

CLERK SUPREME COURT

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

Defendant appeals the trial court's judgment allowing the plaintiff's damages for a shortage in the amount of land contracted to be purchased by and conveyed to the plaintiffs from the defendant in an action for specific performance and damages based on a violation of the agreement of sale and the covenants and warranties in the deed. The defendant contends the doctrine of merger precludes recovery on the antecedent agreement of sale, and that proof of an agreement to deliver a specified number of acres is insufficient. Plaintiffs, on cross-appeal, contend they should have been awarded survey costs and attorney fees in addition to damages for shortage in the land conveyed. We review all issues *de novo* (see Iowa R. App. P. 3.) and affirm the trial court.

I. Shortage of Acreage. It is the law of this state and generally that for the purpose of determining whether relief on the ground of shortages in quantities of land conveyed under a contract of sale shall be granted, courts have divided the cases into two general classes: (1) where the sale is of a specific quantity, which is usually denominated a sale by the acre; and (2) where the sale is of a specific tract by name or description, which is usually called a sale in gross. See, Annot. 1 A.L.R. 2d 9, at 18-19; Gardner v. Kiburz, 184 Iowa 1268, 168 N.W. 814 (1918). In Gardner, it was held that proof of the terms of the antecedent agreement of sale is not merged in the deed, so as to defeat a claim for diminution of the contract price as a result of the shortage in quantity of land conveyed.

Applying these principles to the present case, we find on our *de novo* review that the evidence supports the trial court's findings of a per acre sale price and resulting damage award based on diminution of contract price, for the resulting shortage of acreage.

II. Loss of Use Because of Railway Easements. A portion of the trial court's damage award was for loss of use because of railway easements over the property conveyed. We find the evidence as to such loss undisputed. Defendant

does not dispute the method which the trial court used in computing damages for loss of use so we also affirm that portion of the trial court's award. 8

III. Survey Costs and Attorney Fees. Lastly, we consider plaintiffs' claim on cross-appeal that they should have been awarded survey expenses and attorney fees. The trial court found no legal authority for awarding such damages in the absence of an express agreement to pay same. It found the proof of such an agreement to be wanting. On our *de novo* review, we do not disturb this determination. The trial court's decree is affirmed.

AFFIRMED.