell portion of the fence line. Our conclusions are entirely consistent. There are four factors we feel mandate a different result for the Hanrahan portion of the fence line. First, with regard to the Hansen-Presnell fence line, the location was a result of agreement between grantor and grantee, when the actual boundary line was unknown. There was not a grantor-grantee relationship between Heiar and defendant Hanrahan. Second, there were no measurements made to establish the Hansen boundary as there were with the Hanrahan portion of the fence. Hansen and Heiar merely eyeballed the location of the boundary, whereas there was at least an attempt to correctly locate the Hanrahan property line. Third, the Hanrahan portion of the fence was clearly established as a convenient extension of the Hansen-Presnell line only after the Hansen-Presnell boundary had been established by the parties. Last, plaintiff Heiar recognized the difference between a fence as a convenience or barrier and a fence as a line of division when he testified that he claimed up to the Hansen-Presnell fence line but made no claim to the property up to the Hanrahan portion of the fence line. Consequently, we conclude that the Hansen-Presnell fence was recognized as a boundary line while the Hanrahan portion of the fence, running from the intersection of lines 21 to 4 and 24 to 23, south to point 23, was recognized as a convenience fence, precluding acquiescence.

There was acquiescence, however, to the portion of the Hanrahan fence running from point 23 to 22 to the intersection of line 27 to 26 for the requisite time period. Plaintiff Heiar claimed the land up to that portion of the fence line after he was requested by Kaczinski to move the fence off his newly acquired Parcel B1. Heiar moved the fence west to the 215 foot line he and Urban Hanrahan determined to be the boundary in 1959. At that time plaintiff Heiar no longer considered the fence as a convenience fence. Defendant Hanrahan could not have considered the fence as merely a convenience fence after Heiar moved the fence west as she testified that the only reason the fence was not placed where plaintiff Heiar originally wanted the fence, at the 215 foot mark, was to keep the fence in a straight line and to reduce the size of yard she was to maintain. The evidence clearly shows that plaintiff Heiar claimed up to the fence line after he moved the fence for Kaczinski. The fact that Heiar intended to move only the fence encroaching upon Kaczinski's land, but in fact also moved a portion

of the fence on defendant Hanrahan's property is of no help to defendant Hanrahan. Defendant Hanrahan had an obligation to do some act inconsistent with Heiar's new claim up to the moved fence. Ivener v. Cohen, 175 N.W.2d 121, 122 (Iowa 1970). The evidence shows that both defendant Hanrahan and plaintiff Heiar, from 1965, treated the fence as the boundary. Both maintained the property up to their respective sides of the fence. That fact, coupled with defendant Hanrahan's knowledge that plaintiff Heiar claimed up to the fence is sufficient to establish the fence running from the intersection of lines 27 to 26 and 23 and 24 to point 22 to point 23 as the boundary by acquiescence.

We turn attention next to the fence represented by points 23 to 22 to 17 to 16. Specifically, we will determine whether defendant Heiar and his predecessors acquiesced to the portion of that fence running south from the intersection of line 27 to 26 and 22 to 17, to point 17 then to 16 and eventually over to point 2.

All parties agree that plaintiff Lloyd Heiar complied with Kaczinski's request in 1965 and moved a portion of the Hanrahan fence back to the place Heiar originally marked off as the intended boundary with Urban Hanrahan, the 215 foot line. Moving the fence created a jog in the otherwise straight fence line. The jog, represented by points 23 to 22 to 17 to 16 is 161 feet in length, which is approximately equal to the 158 feet of frontage defendant Hanrahan sold to Kaczinski in 1965. That fact itself shows that in 1965 Heiar, Kaczinski and Hanrahan each considered the fence running from points 23 to 22 to 17 to 16 the boundary between plaintiff Heiar's property, defendant Hanrahan's property and nonparty Kaczinski's property.

Plaintiff Heiar testified that he claimed the land up to the fence running from points 23 to 22 to 17 to 16. Kaczinski recognized that line as the boundary line as he would not close the transaction until he was satisfied the fence did not encroach upon his land. It is clear the Heiar portion of the fence running from the intersection of lines 27 to 26 and 22 to 17 to point 17 to 16 was treated as the boundary line between Kaczinski and plaintiff Heiar. And, if it was so recognized for the requisite period of ten years, the fence line would conclusively establish the boundary line notwithstanding the existence of a survey showing the proper division line elsewhere. Mahrenholz v. Alff, 112 N.W.2d 847, 849 (Iowa 1962).

The question thus becomes whether the successors in interest to Kaczinski also recognized the fence as the boundary. If they did not recognize the fence as a boundary

before the time period expired, then the boundary could not be established by acquiescence. In this case the fence was erected in 1965 and acquiesced to as the boundary by owner Kaczinski. It does not appear from the facts that grantee Smith of grantor Kaczinski treated the fence as anything but a boundary line. The issue thus depends upon whether defendant Heiar, grantee of grantor Smith, treated the fence as a boundary line.

As stated in Ivener v. Cowan, 175 N.W.2d 121 (Iowa 1970), "[a]cquiescence may be inferred from silence or inaction of one party who knows of the boundary line claimed by the other and fails to take steps to dispute it for the ten year period." Id. at 122. In Marenholz v. Alff, 112 N.W.2d 847, the court stated that when "the parties or their predecessors in ownership recognize as the boundary line contended as the line of division for the requisite period, the parties will be found to have acquiesced in the establishment of that line as the boundary." Id. at 849. In Olson v. Clark, 109 N.W.2d 441 (Iowa 1961), the court stated when one of the parties has knowledge or notice that another party is treating a fence as a boundary, mere denial by the party with notice will not defeat the other party's claim to the land up to the fence. Id. at 444.

Applying those principles to defendant Heiar, we conclude he failed to defeat plaintiff Heiar's claim that the fence established the boundary line by acquiescence. Defendant Heiar clearly had notice that plaintiff Heiar was claiming the fence line from points 23 to 22 to 17 to 16 as the boundary. Plaintiff Heiar had maintained the property up to the fence since 1965 when plaintiff Heiar moved the fence for Kaczinski. Defendant Heiar took no action inconsistent with plaintiff Heiar's dominion and use of the land up to the fence line. Defendant Heiar even approached plaintiff Heiar to use two different portions of land west of the fence running from points 24 to 16. Therefore, we conclude that plaintiff Heiar has established that defendant Heiar and his predecessors have acquiesced to the fence as being the boundary for the requisite period.

III. Propriety of Order Nunc Pro Tunc An order nunc pro tunc may be entered to correct an evident mistake on entries made and signed by the court. § 607.17, The Code 1979. An order nunc pro tunc is allowed on a limited basis for retroactive correction of errors or omissions in the form of prior orders. Feddersen v. Feddersen, 271 N.W.2d 717, 718 (Iowa 1979). Entry of the order lies in the sound discretion of the court.

In the present case, there was a clearly evident mistake reflected on the face of the trial court's judgment entry. Uncontradicted testimony of defendant Heiar established that he claimed no land south of the line running from point 16 to 28. The judgment as entered indicates that defendant Heiar claimed land down to the northern boundary line of block 13, which is south of the line from point 16 to 28. That error was corrected by the entry of the order nunc pro tunc. The order nunc pro tunc, establishing the line running from point 16 to point 28 as the boundary dividing plaintiff Heiar's property from defendant Heiar's property to the north, is affirmed. The portion of the order establishing as the boundary line from point 15 north to point 16 is vacated, as we have concluded that plaintiff Heiar has established ownership to the property west of that line by acquiescence.

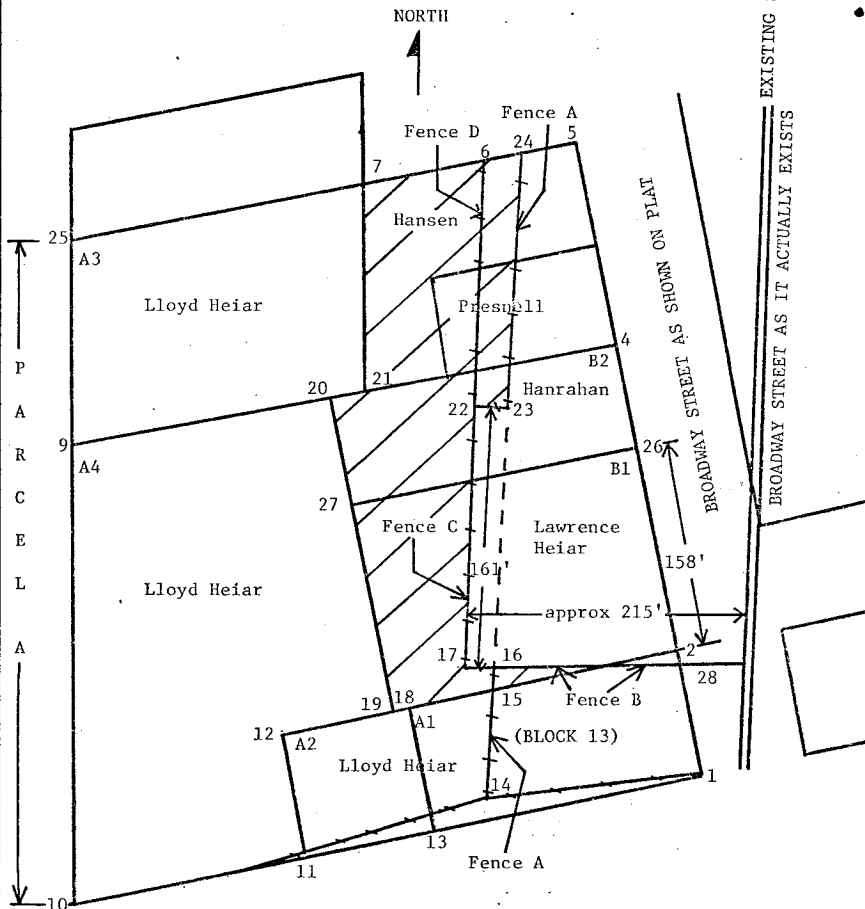
That plaintiff Heiar has established the line running from point 16 to 28 as the boundary by acquiescence is clear. The evidence shows that defendant's grantor, Smith, erected a fence from point 16 to 28 in 1969. Although nonparty Citek, then the owner of Block 13, knew the fence was not in the correct place, Citek objectively treated the fence as the boundary line and took no action to prevent Smith's encroachment on her property. Defendant Heiar testified that he, like his predecessor in title, treated the fence as the boundary line. The fence was removed in 1977, but a clear monument in the form of a traveled path continued to definitely mark the line from 16 to 28 until the present time. Defendant Heiar admitted that he had no intention of claiming land further south than the line. Defendant Heiar, and Citek, and subsequently plaintiff Heiar maintained the property up to, but not beyond the fence or the path replacing the fence. Thus, clearly plaintiff Heiar has established the line from 16 to 28 as the boundary by acquiescence. We further conclude that the court's order nunc pro tunc was appropriate to correct an obvious mistake and to conform the terms of judgment to the record.

IV. Conclusion In summary, we hold that plaintiff Heiar established by clear and convincing evidence that the portion of fence running from point 24 south to the intersection of line 21 to 4 (the Hansen and Hanrahan property line), the portion of fence running from point 23 to 22 to 17 to 16 and the definitely marked line from point 16 east to 28 is the boundary by acquiescence against the defendants and their predecessors. Since this was not a proceeding under chapter 650, we make no determination as to any boundary lines other than those stated in this opinion. Specifically, that means that the

portion of fence running from point 23 north to the intersection of line 21 to 4 has been determined not to be the boundary by acquiescence, but we do not attempt to further delineate the boundaries between plaintiff Heiar and defendant Hanrahan.

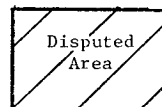
REVERSED IN PART AND AFFIRMED IN PART.

REFERENCE SKETCH



LEGEND:

<u>Fence Points</u>	<u>Built By</u>	<u>Built In</u>
A 24-14	Lloyd Heiar	1962
B 16-28	Previous owner	1969
C 22-17	Lloyd Heiar	1965
D 22-6	Lawrence Heiar	1972



Fence Line

Hansen-Presnell fence: 24 to Hanrahan property line

Heiar-Heiar pasture fence: 6 to 22

Hanrahan-Heiar fence: 2 to 17 to 22 to 23 to Hansen property line

Hanrahan portion: intersection of 27 to 26 and 17 to 22 then to 22 to 23 to Hansen property line

Heiar portion: intersection of 27 to 26 and 17 to 22 then to 17 to 2