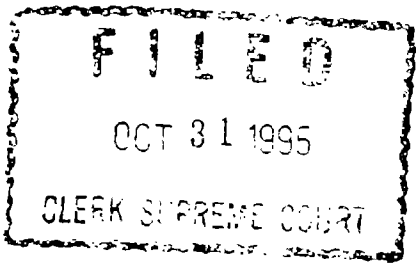
IN THE COURT OF APPEALS OF IOWA

No. 5-446 / 94-1880



PHILLIP BUSH,

Appellee,

vs.

THOMAS L. GLASSMAKER,
JOSEPH J. GLASSMAKER and
ROBERT JOHN GLASSMAKER,

Appellants

Appeal from the Iowa District Court for Cherokee County, Joseph J. Straub, Judge.

Glassmakers appeal a district court judgment which determined Bush had established an old fence line constituted a boundary by acquiescence between the parties. **AFFIRMED.**

John A. Wibe of Martin, Wibe & Cozine, Marcus, for appellants.

David P. Jennett, Storm Lake, and Dan Connell of Dan Connell, P.C., Storm Lake, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

Glassmakers appeal the judgment of the district court establishing a boundary by acquiescence. We affirm.

Phillip Bush and defendants Thomas, Robert, and Joseph Glassmaker are the owners of adjoining eighty-acre parcels in section 29 of Sheridan Township, Cherokee County, Iowa. Bush began farming his parcel in 1976-1978, and the Glassmakers began farming their land in 1979.

For many years a creek meandered in an east-west direction near the original government survey line dividing the two tracts. A fence line was placed along the creek by a prior owner of both tracts to separate pasture from other cropland. Phillip Bush and his predecessors in title have farmed all of the land north of the fence for thirty-three years. Over the years the Glassmakers maintained the east one-half of the fence, and the Bushes maintained the west one-half of the fence.

At the time Glassmakers acquired their land in 1979, they knew Bush was farming all of the land north of the fence. They also knew the fence line was not located on the original government survey line.

In the late 1980s, Bush proposed straightening the creek thereby increasing the tillable acreage available on both sides of the fence. No mention was made about changing the existing fence line during Bush's discussions with the Glassmakers about the creek.

After the creek project was completed, Glassmakers had the property surveyed to locate the original survey line. When the line was found to be other than the fence, Glassmakers removed the fence placing a new fence on the survey line

As a result, Bush initiated these proceedings to establish the fence line as the boundary dividing these properties. After a bench trial, the district court concluded the fence line was recognized as the boundary for more than thirty years and that the Glassmakers had acquiesced in this boundary arrangement for at least ten years. The fence line was established as the boundary by acquiescence pursuant to Iowa Code section 650.14, and Bush was awarded all of the property north of the fence.

On appeal Glassmakers contend the district court's findings are not supported by substantial evidence. They argue the old fence was merely a barrier, not a boundary, and Glassmakers' acquiescence, if any, did not occur for the requisite number of years

An action to establish a boundary by acquiescence is a special action tried as an ordinary proceeding. Iowa Code § 650.15 (1993). Our review is therefore limited to errors of law. *Davis v. Hansen*, 224 N.W.2d 4, 5 (Iowa 1974). We are bound by the district court's findings of fact if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

A finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence. In evaluating sufficiency of the evidence, we view it in the light most favorable to sustaining the court's judgment. We need only

consider evidence favorable to the judgment, whether or not it was contradicted *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978).

A boundary line may be established by showing that two adjoining landowners or their predecessors in title have recognized and acquiesced in a boundary line for a period of ten years. Iowa Code §§ 650.6 and 650.14; *Tewes v. Pine Lane Farms, Inc.*, 522 N W.2d 801, 806 (Iowa 1994). Mutual knowledge of and consent to the claimed boundary line are required *Selle v. Schaeffer*, 297 N.W.2d 379, 381 (Iowa 1980). The party seeking to establish a boundary other than that disclosed by a survey, has the burden of proving acquiescence by clear evidence. *Harvey v. Platter*, 495 N.W 2d 350, 352 (Iowa App. 1992).

Proof of acquiescence may be direct or circumstantial. It is sufficient to show both parties were aware of a fence line and that both adjoining landowners treated the line as a boundary. *Novotny v. Roberts*, 492 N.W.2d 216, 219 (Iowa App. 1992). Acquiescence may be inferred from silence or inaction of an adjoining landowner who knows of the boundary claims by another and fails to dispute it. *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84-85 (1967).

We are convinced the district court's judgment is supported by substantial evidence. There is evidence in the record indicating the disputed fence line was maintained as a partition fence by Glassmakers and their predecessors.[1] There is also

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[1]A "partition fence" is a fence located on a boundary between two adjacent properties. *Kundel Farms v. Vir-Jo Farms, Inc.*, 467 N.W 2d 291, 293 (Iowa App. 1991). Iowa Code section 359A.1 requires erection and maintenance of partition fences by adjacent landowners.

evidence that Bush and his predecessors farmed the disputed acreage for more than thirty years. Although the Glassmakers knew the fence was not located on the survey line when they purchased the property in 1979, they did not assert their claims until 1991.

We also acknowledge that there is evidence supporting Glassmakers' contention that the fence was intended as a barrier rather than a boundary. The district court considered this evidence and concluded otherwise. Since our review is limited to errors of law, we are bound by the district court's findings of fact because they are supported by substantial evidence. Glassmakers' argument that the required ten-year period has not elapsed also fails for the same reason.

The judgment of the district court is affirmed.

AFFIRMED.

Habhab, J., concurs; Hayden, P.J., dissents.

HAYDEN, P.J. (dissenting)

I respectfully dissent

The old fence in question here, to be on line between the parties' land, would require it to be placed in the creek Had anyone attempted to build the fence, in part, in the creek bed it would not have been sturdy enough to turn or confine livestock

I determine the old fence was a barrier to confine livestock. It was not originally established or later acquiesced in as a boundary line fence. The evidence does not clearly show knowledge by *all* parties to establish acquiescence. (Emphasis mine.) Knowledge by both parties is a condition precedent for the existence of acquiescence. *Petrus v. Chicago, Rock Island & Pacific R.R.*, 245 Iowa 222, 228, 61 N.W.2d 439, 442 (1953).

> 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, and this may be shown by his conduct, by his words, or even by his silence. There must, however, be something in the record to show that the party, charged with acquiescence, consented to the act of the other in establishing the line and assuming possession. Acquiescence means a consent to the conditions, and involves knowledge of the conditions.

Griffin v. Brown, 167 Iowa 599, 611-12, 149 N.W. 833, 838 (1914).

The burden is upon the party claiming a boundary line, other than the legal description as disclosed by a survey, to establish the mutual acquiescence by clear proof. *Davis v. Hansen*, 224 N W 2d 4, 6 (1974); *Drake v. Claar*, 339 N.W.2d 844, 847 (Iowa App. 1983).

I determine the facts of this case fail to establish a boundary by agreement or acquiescence. The knowledge element required to prove acquiescence has not been clearly shown, much less established. The only presumption, which the supreme court recognizes in boundary by acquiescence cases, is as follows:

> [T]he reciprocal recognition of and acquiescence in a fence as marking the boundary though occupation and exercise of exclusive dominion thereto by the respective adjoining owners for a period of ten years raises a conclusive presumption of an agreement upon the line so marked as the boundary.

Steck v. Anderson, 231 Iowa 490, 498, 1 N.W.2d 647, 650 (1941). This proposition makes it clear any presumption in such cases does not arise until mutual acquiescence has been established.

Appellee has failed to show appellants' acquiescence in the old fence as the boundary line. As mentioned, appellants' knowledge of the appellee's claim is critical. Appellants must assent or consent to claimant's possession by words, conduct, or even silence. This has not been shown or established.

I determine the old fence was a barrier to keep livestock confined. Appellants relied on that. They had no knowledge appellee claimed some of the land as his own. *See Harvey v. Platter*, 495 N.W.2d 350, 351-52 (Iowa App. 1992); *Ashton v. Burken*, 403 N.W.2d 52, 56 (Iowa App. 1987).

I dissent from the majority decision and would reverse the trial court.