1965

Frank Fuoco and Anna Fuoco v. Benjamin H. Williams and Verna v. Williams : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK FUOCO and ANNA FUOCO,
Plaintiffs-Appellants,

vs.

BENJAMIN H. WILLIAMS and VERNA V. WILLIAMS,
Defendants-Respondents.

No. 10362

APPELLANTS' BRIEF

Appeal from the Judgment of the Third Judicial District for Salt Lake County
Honorable Stewart M. Hanson, Presiding Judge

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STATEMENT OF THE KIND OF CASE

This is the second appeal from judgments of the District Court of Salt Lake County in this case which involves a boundary line by acquiescence.

DISPOSITION IN LOWER COURT

The case in the second trial was tried to the court. From a judgment for the defendant, plaintiffs appeal.

The plaintiffs brought this suit against the defendants to quiet title to a tract of land located in Salt Lake County, specifically described in the complaint, to enjoin the defendants from trespassing and for damages. The defendants answered and counterclaimed alleging ownership and right of possession of a specifically described tract of land and praying for injunctive relief and damages. The plaintiffs filed a motion for a summary judgment based on an affidavit and map which indicated that an overlap of approximately 20 feet was created by a tie to a "county monument in the intersection of two county roads" which first appears in the defendants' chain of title in a deed to the defendants dated October 31, 1950. (R. 7-9).

After hearing, the trial court granted the motion for summary judgment, holding that the plaintiffs had record title to the 20 feet. However, the court permitted the filing of an amended answer and counterclaim to plead title by adverse possession and acquiescence. (R. 10). Such amended pleading was filed. (R. 14-17). At the pre-trial conference the court ruled that before the defendants could present evidence upon the issue of adverse possession "they must supply the plaintiffs with a copy of the tax description showing description of the property under which they claim to have paid taxes . . . at least ten days prior to the trial." (R. 19-21). This was not done. The only remaining issue was title by acquiescence.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek reversal of the judgment and judgment in their favor quieting title to the real estate in dispute as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

The twenty-foot strip of land in dispute is shown on Exhibit P-1 by the letters "ABCD", "AB" being the boundary line claimed by the defendants and "CD" being the line claimed by the plaintiffs. (R. 20). See also the area marked on Exhibit P-1. The property in question is located near the intersection of Highland Drive and 3900 South. Defendants built a fence along line "CD" a short time before the suit was filed. (R. 66, 67). This precipitated the suit.

The testimony of the defendant, B. H. Williams, is set out rather fully because the appellants claim that no title by acquiescence was proved, and that if there is proof anywhere in the record it is by the following testimony.

Mr. Williams, when asked "if there was any line of any kind dividing the Butterworth property" from that of his father stated, "There was no fence in there, just east of the ditch." (R. 47). Mr. Williams then stated that the ditch was placed there in about 1916 or 1917 and the questioning went on to show the present location of the ditch. (R. 47). No statement was ever made that the ditch is the actual boundary.

Mr. Williams went on to testify that the ditch was used to irrigate the Butterworth property. (R. 50), [Butterworth land is the same as that now owned by Mr. Fuoco, R. 54], and that no person ever used the ditch to take care of land east of the ditch. (R. 51). It was also stated by Mr. Williams that the ditch "was deep enough to be clearly seen at any and all times" since 1920. (R. 53). And, that neither Mr. Butterworth, nor any other owner of this property, made any claims to any land east of the ditch. (R. 54).

On cross-examination, the ditch was described as follows:

> "Q. How deep and wide was that ditch as it ran south from the point where it crosed the lane?
>
> A. It was two good plow furrows, 12-inch plow *furroughs*.
>
> Q. In other words, what would a plow furrow be?
>
> A. 12 inches.
>
> Q. 12 inches by 6 or 8 inches deep?
>
> A. Yes, sir.
>
> Q. And you think the ditch would be maybe 2 feet wide, 6 or 8 inches deep?
>
> A. Yes, sir." (R. 65).

Also:

> "Q. Now, Mr. Young — or Mr. Williams, I think you have testified that that ditch has never been changed in location since it was built along about 1915 or 1916?

A. A foot or two east or west.

Q. Has it been moved east or west?

A. That is what I say, it could have been moved east or west.

Q. It could have been moved a foot or two east or west?

A. It is in the same location as it is located in now.

Q. I will ask you if it is in the same location now as it was in 1950?

A. Yes, that is right. That is where the ditch is, just west of my fenceline." (R. 65, 66).

With respect to the ditch, plaintiff, Mr. Fuoco, testified that he didn't see a ditch when he walked over the ground before purchasing (R. 91), nor later (R. 99). Plaintiff's witnesses, Janet Sander and Frank Young described the ditch as "not much of a ditch," (R. 144) and "a little ditch that runs south, but it wasn't up to much." (R. 150). Plaintiffs' witness, Grace Young, describing the ditch, stated, "I would say like I said, that somebody just took a shovel and shoveled it off."

With respect to the entire Fuoco tract of land, it was clearly shown in the trial that for a number of years this area had grown up in weeds. (R. 81, 120, 121, 142, 155). Williams said it had been in weeds except for one year, since 1939. (R. 81). Mr. Oman stipulated that "it has grown in weeds for the last fifteen years or so." (R. 142).

Mr. Williams testified that he leased and farmed what is now the Fuoco property in 1923 or 1924 and then his father leased it from about 1925 to 1934. (R. 79, 80). Williams again used the Fuoco land from 1934 to 1937 and Leone Le Chaminant farmed it from 1937 to 1939. From 1939 to 1959 the irrigation ditch was not used except for one year. (R. 81, 82).

The Williams land east of the ditch was used for a manure pile and stack yard until about 1938 when the barn was moved. (R. 71-73). There is no evidence of use until 1950 when Williams planted a garden. (R. 83).

The only other testimony of Mr. Williams which bears on the question of acquiescence is as follows:

> "Q. Mr. Williams, as to any work you did, or your father did, raising crops over on Butterworth's land, did you divide the crop between yourself and Butterworth?
>
> A. Yes. We took two thirds and gave Butterworth one-third.
>
> Q. And I asked you what line you used to divide the Butterworth crop from your crop.
>
> MR. SKEEN: I object as calling for a conclusion of the witness.
>
> MR. OMAN: He did the work.
>
> MR. SKEEN: It is a conclusion to say what line was adopted and further it is leading.
>
> THE COURT: Use the word 'ditch' then.

MR. OMAN: I beg your pardon, your Honor. I didn't hear you.

THE COURT: Restate the question.

Q. (By Mr. Oman) Mr. Williams, did you divide with Butterworth all crops raised on the west side of this ditch we have been talking about?

A. Yes, sir.

Q. Did you give him any part of the crop raised on the east side of that ditch?

A. No, sir.

Q. You claimed that property as your own?

A. Yes, sir." (R. 83, 84).

The trial court found in favor of the defendants as to the location of the ditch and acquiescence in the ditch as a boundary line. (R. 26-28).

This appeal is taken from the judgment of the trial court.

STATEMENT OF POINTS

1. The defendants failed to prove the long, continued existence of a monument definitely establishing a boundary line.

2. There is no evidence that the parties mutually recognized the ditch as the boundary line.

ARGUMENT

1. THE DEFENDANTS FAILED TO PROVE THE LONG, CONTINUED EXISTENCE OF A MONUMENT DEFINITELY ESTABLISHING A BOUNDARY LINE.

As indicated in the trial, all of the issues in this case have been resolved, except the issue of title by acquiescence. (R. 45). The record title to the twenty-foot strip of land in dispute is in the appellants.

This Court has held that in order to make a case under the acquiescence doctrine, it *must* be shown:

(1) There was uncertainty as to the location of the true boundary.

(2) The parties have occupied their respective parcels up to an open boundary line, visibly marked by monuments, fences or buildings.

(3) The monument, fence or building must have existed for a long period of time.

(4) The monument, fence or building must have been mutually recognized as the dividing line.

Fuoco vs. Williams, 15 Utah 2d 156, 389 P.2d 143; King vs. Fronk, 14 Utah 135, 378 P.2d 893; Brown vs. Milliner, 120 Utah 16, 232 P.2d 202; Glenn vs. Whitney, 116 Utah 267, 209 P.2d 257; Ringwood vs. Bradford, 2 Utah 2d 119, 269 P.2d 1053; Hummel vs. Young, 1 Utah 2d 237, 265 P.2d 410.

In the case of King vs. Fronk, supra, the court referred to the boundary marked on the ground as "monuments visibly placed," "monumented line," and an "existing line marked by monuments." The only basis for acquiescence in this case was considering the irrigation ditch to be a "monument" within the meaning of the rule.

A monument is defined by the dictionary as "permanent landmarks established for the purpose of indicating boundaries." Bouvier's Law Dictionary, Third Edition.

Obvioulsy an irrigation ditch is not ordinarily constructed for the purpose of marking a boundary. It is used for carrying water to the place of use and must be constructed to conform to the slope and contour of the land and to connect with the water source and with other ditches and laterals. An irrigation ditch, particularly a small ditch, would not give notice to one who views it that it would establish a boundary line as in the case of a fence or building. If we assume for the sake of argument that the land in each tract was occupied up to a small ditch, such as the one involved here, this fact alone would not put the parties upon notice of intent to claim ownership of the ditch. A landowner "could not irrigate uphill from a ditch" and the fact that his neighbor used the land to the ditch could easily be explained as a neighborly act or a grant of license.

From the evidence it is clear that there was not a monument of the kind contemplated by the rule and

there is no evidence that there was anything on the ground of long and continued existence *definitely* establishing a boundary line. It was stipulated that the Fuoco property, including the twenty-foot strip, was in weeds for at least 15 years immediately prior to the filing of this suit. (R. 142). As indicated above, Williams testified that the ditch was only used in one year from 1939 to 1959. (R. 81, 82).

Because the whole tract of land was in weeds for such a long period of time, it is evident that the parties were not occupying up to an open boundary line, visibly marked, as is required for acquiescence in this jurisdiction. King vs. Fronk, supra. See page 7 of this brief.

The ditch, it was testified to by Mr. Williams, has been moved "a foot or two east or west," or "Could have been moved a foot or two east or west." (R. 65, 66). A boundary which has been moved or could have been moved, even a foot or two, does not fall within the definition of a "monument,"—see page [redacted] of this brief,—as it is not a permanent landmark. A boundary to land cannot be such that it can be moved around at will, this is another reason why the ditch in this case should not be considered a long, existing monument establishing a boundary.

The location of the ditch was also disputed. Mr. Williams tied the location of the line to two landmarks. One was "just east of the ditch." (R. 47). The present fence was built "right on the edge" of the ditch, (R.

53) and the present fence, he stated, is "about in the same line" as some old fence posts which have since rotted out. (R. 62). The present fence was constructed shortly before the trial (R. 66, 67) so this attempted tie is of little help. Mr. Williams then said the fence along the east side of Frank Young's property, the property north of the lane, has been within a foot or two of its present location for 60 years. (R. 63, 118). The Young fence is shown on Exhibit P-1 by some red crosses. (R. 118). Mr. Williams did not tie the present fence or the old fence posts with anything but the present ditch, or with the west side of his father's property. (R. 62).

The second reference point used was an old flume which crossed the lane and carried water to the ditch in question. This, it was stated by the witnesses testifying to it, crossed the lane at the south end of the Young fence. (R. 64, 119, 150, 168). Mr. Williams said the ditch crossed the lane and ran 18 or 20 feet west before going directly south. (R. 65). Plaintiffs' disinterested witnesses testified that the ditch ran directly south from the flume as follows:

Mr. Sanders: The old fence posts were in line with the Young fence and the ditch ran "directly south" of where it crossed the lane. "There was no jog in there." (R. 134).

Mr. Young: The ditch ran south, "just on a degree to the southwest." But, there were no jogs. "It

run straight, come across the road and run straight down in front of the barn." (R. 150, 151).

Mrs. Sander: The ditch went south from the flume. (R. 143-144).

On cross-examination, Mr. Williams was asked to locate the old fence posts on the map. In so doing, he placed some pen circles on the red line, "CD", on Exhibit P-1. (R. 62). That line is the line plaintiffs are claiming and the circles were also placed on a line with the fence on the east side of Frank Young's property. It should be noted that the flume was also on this line. (See Exhibit P-1).

We submit that the evidence fails to show a monument of any kind which was intended to establish a boundary and that the evidence is in dispute as to the location of the small ditch which it is claimed by the defendants marks the boundary. Williams' evidence as to location is contradictory and vague. He testified that the ditch was located near old fence posts which he indicated on the map Exhibit P-1 exactly on the boundary line claimed by the plaintiffs; (R. 118), and then on redirect testified in response to a leading question that he intended to put the marks where the present fence is located. (R. 30-31). He admitted the ditch had been moved and all the distinterested witnesses whose testimony is quoted above testified that the old ditch, prior to 1954, had been about 20 feet east of the present ditch. It is apparent from the foregoing that if a small, two-plow furrow ditch can be

used as a "definite" monument within the rule of this court established in this case on the previous appeal, and in King vs. Fronk, supra, confusion and chaos in land cases will be the result.

2. THERE IS NO EVIDENCE OF MUTUAL RECOGNITION OF THE DITCH AS A BOUNDARY LINE OVER A LONG PERIOD OF TIME.

The record discloses the following with respect to ownership of the land on each side of the ditch as follows:

Williams Property

Prior to 1935	Henry Benjamin Williams
1935 to 1950	Mercy Hodgson Williams
1950 to present	Defendants (R. 9)

Fuoco Property

1896 to 1936	Melinda H. Butterworth
1936 to 1951	Annie N. M. Christensen and Effie G. Butterworth
1951 to 1959	H. Leland Christensen
1959 to present	Plaintiffs (R. 8, 9).

During the tweny-year period prior to the commencement of suit, from 1942 to 1962, there is no evidence of recognition of the ditch as a boundary line by

Fuoco and his predecessors in interest. There is no evidence by written or oral agreement or by acts or conduct. In fact, the testimony of the defendant, Benjamin Williams, is that for a period of 20 years from 1939 to 1959 the Fuoco property was cultivated only one year (Williams did not know what year) and the rest of the time it grew up in weeds. (**R. 81, 82**). It was held in the case of Fuoco vs. Williams, supra, that use of the land up to a ditch on each side of the ditch is not such acts or conduct as would show mutual recognition of the ditch as a boundary line. The Court said:

> " . . . In the case at bar it was conceded that defendants had occupied the land up to the ditch for a long period of years and that the dispute was between adjoining land owners. The evidence presented shows the ditch was used for irrigation purposes and the record is void of any evidence showing that the plaintiffs' predecessors ever acquiesced in it as a boundary line; therefore, the first issue must be resolved in favor of the plaintiffs.
>
> As to the second issue, we believe that the court erred in telling the jury that the only question was the location of the small irrigation ditch, since such presentation to the jury was based on the assumption that the irrigation ditch was dug where it was *for the purpose of establishing a boundary* and not for the purpose of irrigating land. Any number of ditches could criss-cross one's property for the purpose of irrigating land without any contention or realistic assumption that they were to be boundary lines, —even though by permission, others may have used the dry land in between. . . . "

The Court reversed and remanded with the following instructions:

> "Therefore, the judgment of the trial court is reversed and remanded for a new trial with instructions to the effect that the judge or jury should determine the matters of whether the ditch was *acquiesced in* over a long period of time, as a *boundary* and not simply as an irrigation medium. . . . "

In the second trial, as indicated above, there is not only a failure on the part of the defendants to show acquiescence in the ditch as a boundary over a long period of time, but the proof is that there was no occupancy up to the ditch. The land grew up in weeds (except for one year) from 1939 to 1959. This testimony of Williams certainly negatives occupation up to the ditch and makes this case weaker than the one which was reversed.

During the period from 1923 to 1924 the evidence is that Benjamin Williams leased what is now the Fuoco property and farmed the land on both sides of the ditch on a crop share basis. Williams testified that during that period of time the crop returns on the land west of the ditch were divided on the basis of one-third and two-thirds with Butterworth. Butterworth is referred to as "him" (R. 83) and neither his relationship to the record owner, Melinda Butterworth, nor his identity is disclosed in the record. *There is no evidence that Williams' father, who succeeded Williams as lessee from* 1924 *to* 1934, *divided the crop proceeds on the*

basis of the ditch. (R. 80). Thus, for a period of 29 years out of the 38 years immediately prior to filing the suit (for 19 years it was in weeds and for 10 years it was leased by Williams (R. 80))—the defendants could not have been occupying the land adversely to plaintiffs or their predecessors. If the division of crop receipts constituted acquiescence it was only for one year and did not meet the requirement of "acquiescence over a long period of time."

Under a familiar rule of law, a lessee cannot take advantage of the landlord and tenant relationship to defeat the title of the landlord. The rule in this jurisdiction is stated in Woodbury vs. Bunker, 98 Utah 216, 98 P.2d 948, as follows:

> " . . . So long as the tenant remains in possession, his possession is that of the landlord, and he cannot by words or acts make his possession of that of one whom he permits upon the premises a possession adverse to the landlord. . . . "

The defendants having failed to prove the necessary elements of a title by acquiescence, the record boundary line "CD", Exhibit P-1, must stand as the true boundary.

It is respectfully submitted that the judgment must be reversed. The District Court should be directed to enter a judgment for the appellants.

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