

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 28 1987

CLERK SUPREME COURT

LAURENCE E. LeCLAIR, LARRY J. LeCLAIR as Trustee of the Alice R. LeClair Estate Trust, and the **ALICE R. LeCLAIR ESTATE TRUST,**

Filed October 28, 1987

Plaintiffs-Appellants,

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vs.

RAYMOND REISMANN and **VELMA REISMANN,**

7-324
86-1119

Defendants-Appellees.)

Appeal from the Iowa District Court for Clay County (No. 21262), Murray S. Underwood, Judge.

Plaintiffs appeal the district court's ruling which, contrary to plaintiffs' claims in the trial court, found a boundary by acquiescence, claiming that insufficient evidence was presented to establish the boundary as claimed by defendant such that the line should be established by deed in plaintiffs' favor. **AFFIRMED.**

Christopher A. Bjornstad of Cornwall, Avery, Bjornstad & Scott, Spencer, for plaintiffs-appellants.

Emery H. Emerson, Jr. of Emerson Law Office, Storm Lake, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ. Snell, J., takes no part.

PER CURIAM

Every so often, our arid world of legal analysis intersects with the bucolic handiwork of a much higher court. This case, in some respects, represents such an interfacing. On May 14, 1985, appellants initiated the present action, claiming appellees were encroaching upon appellants' land and requesting the district court to establish a boundary line and order an end to the aforementioned encroachment. Appellees' answer plead, in essence, that a boundary line had been established by acquiescence and that this boundary line negated appellants' encroachment claim. As is obvious from their party designation on appeal, the district court agreed with appellees. This appeal followed.

Although the petition was filed in equity, the district court treated the cause as a special proceeding arising under Iowa Code Chapter 650 (1985). As the district court was to determine whether certain alleged boundaries had been acquiesced in by the parties, we think that court correctly determined the nature of the action and treated it accordingly. See Iowa Code § 650.6 (1985); Johnston & Son v. Robuck, 104 Iowa 523, 529, 73 N.W. 1062, 1064 (1898) (no motion necessary for trial court to transfer case to proper docket). As such, our review is limited to the correction of legal errors. Iowa Code §§ 650.15, 611.3 (1985); Iowa R. App. P. 4; see Schauland v. Schmaltz, 252 Iowa 426, 428, 107 N.W.2d 68, 70 (1961).

The applicable law was set forth in Brown v. McDaniel, 261 Iowa 730, 732-33, 156 N.W.2d 349, 351 (1968), as follows:

It is true in this jurisdiction that where two adjoining property owners acquiesce for ten or more consecutive years in a boundary line definitely marked by a fence, wall, or other markers, it then becomes the true boundary although a survey may show otherwise and neither party had intended to claim more than the property described in their respective deeds.

The burden is upon the party claiming a boundary line different from that dis-

closed by the survey to establish the alleged acquiescence by clear proof. Id. A demonstration of mutual acquiescence is required. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974). These case-law principles have been codified in Iowa Code section 650.6 (1985) as follows:

Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue may be tried before commission is appointed, in the discretion of the court.

The present controversy concerns a grain bin constructed by the Reismanns on land now claimed by the appellants, LeClair interests. It appears clear that in fact, as demonstrated by surveyors' reports, the bin *does stand on LeClairs'* property. However, as LeClairs concede in brief, the "line which sets out the correct legal division between the properties has been ignored by both parties for years." The issue in the district court, therefore, was squarely joined at determining the location of the de facto agreed-upon property division.

We think the record provides ample support for the district court's determination which found in favor of the Reismanns on the acquiescence issue. It *appears clear* that a fence constructed by LeClairs' predecessor in interest in 1926 marked the agreed-upon boundary line at least until torn down by LeClair in 1978. Although this fence apparently existed in a dilapidated condition for some years prior to its removal, we believe the local flora demonstrate the fence was, in fact, the agreed upon boundary line. A number of photographs were submitted in evidence. These photographs depict the following flora, planted by the Reismanns or by their predecessors in interest, the location of which is completely consistent with the Reismanns' theory of acquiescence, and completely inconsistent with the LeClairs' current claims: flower beds of irises and corn lilies, honeysuckle bushes, a line of bur oaks and maples, several

other smaller trees, stump holes, and grassy areas. In addition, the pile of rocks which the Reismanns claim served as the southern mark for the 1926 fence can still be seen. While only God can make a honeysuckle bush, see generally Genesis, chapter 1 (King James) (with apologies to Robert Frost), mere humans can acquiesce in the propriety of its location. As substantial evidence supports the district court's finding that such was the case here, see Iowa R. App. P. 14(f)(7), we affirm that court's decision.

AFFIRMED.

Donelson, J , concurs, Oxberger, C J , and Schlegel, J , concur in result only.