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IN THE COURT OF APPEALS OF IOWA

RALPH S. NOBLE and
HELEN E. NOBLE,

Appellees,

vs.

SOUTHSIDE ASSEMBLY OF
GOD CHURCH,

Appellant.

Filed June 30, 1978

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2-60804

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from decree quieting title to three foot strip in plaintiffs' by doctrine of acquiescence. - Affirmed.

Kenneth D. Benhart, of Marks, Flagg, Hockett & Marks, Des Moines, for Appellant.

Virgil S. Moore, Des Moines, for Appellees.

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

PER CURIAM

Defendant Southside Assembly of God Church appeals the trial court decree awarding plaintiffs Ralph and Helen Noble title to a three-foot strip of land along the southern edge of defendant's property which forms the north-south boundary between plaintiffs' and defendant's properties. Plaintiffs brought this action to quiet title to their property and the amended petition claims ownership of the three-foot strip by adverse possession.

Our initial problem is with the trial court's decree. In its conclusions of law, the trial court discussed both adverse possession and acquiescence. However, on its ruling, the court simply quieted title in plaintiffs without discussing the legal theory upon which it based its decision. Our review of this equity proceeding is de novo. Section 649.6, The Code; rule 4, Rules of Appellate Procedure. Therefore, we make an independent determination of the law applicable to our de novo review of the facts.

Defendant's first contention on appeal is that the trial court erred in finding plaintiffs established title to the three-foot strip by adverse possession. To establish ownership by adverse possession, plaintiff is required to prove hostile, actual, open, exclusive and continuous possession, under claim of right or color of title, for at least ten years. *Moffitt v. Future Assurance Associates*, 258 Iowa 1160, 1170, 141 N.W.2d 776 (1966). However, it does not necessarily require the claimant to live upon the land, or to enclose it with fences, or to stand guard at all times upon its borders, to oppose the entry of trespassers or hostile claimants. It is enough if the person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general, in holding, managing, and caring for property of like nature and condition. 258 Iowa at 1171; *Whalen v. Smith*, 183 Iowa 949, 953, 167 N.W. 646, 647 (1918).

But occupancy alone is not sufficient. The claim of right must be as broad as the possession. Plaintiff must show possession was taken with the intention of asserting title beyond the true boundary line. *Moffitt*, supra; *Griffin v. Brown*, 167 Iowa 599, 607, 149 N.W. 833, 836 (1914). In the instant case Ralph Noble testified that it was his intention to occupy only the land described in his deed. He did not intend to claim or occupy any of defendant's property. See e.g., *Griffin*, supra. However, the evidence

docs show plaintiffs believed, acted and maintained the three-foot strip as though it was theirs.

Defendant's second contention on appeal is that acquiescence of the boundary lines was not an issue framed by the pleadings and therefore, should not be considered on appeal. Alternatively and without conceding the issue, defendant argues the evidence did not support a finding of acquiescence even if it had been plead or tried. Generally issues and questions not pled and presented to the trial court are not preserved and will not be considered when raised for the first time on appeal. *Schnabel v. Display Sign Service, Inc.*, 219 N.W.2d 546, 548 (Iowa 1974).

In the instant case, testimony concerning defendant's lack of objection and general acceptance of plaintiffs maintenance of the three-foot strip was not objected to and therefore is preserved for appeal. Secondly, plaintiffs' petition includes a prayer for general equitable relief. "A prayer for general equitable relief is to be liberally construed. The relief granted under it must be such as will not surprise the defendant." *Chadek v. Alberhasky*, 253 Iowa 32, 36, 111 N.W.2d 297 (1961). When plaintiffs brought suit to quiet title to their property, they asserted ownership over the disputed three-foot strip. Defendant was not surprised by the evidence presented or the relief granted.

A boundary by acquiescence may be established where two or more adjoining owners or their predecessors in interest, for ten or more consecutive years, have mutually acquiesced in a line definitely marked by a fence or in some other manner, as a true boundary although a survey may show otherwise and neither party intended to claim more than called for by his or her deed. *Davis v. Hansen*, 224 N.W.2d 4, 6 (Iowa 1974); *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82 (1967). 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 knowledge of the line so established and the possession taken, assents thereto, which may be shown by his conduct, his words or by his silence. *Griffin v. Brown*, 167 Iowa at 611.

Our de novo review of the evidence leads us to the same conclusion reached by the trial court - that plaintiffs were justified in having the three-foot strip of defendant's property quieted to them. Because the evidence is somewhat lacking on plaintiffs' claim of right, we reach this result through acquiescence and not by adverse

possession. Plaintiffs mowed, fertilized and generally kept up the area since they bought their property over 30 years ago. Further, they planted a row of flowers on what they thought and claimed to be their property line. For years, the defendant did little or nothing with the area and when it finally erected a woodenpost baracade in the 1960's, it was along the line claimed by plaintiffs. Additionally, the evidence indicates that when plaintiffs and the pastor of defendant church had discussion relative to their respective properties, there was no denial of plaintiffs' claim to the area and at times there is evidence of complete agreement. Kotze v. Sullivan, 210 Iowa 600, 603, 231 N.W. 339 (1930).

AFFIRMED.