1965

Frank Fuoco and Anna Fuoco v. Benjamin H. Williams and Verna v. Williams : Respondent'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

RESPONDENTS' BRIEF

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

MILTON A. OMAN
Continental Bank Building
Salt Lake City 1, Utah
Attorney for Defendants-Respondents

E. J. SKEEN
522 Newhouse Building
Salt Lake City 1, Utah
Attorney for Plaintiffs-Appellants

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NATURE OF THE CASE

This is the second appeal from judgments of the District Court of Salt Lake County, each favoring defendants, from an action brought by plaintiffs to quiet title in a parcel of land approximately twenty feet wide along plaintiffs' east boundary line and along defendants' west boundary line, which is now and has been for over fifty (50) years occupied and used by defendants and their predecessors.

DISPOSITION IN THE LOWER COURT

The Lower Court concluded that, in sending this case back for a new trial in the first appeal by this same plaintiff in this case, the Supreme Court did not intend that the issue concerning the location of the ditch in question be relitigated. Upon this basis the Lower Court assumed the jury's determination, in the first trial, with respect to the location of the ditch to be correct. It was then determined, in the second trial, that the only issue left to be decided was whether or not the particular ditch in question was acquiesced in as a boundary line by plaintiffs' predecessors and defendants' and their predecessors for a long period of time. This issue was again resolved in favor of the defendants.

STATEMENT OF THE ISSUE TO BE RESOLVED ON APPEAL

It must be determined whether or not the particular ditch in question was acquiesced in as a boundary line by plaintiffs' predecessors and by defendants' and their predecessors for a sufficiently long period of time.

STATEMENT OF FACTS

Plaintiffs and defendants are adjoining landowners near 3900 South and Highland Drive Streets in Salt Lake County, Utah. Defendant, Ben Williams, owns a tract of land located south of 39th South Street on the West side of Highland Drive Street. The plain-

tiffs, in the year 1960, purchased a parcel of land immediately west of Respondents' property. (R. 44, 47). The twenty (20) foot strip in dispute involves the placement of the boundary between their properties. Defendant, Ben Williams, has lived on this property with his parents since he was a child. (R. 3). Prior to 1934, an irrigation ditch was dug between the plaintiffs' and defendants' properties for the purpose of irrigating the plaintiffs' property. The defendants claim their property runs west from Highland Drive Street to the irrigation ditch dividing the properties in question and that the irrigation ditch has been acquiesced in as a boundary line dividing the two parcels for well over fifty (50) years and that said ditch is still in existence. At the previous trial the plaintiffs conceded that the defendants had been using the parcel up to the ditch since 1934, whereupon, the Lower Court limited the questions to be submitted to the jury to that concerning the location of the ditch. That is whether the irrigation ditch in question was located along Line AB or Line CD? The twenty-foot strip of land in dispute was shown on Exhibit P-1 by the letters "AB and CD". "AB" was the boundary line claimed by the defendants and "CD" was the line claimed by the plaintiffs. (Old R. 20). The jury, after hearing the evidence, was taken to the premises to view the same. By Special Verdict, they found that the ditch forming the boundary line between the two parcels of land was located along the line AB as claimed by defendants. (Old R. 37). Based upon the findings of the jury, the Lower Court

in the previous trial entered judgment for the defendants quieting title, by acquiescence, in the defendants to the disputed parcel. (Old R. 41-43). The plaintiffs appealed and the Supreme Court reversed the judgment of the trial court and remanded such for a new trial, stating 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." Fuoco vs. Williams, 15 Ut.2d 156, 389 P.2d 143.

At the new trial the Lower Court resolved the issue of whether or not the particular irrigation ditch was acquiesced in as a boundary line in favor of the defendants and it is from this judgment that the present appeal is taken by the plaintiffs.

ARGUMENT IN AFFIRMANCE

THE LOWER COURT DID NOT ERR IN ITS FINDING THAT DEFENDANTS HAD ACQUIRED TITLE BY ACQUIESCENCE.

A. The court correctly relied upon the finding made by the jury in the previous trial with respect to the location of the particular ditch involved in this controversy.

B. The defendants did prove the long, continued existence of the said ditch as a monument definitely establishing a boundary line mutually recognized

by appellants' predecessors and by defendants and their predecessors as such.

A. The court correctly relied upon the finding made by the jury in the previous trial with respect to the location of the particular ditch involved in this controversy.

In the earlier Supreme Court decision, Fuoco vs. Williams, 15 Ut.2d 156, 389 P.2d 143, in which the judgment for defendant, Benjamin H. Williams was reversed and remanded for a new trial, the court said:

> "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 sole purpose of irrigating the land."

The court further stated:

> "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."

It is from this language and similar language throughout the opinion that the lower court in the present trial correctly concluded that it was not the intent of the Supreme Court that the issue with respect to the location of the ditch be relitigaited.

The latter above-quoted statement of the Supreme Court refers specifically to the issue of acquiescence in the ditch (referring here to that ditch located by the jury in the previous trial) *as a boundary line* and makes no reference to the issue of location. From this language it would seem that the Lower Court was correct in its interpretation of the Supreme Court's previous decision.

It is the law in Utah that an issue which has been properly litigated in a court of competent jurisdiction is conclusive upon the parties and those in privity with them and cannot be relitigated in another court by the same parties in an action upon the same matter. Matthews v. Matthews et al. (142), 102 Ut. 428, 132 P.2d 111. In the Matthews case the court said:

> "Public policy requires that parties ought not to be permitted to litigate the same issue more than once, and, that when a fact has been judicially determined by a court of competent jurisdiction or an opportunity for such trial has been given, the judgment of the court so long as it remains unreversed, should be conclusive upon the parties and those in privity with them in law or estate."

It is respectfully submitted that the issue concerning the location of the ditch was not open to relitigation in the present trial.

B. *The defendants did prove the long, continued existence of the said ditch as a monument definitely establishing a boundary line mutually recognized*

by appellants' predecessors and by defendants and their predecessors as such.

Where there is no proof of an actual agreement the court has relied upon the doctrine of boundary by acquiescence and implied an agreement if certain elements be shown to exist. The elements which must be shown by the person claiming title by acquiescence are: (1) occupation up to a visible line marked definitely by monuments, fences or buildings, (2) acquiescence in the division line as the boundary, (3) acquiescence for a long period of time and (4) acquiescence by adjoining landowners.

Where the preceding requirements are met, a rebuttable presumption arises that the parties have agreed the boundary should be the one in which they have acquiesced, wholly apart from whether or not an actual express agreement was made. If the presumption arises the burden shifts and it becomes incumbent upon the party who assails the title by acquiescence to show by competent evidence that a boundary was not thus established.

Fuoco vs. Williams, 15 Utah 2d 156, 389 P.2d 143; King vs. Frank, 14 Utah 135, 378 P.2d 893; Nunley vs. Walker, 13 Ut.2d 105, 369 P.2d 1117; Affleck vs. Morgan, 12 Ut.2d 200, 364 P.2d 663; Harding vs. Allen, 10 Ut.2d 370, 353 P.2d 911; 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 337, 265 P.2d 410; 3 Utah Law Review.

Plaintiffs contend that defendants failed to prove a "mutual recognition" of the particular irrigation ditch as a boundary.

An irrigation ditch can become a boundary line or monument if such be the intention of the adjoining landowners. Monuments include such natural objects as mountains, streams, trees, etc., or artificial objects such as roads, fences, walls, ditches and other similar matters marked or placed on the ground by the hand of man. 12 Am Jur 2d (Boundaries) Sec. 4 & 5, pages 549 thru 551.

The record is clear that Mr. Williams, the defendant, and his predecessors, under claim of title, occupied and used the property lying immediately east of the ditch bank far in excess of twenty-five (25) years to the exclusion of all others.

Plaintiffs' witness, Owen Sanders, testified that the property west of defendants' old barn to the east of the ditch in question was used by defendants and their predecessors as a place to throw refuse, manure, as a lane over which to drive their wagons and hayracks, as a place to grow apple trees and for gardening. (R. 81, 82, 85). Mr. Sanders further testified that to his knowledge defendants and their predecessors were the only persons ever to use the property east of the present ditch as it runs parallel to the fence

now in existence. (R. 86, 87). Mr. Frank Young, witness for plaintiffs, testified that the property west of the barn and to the east of the ditch was used by defendants and their predecessors for gardening, to raise corn, to grow fruit trees, in part for a corral, etc. (R. 109, 110). Mr. Young also testified that he has never seen anyone other than defendants or their predecessors doing anything with the property east of the fence line as it is now constructed. (R. 117). Mr. H. Leland Christensen, another witness for plaintiff, testified that he remembered defendants placing corn shocks on the west end of their property. (R. 137). Defendant Benjamin H. Williams and his sister, Mrs. Afton W. Marker, both testified that defendants and their predecessors had used and occupied the property in question for over 20 years—more nearly 50 years—to the exclusion of all others under claim of title to the property. (R. 7, 8, 12, 28-34, 58, 59, 60, 62).

The Supreme Court in its earlier decision, Fuoco vs. Williams, supra, on this matter, stated that:

> "The plaintiffs conceded that the defendants had been cultivating the ground up to the ditch for oiver 20 years."

It is respectfully submitted that defendants were occupying and using all of the property from their east boundary along Highland Drive west to the ditch in dispute, to the exclusion of all others.

Mr. Frank Young, witness for plaintiffs, testified that Mr. Butterworth, former owner of the tract now

owned by plaintiff, Frank Fuoco, attempted to raise corn and potatoes at one time. (R. 111). As was pointed out, supra, Mr. Young also testified that he has never seen anyone other than defendants or their predecessors using the property east of the ditch in question and the present fence line as it is now constructed. (R. 117). It is logical to infer from this testimony that Mr. Butterworth farmed only up to the ditch and would seem to indicate that Mr. Butterworth probably used the water from the ditch in question to irrigate his crops. Defendant, Ben Williams, testified that Leone LeCheminant grew crops on what is now the Fuoco property up to the west side of the ditch in question for two or three years. (R. 38). This fact is also recognized by plaintiffs in their brief at page 8. Plaintiffs' witness, Mr. H. Leland Christensen, testified that he farmed what is now the plaintiffs' property at one time and did use water for irrigating from the particular ditch in question. (R. 135). This fact was also recognized by plaintiffs' witness, Mr. Young, in his testimony. (R. 112).

Plaintiffs' witness, Mrs. Grace D. Young, testified that because of a hump located on what is now the plaintiffs' property the land was difficult to irrigate and flooding would sometimes occur when an attempt was made to irrigate this property. Perhaps this is an explanation for plaintiffs' predecessors letting the land grow up in weeds for many years.

The fact that all witnesses testified to the existence

of the ditch in question would seem to be evidence enough of its visibility.

Mutual recognition of a boundary line may be shown by acquiescence over a long period of time. It is not incumbent upon the defendants to show an express agreement between themselves and plaintiffs' predecessors in the title in order to prevail. An implied recognition of a boundary line may be supplied by the passage of time. Fuoco vs. Williams, 15 Ut.2d 156, 389 P.2d 143; King vs. Fronk, 14 Ut.2d 135, 378 P.2d 893; 3 Utah Law Review.

Plaintiffs' predecessors and the defendants and their predecessors have for many years intended that this irrigation ditch constitute the boundary line. The testimony indicates that the ditch was constructed along the east side of the plaintiffs' property for the purpose of irrigating that property and was placed along what was considered to be its east boundary. (Old R. 114 (New R. 4, 7, 10, 90, 126, 130). Since the property of the parties slopes from the east to the west, it was assumed many years ago that the ditch in question was on the boundary line of the two parties. It is illogical that, at the time the irrigation ditch was constructed, it was not placed on what plaintiffs contend is the boundary line, approximately twenty feet east of the position where it was actually located, unless the adjacent property owners considered the boundary line to be where the ditch was located. The land at the time the ditch was constructed was pri-

marily farm land. The feeder ditch or canal serving the plaintiffs' property flowed from the east to west to the northeast corner of plaintiffs' property. It would have been a simple matter to bring the ditch across the road from north to south at the actual record boundary to irrigate all of the tract if the boundary line were not considered to have been in the location as claimed by defendants. When land is being used as farm land and is being served by irrigation water, it would be unwise, to say the least, for the owner of the land not to construct his irrigation ditch on what he treated as his property line, so that he would not lose the use of any of his property through lack of water. It is not logical to say that plaintiffs' predecessors, to be neighborly, allowed a twenty-foot strip of their farmland to lie east of the ditch where it could not be irrigated so that their neighbors could use the land.

Plaintiffs' predecessors in title made no objection and it was assumed by others living in the area that the ditch in question constituted the boundary line between the two properties. The plaintiffs have lived in this neighborhood for many years themselves and have owned and tilled the land adjacent on the south of the property they recently acquired from Butterworth. They knew of the sale ten or more years ago on the south part of the Williams' property to one Hansen (the north part of said tract was conveyed to respondents by the said deed of 1950), and know that the west line of the tract claimed and occupied by Hansen

had been tightly fenced by him since his acquisition of that part of the Williams property. (R. 49, 60, 87); that said fence was in direct line with the fence constructed by defendants conveniently close to and on the east bank of the irrigation ditch of plaintiffs', which had been acquiesced in and recognized for nearly fifty years as the division line of these properties. Hansen had also constructed a concrete wall and fence along the boundary of the property between the lot he had acquired from Williams' parents and that of defendants. This wall extended all the distance to the southwest corner of the land claimed by defendants, down to the said ditch on the line AB. (R. 11, 12, 61, 68, 79). The whole or former Williams tract, as it existed, before the south part thereof was sold to Hansen, had a common west boundary, and with the lands acquired by plaintiffs recognized all of these years. The ditch extends the entire distance of this old west line ofthe Williams property, and has done so for many years.

Plaintiffs had personal knowledge, before they bought the tract to the west of the Williams tract from Butterworth, that this line had already existed for all the years they had lived in the neighborhood. They tilled the land immediately south of the south side of the old Williams property. Plaintiff, Frank Fuoco, indicated in his testimony that he did not farm the 25 foot strip in dispute located just east of the irrigation ditch because he did not know it was his until the recent survey was conducted. (R. 53). Plaintiffs did not in-

tend to buy any land lying east of this line from Butterworth, but claim to find, after surveying out the description in the Butterworth deed to them, that they had acquired twenty feet more than they had expected to acquire. They now desire that the boundary line be changed and moved back to the east about twenty feet, after it had been used, acquiesced in, acknowledged, and recognized as the property line for nearly fifty years.

Defendant, Benjamin H. Williams, testified that either he or his father had leased what is now the Fuoco property during the period from 1923 or 1924 to 1937 and one other year sometime between 1940 and 1959. (R. 37). Defendants further testified that only the crop returns on the land west of the ditch were divided on a crop-share basis with their lessor. As to the proceeds from the crop raised east of the ditch, Mr. Williams testified that defendants and their predecessors retained all proceeds. (R. 40). Defendant, Ben Williams, also testified that the ditch in question was used to irrigate what is now the plaintiffs' property lying to the west of the ditch. (R. 39). Plaintiffs presented no evidence whatsoever to contradict this testimony. It would seem that the division of crop receipts would be significant circumstantial evidence of the acquiescence of plaintiffs' predecessors in the ditch as the boundary line.

The landlord-tenant rule would not be controlling here since defendants were lessees for only a small

portion of the period during which defendants claim the ditch was acquiesced in as a boundary line.

As was pointed out, supra, what is now the plaintiffs' property west of the ditch in question, was farmed at different intervals of time by Mr. Butterworth, Mr. H. Leland Christensen, and Mr. Leone LeCheminant. The fact that others farmed what is now the plaintiffs' property only up to the ditch in question is significant evidence of the acquiescence of plaintiffs' predecessors in the ditch as a boundary line.

Plaintiffs contend that the ditch in question was not a permanent land mark and hence does not fall within the definition of a "monument." In support of their contention, on page 14 of their brief plaintiffs state that defendant, Ben Williams, admitted the ditch had been moved. This is not true. Though defendant stated that the ditch could have moved one or two feet either to the east or west he stated that to his knowledge it had not been so moved. (R. 23, 33). Testimony indicated that periodically the ditch required cleaning if it was to be of satisfactory use. (R. 34). The record points out that one way of cleaning the ditch is to plow it out. (R. 34). It is possible that as a result of this cleaning process or of erosion taking place that the ditch might shift slightly to the east or the west. Defendant, Ben Williams, was merely being realistic when he testified that the ditch could have shifted to the east or west—one or two feet.

As was pointed out, supra, the location of the ditch

was not an issue in the present trial; however, plaintiffs insist on reviving this issue in their current appellate brief (page 12). Since it was determined by the Lower Court that it was not the intent of the Supreme Court that the issue concerning the location of the ditch in question be relitigated, the fact that certain of plaintiffs' witnesses testified in the present trial that the ditch was not located where the jury had determined it to be would seem to be immaterial. As to that issue the jury's finding in the previous suit would be binding and the doctrine of res judicata should be applied. Matthews vs. Matthews et al., 102 Ut. 428, 132 P.2d 111.

It might be noted, however, that the testimonies of plaintiffs' witnesses in the present trial, with respect to the location of the ditch in question, conflict either with their testimonies given in the previous trial and are inconsistent with each other in some respects in the present trial.

At one point in his testimony plaintiff, Frank Fuoco, testified that he at no time had knowledge of any ditch in the area in dispute. (R. 46, 47). Plaintiffs' witness, Mrs. Young, testified that plaintiff, Mr. Fuoco, at one time attempted to irrigate by using that ditch, which she referred to as being the original ditch, which she testified ran along the west boundary of the Williams' property. (R. 129, 131). In the previous trial, where the issue as to the location of the ditch was in dispute, plaintiffs' witness, Owen Sander, lo-

cated the ditch along Line AB by drawing a line with a dark pencil on Exhibit P-1 down the north side of the road, then crossing the road to Point A on the Exhibit, then south to his property. (R. of previous trial at 113). Mr. Frank Young, witness for plaintiff, at one point in his testimony states that the water ran south across the road and then turned west and after running west for some distance it could be turned into a ditch running south across the east side of what is now the Fuoco property. (R. 107).

If any confusion exists as to the exact surveyed location of the east bank of said ditch, it is cured and made unmistakeably clear and precise by that description in the judgment rendered by the lower court in the previous trial which describes, with meticulous care, the legal or metes and bounds description of the property found to be owned by defendants. This is the description of the property set forth in the warranty deed whereby the mother of the defendant, Ben Williams, conveyed this land to him in 1950. (R. 11). It is the same tract occupied solely and claimed by defendants and the parents of the defendant, Benjamin H. Williams, for more than 30 — more nearly 50 — consecutive years. It is the tract upon which defendants have paid the taxes since the tract was conveyed in 1950 to them. (R. 11). The evidence is uncontradicted on these items, and the testimony adduced at the trial was clear and unequivocal relating to the years of occupancy by defendants, and as to their said long

years of tilling and caring for this tract as their own property to the exclusion of all persons.

Recognition of a boundary line by adjoining property owners may be shown by implication. Nunley vs. Walker, 13 Ut.2d 105, 369 P.2d 117. The defendants may acquire title by acquiescence if their use has been for a sufficient length of time. King vs. Fronk, 14 Ut.2d 135, 378 P.2d 893; Nunley vs. Walker, supra; Affleck vs. Morgan, 12 Ut.2d 200, 364 P.2d 663; Harding vs. Allen, 10 Ut.2d 370, 353 P.2d 991.

This Honorable Court stated in the case of King vs. Fronk, supra:

> "Besides a, visible, persisting boundary having been shown over a long period of time is convincing evidencee of an intended or acquiesced in boundary. Under such circumstances, it would seem that in the nature of things, it is incumbent upon him who assails it to show by competent evidence that a boundary was not thus established . . . "

Whether or not defendants' and plaintiffs' predecessors "mutually recognized" the ditch as a boundary between the parcels is amply demonstrated by their acquiescense in the ditch as a boundary line far in excess of twenty-five (25) years. It was only after the year 1950 when the appellants purchased the property located west of the ditch in question that this contest arose.

CONCLUSION

At the first trial on this matter the trial judge determined that there was but one issue of fact in dispute between the parties. That issue was the location, in regard to the disputed tract, of an irrigation ditch that had been serving the appellants' property for over twenty-five years. Plaintiffs, Mr. and Mrs. Fuoco, maintained that the old ditch was no longer in the same location and that it had originally been located along Line CD of Exhibit P-1. Defendants contended that the ditch was the same as that in existence now and that such was located along Line AB. This issue was resolved by the jury in favor of the defendants. On appeal, by plaintiffs, this Honorable Court reversed the judgment and remanded such for a new trial stating:

> "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."

Though testimony was offered at the time of the new trial concerning the location of the irrigation ditch the Lower Court concluded that it was not the intent of this Honorable Court on remand that this issue be relitigated. The Lower Court then determined that the only issue to be resolved at the new trial was whether or not this particular ditch had been acquiesced in for a sufficiently long period of time as a boundary line. This latter issue was heard by the court sitting without a jury and was correctly resolved in favor of the defendants. This is the second appeal by the plaintiffs.

Plaintiffs failed to present sufficient competent evidence to refute defendants' claim to the land lying east of the ditch. The record clearly demonstrates that plaintiffs' predecessors and defendants and their predecesors for well over twenty-five (25) years acquiesced in this particular ditch as a boundary line. It is clear from the testimony of the various witnesses that defendants have used and occupied the land in dispute up to this ditch under claim of title and to the exclusion of all others during this long period of time. The testimony of plaintiffs' witnesses also clearly indicates that plaintiffs' predecessors were well aware of the ditch and that they or their tenants during various intervals of time farmed up to and, only up to, the west bank of the ditch in question and used water from said ditch for purposes of irrigation.

The defendants' mother, in deeding the property to the defendants' included the disputed parcel when she conveyed to them in the year 1950. This conveyance is another indication that the respondents and their predecessors had considered and treated the irrigation ditch as being the boundary line between parties' respective tracts of land. Further, the fact that Hansen, after his acquisition of the south part of the Williams property, constructed a fence on what he considered at that time to be his west boundary, directly in line with the east bank of the ditch in question, as is indicated by Line AB on Exhibit P-1, is evidence that it was assumed by others living in the area that the ditch in question constituted the boundary.

The property in question has changed in value considerably from that of farm property to that of commercial property because it now adjoins a shopping center. In the case of King vs. Fronk, supra, this Honorable Court appropriately describes the motivating factor in the instant case when it stated:

> "The rub comes when, after many years, land value appreciation tempts a test of the vulnerability of a claimed ancient boundary."

Respondents respectfully submit that the judgment should be affirmed.

Respectfully submitted,

MILTON A. OMAN

701 Continental Bank Bldg.
Salt Lake City, Utah

Attorney for Defendants
and Respondents