IN THE COURT OF APPEALS OF IOWA

No. 1999-194 (9-418) / 98-1706
Filed November 10, 1999

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CLERK SUPREME COURT

MARK ELLIOTT,

Plaintiff-Appellant,

vs.

RICHARD BAER and JOAN BAER,

Defendants-Appellees.

Appeal from the Iowa District Court for Mitchell County, John S. Mackey, Judge.

The plaintiff appeals from a judgment in the defendants' favor entered in the plaintiff's quiet title action. **AFFIRMED.**

Russell Schroeder, Jr., of Schroeder Law Office, Charles City, for appellant.

Brian R. McPhail of Gross & McPhail, Osage, for appellees.

Considered by Streit, P.J., and Mahan, and Zimmer, JJ.

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ZIMMER, J.

Plaintiff appeals the district court decision for defendants in this action to quiet title. Plaintiff claims the court erred in finding defendants established an old fence line as a boundary by acquiescence. We affirm on appeal.

In 1994, Mark Elliott purchased certain property in rural Mitchell County. The northern portion of the property contains large trees and thick brush. A creek meanders through the property. The property contains a fence which runs south of the north survey line. Richard and Joan Baer own property directly to the north of Elliott's property.

After Elliott purchased the property he had a survey conducted because he wanted to put up a new fence in order to keep horses in the area. The new fence was never erected. Elliott cleaned brush out of the property. In 1997, Baer told Elliott the fence was the boundary between the properties. Elliott then filed an action to quiet title. Baer claimed the fence line was the boundary by acquiescence.

Elliott purchased the property from Leo Meitner. Meitner bought the property in 1956. He testified Baer used the property north of the fence, but south of the property line, as pasture land during one or two years. Meitner used the disputed property to dump rocks and brush. Meitner and Baer both worked to keep the fence in repair. Meitner stated he always knew the property line was north of the fence, and told this to Elliott when he sold him the property. He testified the fence would be in the creek in places if it followed the property line, so the fence was placed south of the property line.

Edward Smolik, a neighbor, testified he saw cattle in the disputed area during one or two years. He stated he had not seen any cattle in that area for probably ten years. He admitted he had not paid much attention to the property.

Baer purchased the property north of the disputed property in 1962. He testified he used the disputed area as a pasture for cattle from about 1962 until 1972. He took a walk through the disputed area about twice a year. He considered the fence to be the accepted boundary between the properties.

After considering the evidence and personally viewing the property, the district court found Meitner and Baer had agreed the fence line was the true boundary between them for approximately thirty years. The court found the fence was intended to be the boundary. The court noted the maintenance of the fence was shared for purposes of confinement of livestock on both sides of the fence. The court concluded the fence line should be permanently established as the boundary between the property of Elliott and Baer. The court changed the legal description of Elliott's property. Elliott appealed.

A suit to establish title by acquiescence is contemplated by Iowa Code section 650.14 (1997). *Harvey v. Platter*, 495 N.W.2d 350, 351 (Iowa App. 1992). This section provides:

> If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established.

Iowa Code § 650.14.

An action brought under chapter 650 is a special action and is heard on appeal as an ordinary action. *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997). Our review is on assigned errors of law. *Id.* The findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 804 (Iowa 1994). If supported by substantial evidence, the judgment will not be disturbed on appeal. *Id.*

Elliott contends there is not substantial evidence in the record to support the district court's finding Meitner and Baer had agreed the fence line was the true boundary between them for approximately thirty years. He points out Meitner knew the fence was not the true property line. Meitner treated the property as his own by using it for dumping rocks and brush. Elliott also points out the witnesses were not in agreement concerning how many years Baer used the disputed property as a pasture for his cattle. Elliott claims there is insufficient evidence to show Baer used the property for ten years. He asserts the fence was a barrier for cattle, and should not be considered the property line.

A boundary by acquiescence may be established where the two adjoining owners 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. *Mensch v. Netty*, 408 N.W.2d 383, 386 (Iowa 1987). The burden is upon the party claiming a boundary line, other than disclosed by a surveyor, to establish the requisite mutual acquiescence by clear proof. *Novotny v. Robbins*, 492 N.W.2d 216, 218 (Iowa App. 1992). Determining whether acquiescence has been established requires an inquiry

into the factual circumstances of each case. *Mahrenholz v. Alff*, 253 Iowa 446, 451-53, 112 N.W.2d 847, 849-51 (1962).

Each of the adjoining landowners or their grantors must have knowledge of and consented to the asserted property line as the boundary line. *Tewes*, 522 N.W.2d at 806. Acquiescence may be inferred from the 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. *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84-85 (1967). There is no requirement of some overt act in order to establish acquiescence. *Ollinger*, 562 N.W.2d at 171.

The acquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as a true line. *Brown v. McDaniel*, 261 Iowa 730, 735, 156 N.W.2d 349, 352 (1968). However, a fence erected for a purpose other than to mark a boundary may later become a boundary if the adjoining landowners acquiesce in it as such for the statutory period of ten years. *Harvey*, 495 N.W.2d at 352.

Under our standard of review, we are prohibited from weighing the evidence or the credibility of witnesses. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). In the present case, the district court found Baer was credible. The court found Baer used the disputed property as a pasture for cattle for ten years. Meitner made no objection, although he admitted he knew Baer had used the disputed property as a pasture. Acquiescence may be inferred from the 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 a ten-year period. *Dart*, 261 Iowa at 241, 154 N.W.2d at 84-85. There is substantial evidence in the record to support the district court's decision.

Furthermore, even if the fence had been erected as a barrier, it could later become a boundary if the adjoining landowners acquiesce in it as such for the statutory period of ten years. *See Harvey*, 495 N.W.2d at 352. Because we have found Baer used the property as a pasture for ten years, with Meitner's knowledge, we conclude the fence was used as a boundary, even if it was originally erected as a barrier.

We affirm the decision of the district court. Costs of this appeal are assessed to appellant.

AFFIRMED.

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