

FILED

APR 14 1977

IN THE COURT OF APPEALS OF IOWA SUPREME COURT

MAX V. RETTENBERGER and)
MADONNA RETTENBERGER,)
Husband and Wife,)

Filed April 14, 1977

432

Appellees,)

vs.)

ICARIUS REALTY CO., INC.,)
an Iowa Corporation,)

59
2-58078

Appellant.)

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Appeal from judgment establishing boundary between two
city lots in Dubuque, Iowa pursuant to chapter 650, The Code.
Judgment for plaintiffs affirmed.

J. Wilson McCallister, of Cooney, McCallister & Zwack,
of Dubuque, for Appellant.

William C. Fuerste, of Fuerste, Carew, Coyle, Juergens
& Sudmeier, of Dubuque, for Appellee.

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

SNELL, J.

This action was instituted under chapter 650, The Code, to establish the true location of a boundary which is in dispute between plaintiffs and defendant, the respective owners of Lot 4 and Lot 3 of Lot 9, Union addition to the City of Dubuque, Iowa. A commissioner was appointed pursuant to §650.7, The Code, who filed a report to which defendant excepted. The trial court took additional evidence, confirmed the commissioner's report and entered a decree for plaintiffs. We affirm.

The nature of the action is a special one. Section 650.4, The Code. On appeal, it is "heard as in an action by ordinary proceedings." Section 650.15, The Code. Accordingly, our review is not de novo, the judgment of the trial court having the effect of a jury verdict is binding on us if supported by substantial evidence. *Dart v. Thompson*, 261 Iowa 237, 240, 154 N.W.2d 82 (1967); *Allen v. Melson*, 260 Iowa 689, 690, 150 N.W.2d 292 (1967); *Dillon v. Chicago & N.W. Ry. Co.*, 255 Iowa 878, 124 N.W.2d 543 (1963).

The crux of the dispute is plaintiff's assertion that defendant is claiming 6.1 feet of plaintiff's land and has built a gas station, part of which is on plaintiff's land. Confusion arose because the distances on recorded plats do not correspond with exact ground measurement. The parties disagree on what evidence is determinative and the correctness of the proceedings.

Defendant's Lot 3 has a 51 foot frontage on Dodge Street; plaintiffs' have 23 1/2 feet. Lots 1 and 2 lie west of Lot 3. All four lots are a subdivision of Lot 9, Union Addition. Lot 9 has a total frontage on Dodge Street of 248 feet. Lots 8 through 1, Union Addition, lie east of Lot 4 and all front on Dodge Street. Rising Avenue intersects Dodge Street diagonally at the west corner of Lot 1 of Lot 9, Union Addition.

The commissioner, a disinterested surveyor, investigated, held a hearing and took evidence. Thereafter he filed a written report finding that the 6.1 foot discrepancy arose at a place other than and east of Lot 9. The 6.1 feet was found to be located at Lot 6. The plat filed in 1856 showed Lot 6 having a Dodge Street frontage of 60 feet whereas on the ground it measures 66.1 feet. The extra footage was the result of a later surveyor's placing it in Lot 6 because he felt that it best fit into the way the land was then being used. Unfortunately, this was not recorded.

Following the filing of the commissioner's report defendant filed 15 exceptions to the report, pursuant to § 650.12. That section provides:

"Within twenty days after such report is filed, any party interested may file exceptions thereto and the court shall hear and determine them, hearing evidence in addition to that reported by the commission, if necessary, and may approve or modify such report, or again refer the matter to the same or another commission for further report."

The trial court took additional testimony and filed a judgment and decree. The basis for the trial court's decision was that natural and artificial monuments that can be located with certainty prevail over courses and distances. The artificial monument located was a three-story frame dwelling on Lot 3. This dwelling was the subject of a devise in 1903 by Patrick Roddy. Due to a misdescription in his will, proceedings were held by the probate court and conveyances made to establish its true location. The court found the true location of the line between plaintiffs' Lot 4 and defendant's Lot 3 was thus established by these conveyances in 1903. In 1937 engineer Carl Bartels surveyed the area and physically located the line in the same place as the probate proceedings indicated and as plaintiffs contended.

I. Defendant claims six errors. The first is that findings of fact and conclusions of law were not made. Although formally separated, they are clearly contained in the judgment and decree. There is no doubt as to the basis of the court's decision so that defendant was not prejudiced on appeal. In any event, defendant did not avail itself of the procedure provided by rule 179(b), Rules of Civil Procedure to enlarge or amend and cannot now complain. *Korsrud v. Korsrud*, 242 Iowa 178, 45 N.W.2d 848 (1951). *McLarnan v. Hasson*, 243 Iowa 379, 383, 49 N.W.2d 887 (1952).

II. Defendant next contends error occurred in the court's failing to make separate rulings on each of defendant's 15 exceptions to the commissioner's report. Rule 118, I.R.C.P. requires the trial court to rule separately, instead of sustaining generally, "a motion or other matter involving separate grounds or parts." In *Ruby v. Easton*, 207 N.W.2d 10, 14 (Iowa 1973), the supreme court reversed because of a trial court's noncompliance with rule 118. The defendant argues this action should be reversed because the trial court failed to rule separately on each of the 15 exceptions it filed to the commissioner's report. We do not find this is required.

Section 650.12, The Code, provides that "any party interested may file exceptions thereto and the court shall hear and determine them, hearing evidence in addition to that reported by the commission, if necessary, and may approve or modify such report or again refer the matter to the same or another commission for further report." All the exceptions challenged or complained of the surveys, the commissioner's consideration thereof, their unrecorded nature, the allocation of the apparent overage to Lot 6, and the lack of evidentiary support for the commissioner's findings.

Section 650.12 does not require specific rulings on the exceptions to the commissioner's report. The trial court heard additional evidence and then filed its judgment which in effect was a modification of the report. The procedure contemplated by chapter 650 is not one of jury trial where rulings and exceptions provide the basis for appeal. See *Coombs v. Quinn*, 66 Iowa 469, 23 N.W. 928 (1885) where the court determined the chapter does not contemplate a jury trial.

There is no appellate review of the commissioner's report and trial court rulings on exceptions. The review is from the final judgment of the trial court. Section 650.15, The Code. Trial court's procedure adequately provides the required basis for review.

III. Next, defendant claims the judgment was not justified by the evidence, issues or any theory of the case and that plaintiffs did not plead the description of the line they sought to establish. Plaintiffs' petition clearly sets out that the boundary between Lots 3 and 4 in Union Addition is in dispute. Although the legal description, other than in reference to the recorded plats of Lots 3 and 4 were not set out, a copy of the plat, Exhibit A, was attached to the petition and incorporated therein. Plaintiffs asked that the boundary be established according to the recorded plat. We find the petition was adequate.

Defendant argues that the court improperly referred to the abstracts as they were never made a part of the record. The court asked if the abstracts of title to the properties would be available to the court. Both parties agreed they were. Further, in closing, plaintiffs' attorney stated he had nothing further, if all the abstracts were delivered on

the record. To this, defendant's attorney said he had nothing to add. The abstracts were properly in the record.

The abstracts showed the history of the title to the properties including the Patrick Roddy probate proceedings. The court's reliance on these proceedings, which were a matter of public record, was clearly within the pleadings, issues raised, and evidence taken to determine the true boundary. We do not find the court's judgment was without foundation in the record.

IV. Defendant also alleges the trial court erred in establishing the disputed boundary pursuant to a prior unrecorded plat to which it had no knowledge. Defendant bases its argument on the recording statute, § 558.41, where unrecorded instruments are invalid against subsequent purchasers, for value, who are without notice. However, the unrecorded plat drawn by surveyor Bartels in 1937 did not, as defendant argues, fix the boundary between Lots 3 and 4. Rather, the 1903 probate proceedings of Patrick Roddy and the subsequent corrected devises of record to his grandson, Joseph La Barge, and his daughter, Margaret Faherty, established the boundary in issue.

In 1909, pursuant to what is now §409.31, The Code, the county auditor subdivided Lot 9 into four subdivisions, for taxing purposes, to correspond to their then present use. All subsequent conveyances were made with reference to the auditor's recorded plat of 1909. Bartels' unrecorded 1937 survey coincides with the boundary lines established by the probate proceedings incident to Roddy's estate and the auditor's 1909 subdivision. Defendant's contention that the trial court established the disputed boundary pursuant to an unrecorded plat is without support in the record.

V. Defendant contends that the court erred in concluding measured distance discrepancies must give way to natural or artificial monuments located with certainty. Defendant asserts there was no discrepancy since its surveyor did not find any excess footage. Be that as it may, the trial court did not make the 6.1 foot overage the basis of its judgment. Rather, as stated *supra*, the basis was the establishment of the artificial monument, *i.e.*, the three-story dwelling. The Iowa law has been established as the court ruled. See *Cooper v. Horridge*, 200 Iowa 711, 205 N.W. 454 (1925); *Tomlinson v. Golden*, 157 Iowa 237, 138 N.W. 448 (1912). In *Root v. Town of Cincinnati*, 87 Iowa 202, 204, 54 N.W. 206 (1893), the court stated:

"Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences or buildings."

VI. The sixth error claimed is that the evidence was insufficient. We find the evidence on which the court relied was clearly established. The probate proceedings are established of record and the 1937 survey of engineer Bartels, though not recorded, was admissible evidence to locate the artificial monument established by the probate proceedings.

We find the judgment of the trial court to be supported by substantial evidence and is therefore affirmed. Costs taxed to defendant. Section 650.16, The Code.

Allbee, C.J. and Donielson, J. concur. Carter and Oxberger, JJ. dissent.

CARTER, J. (dissenting)

I must dissent, not because I believe the result reached by the trial court is necessarily incorrect but because on the record before us it is impossible to tell.

We are faced with two alternative theories under which the trial court might have properly derived the correct location of the disputed boundary line. The first such theory is the one adopted by the commissioner appointed pursuant to chapter 650, The Code. His location of the boundary was based upon his finding that the 1937 survey of plaintiffs' expert was correct, showing an existing six-foot overage in the distance shown on the recorded plat and allocating such overage entirely to lot 6 in order to preserve long established occupational lines. On both the evidence and the law the trial court could have upheld the commissioner's determination under this theory but was certainly not required to do so.

In order to uphold the commissioner on this theory the trial court had to resolve a conflict in the evidence and (a) reject the testimony of defendant's expert that there was no six-foot overage; and (b) reject the legal argument of the defendant that if there was a six-foot overage it should be distributed over all of the lot frontages between Dodge Street and Rising Avenue in proportion to their platted dimensions. The evidence would permit a finding either way on the factual dispute. As to the legal issue, as pointed out in the plaintiffs' brief and argument, there is a fair amount of discretion under existing law in the allocation of any overage. The trial court did not make findings and conclusions resolving either one of these areas of contention because it decided the case on an entirely different theory.

The second theory on which the boundary line could have been located at the spot where the commissioner placed it (which was the theory of the trial court) does not depend in any way upon the originally platted dimensions of the lots. This theory is that the boundary between lots 3 and 4 in the subdivision of lot 9 was originally fixed not by reference to any platted location of lot lines in Union Addition, but rather by reference to a point 51 feet east of the west edge of a certain three-story dwelling house. There is substantial evidence in the record that this contention is correct and that the dimensions of lot 3 of lot 9 on the auditor's plat, with reference to which all subsequent conveyances of said lot 3 were made, were so established.

It is apparent that in order to establish the disputed boundary pursuant to this theory it is necessary to first locate the west edge of the three-story dwelling house in question. At the time the present dispute arose, there was no longer any three-story dwelling house located on lot 3. There was a three-story dwelling house shown in the 1937 survey conducted by plaintiffs' expert. The dwelling house shown in said survey was located at a point where the west edge of said house was a foot or less from the west line of lot 3. If this were the same dwelling to which reference is made in the 1903 deed which is the genesis of the division between lots 3 and 4 of lot 9 I would agree that the trial court correctly decided this case. But unfortunately there is nothing in the record to indicate that this is the case. In view of the fact that the survey of plaintiffs' expert was conducted some 34 years after the original conveyance I do not believe that we can take judicial notice that the dwelling shown in the survey is the same or in the same location as the dwelling referred to in the earlier deed.

I do not feel that we can properly affirm this case on the basis that there is sufficient evidence from which the trial court could have reached the result reflected in its final judgment. For the reasons stated there is not sufficient evidence in the record to locate the boundary with reference to the location of the 1903 dwelling house. With respect to the possibility of adopting plaintiffs' survey evidence in order to support the result arrived at, this would require resolving an evidentiary conflict as to an overage in the platted dimension and, in addition, a judicial resolution of how to allocate the excess footage, if any. If this is to be the basis for a judgment favorable to plaintiffs, defendant is entitled to have the trial court first rule upon these threshold issues.

Nor can we sustain the judgment on the cumulative effect of the evidence supporting either or both of the two theories involved. This is because the two theories operate independently of each other. If the same result is arrived at under both theories it is merely coincidental.

I would reverse the judgment and remand to the trial court for further findings of fact and conclusions of law with permission granted to both parties on remand to offer further evidence on the location of the dwelling house identified in the 1903 deed.

OXBERGER, J., joins this dissent.