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Frank Fuoco and Anna Fuoco v. Benjamin H. Williams and Vernoa V. Williams : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FRANK FUOCO and ANNA FUOCO,
Plaintiffs,

vs.

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

No. 9860

APPELLANTS' BRIEF

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This is an appeal from a judgment of the District Court of Salt Lake County entered on a special verdict of a jury in a boundary line case.

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 a 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 grant 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 trial." (R. 19-21). This was not done. The only remaining issue was title by acquiescence.

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. 56). The property in question is located near the intersection of

Highland Drive and 3900 South. There was no fence along either the line AB or CD until a few weeks prior to the filing of the suit when the plaintiffs put fence posts along CD. These were removed by the defendants, who constructed a fence along AB. (R. 64, 65, 86, 87). 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 this testimony. (R. 57).

Q. Mr. Williams, I ask you if for at least the last twenty-five years you are acquainted with every use that has been made of this property, including this twenty-foot strip, on which you live.

A. I have used it and cultivated it, plowed it and harrowed it or had it plowed and harrowed and pulled the weeds out, hoed it, cultivated it, treated it up to the present time.

Q. For how many years have you done this yourself?

A. Since 1934.

Q. And has any other person to your knowledge made any use of that land—

A. No, sir.

Q. —lying east of the fence?

A. No, sir.

Q. I ask you, Mr. Williams, if during all of this twenty-five year period, if you know,

whether a ditch has been in existence just immediately west of your fence line.

A. Yes, sir.

Q. And I ask you, sir, if that ditch had any relationship to the boundary line you old timers recognized.

MR. SKEEN: If the Court please, I object on the ground that it is leading and calling for a conclusion of the witness.

THE COURT: Well, he may answer if it had any relationship. Of course, he may state without direction what the relationship was.

Q. Did this old ditch I asked you, Mr. Williams, if you know, have any relationship to a boundary line between the old timers' properties and that you and your father claimed?

A. Yes, sir.

Q. I ask you, Mr. Williams—

THE COURT: Now, before we leave that, in view of his objection, let's pursue that and ask him what that relationship is.

Q. How was this ditch used, if at all?

A. For an irrigation ditch.

Q. Yes. How was it used, if at all, as a boundary marker?

A. Well—

MR. SKEEN: I object on the ground that it's obviously a leading question, Your Honor.

THE COURT: Well, you may answer what use you made of the—

MR. SKEEN: Calls for conclusion.

THE COURT: —ditch. Did you use any water out of the ditch?

A. Yes.

THE COURT: Did you cultivate up to the ditch?

A. Yes, sir. I didn't use the water out of that ditch on the east side. (R. 59).

Mr. Williams testified that the ditch had been located "along the west side of the property" for about twenty-five years. (R. 63). Mr. Fuoco first claimed to own land east of the ditch in 1960. That was the first year he came into the neighborhood. (R. 63). On cross-examination Mr. Williams testified that the location of the ditch had been changed several times. (R. 71-72). An effort was made to relate the location of the small lateral which Mr. Williams claimed ran along the line AB to an old fence which ran north and south of the road or lane now known as 3970 South. Mr. Williams testified as follows:

Q. Do you know where that fence was located with respect to the flume under—the ditch passed through and going under the lane?

A. Right at the corner.

Q. Right at the corner?

A. Northeast corner of that or south—yes—be southeast corner of that section over there.

Q. In other words, the flume—

A. Northwest corner of the other—

Q. —the flume was at the southeast corner—

A. Of the old—

Q. —of the old fence, right on the south end of the old fence?

A. Yes, sir. (R. 74).

On redirect Mr. Williams testified the ditch was on the west side of the fence (constructed in 1962) for twenty-five years.

The plaintiffs' witnesses Young and Sanders testified that the old ditch crossed the lane near a fence which is marked by three crosses in red pencil on Exhibit P-1 (opposite the line CD) and that it then proceeded directly south. (R. 91, 113, 115). The ditch was "done away with" in 1954 when a neighbor to the south (Hanson) constructed a fence across it. (R. 92, 118).

The land now owned by plaintiffs was leased by the defendant Williams for a number of years. He cultivated it, put it in potatoes, tomatoes and corn, and irrigated it from the ditch in question (R. 114, 115). Most of the time the Fuoco property was just up in weeds. (R. 134). The testimony regarding common operation of the two properties by Williams, and the fact that most of the time it was "just in weeds" is not contradicted in the record.

Mr. Young testified also that until 1941 or 1942

there was a barn east of the common boundary line and that the land was used only for deposit of refuse. (R. 137). This was not denied.

The trial court ruled as a matter of law that the defendants had proved title by acquiescence, and submitted to the jury one question, and that was regarding the location of the ditch which was claimed as the visible monument which established the boundary line. This appeal is taken from the judgment on the special verdict signed by the Clerk of the District Court.

STATEMENT OF POINTS

1. The defendant did not establish a boundary by acquiescence.

2. The court erred in refusing to submit to the jury the issue of title by acquiescence.

3. The special verdict was erroneous, self contradictory and confusing, and the judgment based thereon is not supported by the verdict or by the evidence.

ARGUMENT

THE DEFENDANTS DID NOT ESTABLISH A BOUNDARY BY ACQUIESCENCE.

As indicated above, the trial court granted a summary judgment to the plaintiffs, holding that the record title to the disputed twenty-foot strip was in the plain-

tiffs. The defendants amended alleging title by adverse possession and title by acquiescence. The adverse possession theory was ruled out by failure to show payment of taxes. (R. 20). The only issue left in the case was title to the disputed area by acquiescence.

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.

King v. Fronk, 378 P. 2d 893; Brown v. Milliner, 232 P 2d 202, 120 Utah 16; Glenn v. Whitney, 209 P 2d 257, 116 Utah 267; Ringwood v. Bradford, 269 P 2d 1053, 2 Utah 2d 119; Hummel v. Young, 265 P 2d 410, 1 Utah 2d 237.

In the case of King v. 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". There never having been a fence on the disputed boundary until a few weeks before the trial, the only basis for acqui-

escence 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.

Obviously 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 other ditches and laterals. An irrigation 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 to the ditch. A landowner "could not irrigate up hill 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.

There is no evidence in the record that either the defendants or the plaintiffs or their predecessors treated the ditch as a boundary. The only testimony which by any stretch of the imagination bears on the subject is Mr. Williams' statement that he used and cultivated the land on which he lives, including the twenty-foot strip since 1934. The court directed leading questions to the witness as to whether the ditch had any relation-

ship to the boundary line, and the witness only testified that the ditch was used as an irrigation ditch. See p. 6 of this brief.

Much of the testimony at the trial relates to the location of the ditch. Mr. Williams testified that it was located on the west side of "my fence line." (R. 63). On cross examination Mr. Williams was reminded that the fence had been built just before suit was commenced and he was asked to tie the location of the ditch to an old fence line which has persisted many years on the north side of the lane. The fence is marked on Exhibit P1 by three red cross marks and is directly opposite the boundary line CD claimed by plaintiffs. Mr. Williams testified that the ditch in question crosses under the lane "right on the south end of the old fence". (R. 74). This is exactly where plaintiffs' witnesses said it was located. (R. 92, 113, 115, 126, 127, 129, 130). It is significant that all located the ditch on the line CD on Exhibit P1 when describing the ditch location with reference to the old fence north of the lane (3970 South) which has existed in the same location as far back as 1924. (R. 126). Mr. Williams testified at one point in the trial: "The ditch has been changed quite a few times in there. I don't know just exactly where it comes." (R. 71). Mr. Young testified that the ditch, which the defendants attempt to use as a monument, was "done away with" in 1954. (R. 92). This is not contradicted.

The ditch involved was small. The flume under

the lane has a two-by-twelve top on it. (R. 93). This means the flume was 12 inches wide.

It is highly significant with regard to defendants' claim that the ditch was the dividing line to refer briefly to the testimony of Owen C. Sanders, who moved next door to the Fuoco property in 1935. He testified that for "probably ten years" the Fuoco property was leased. Mr. Williams leased the property, now owned by Fuoco, for a number of years and used the ditch in question to irrigate the Fuoco property. (R. 114-115). Most of the time the Fuoco property was "just up in weeds". (R. 134). Also witness Frank Young testified that the irrigation ditch crossed the road about ten or fifteen feet west of an old barn and while the barn was there they threw out refuse, manure and apples between the barn and the ditch. There was no garden in the vicinity of the ditch. (R. 137). The barn was torn down in 1941 or 1942. (R. 138).

This testimony regarding the use of the land west of the barn is not disputed, and such use continued to 1941 or 1942. There obviously was no cultivation up to the ditch during this period. After the barn was torn down, there was only a period of 12 to 13 years when it would have been possible for either party to claim the ditch was the dividing line. This is not long enough. King v. Fronk, supra. Also the ditch falls short of the requirement of a "visible boundary of ancient vintage and persistency of placement." King v. Fronk, supra.

In view of the failure of the defendants to prove

the continued existence of a monument definitely establishing a boundary line, and mutually recognized as such by the parties, it is submitted that the trial court erred in holding *as a matter of law* that there was a boundary by acquiescence. The Court erred in denying the plaintiffs' timely motion for a directed verdict for the plaintiffs upon the ground that there was no evidence showing acquiescence in a common boundary line. (R. 144).

THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY THE ISSUE OF TITLE BY ACQUIESCENCE.

If we assume for the sake of argument only that there was some evidence of acquiescence, we contend that the factual issues of elements of title by acquiescence should have been submitted to the jury. Appropriate requests for instructions were made by plaintiffs, and were refused. (R. 23, 24). Exceptions were taken. (R. 147, 148).

Rule 39 of the Rules of Civil Procedure provides that when a jury has been demanded, the trial of all issues so demanded shall be by the jury. Rule 52 provides that in all actions tried upon the facts without a jury the *Court* shall find the facts specially and state separately its conclusions of law. In this case the court refused to submit all issues to the jury, and did not make separate findings, conclusions and judgment as required by the rule. The court obviously should have

done one thing or the other. This was error which requires reversal.

THE SPECIAL VERDICT WAS ERRONEOUS, SELF CONTRADICTORY AND CONFUSING AND THE JUDGMENT BASED THEREON IS NOT SUPPORTED BY THE VERDICT OR BY THE EVIDENCE.

The trial court ignored the obvious issues of fact involved in proving a title by acquiescence including such issues as mutual recognition of a common boundary line marked by a monument, and the issues as to the number of years, if any, when such a marked and visible boundary line was so recognized, and instructed the jury that "Mr. Williams is entitled to the land up to the east side of that ditch." This was error. It is stated in the form of verdict, "there is only one question and that is the location on the ground of the east bank of the original ditch through which the Fuoco property was irrigated." The court did not define in the verdict what he meant by the "original ditch". The word "original" was not used by the witnesses, and the question is so vague it is meaningless. There is testimony of the course of the ditch from above Highland Drive to a point near the south end of the Fuoco property. The ditch runs east and west and north and south. In the second and third paragraphs of the special verdict the court points out that the jury cannot find the east bank of the ditch to be west of the line AB. The answer

of the jury is, "The ditch runs North and South, just west of A and B line on exh. No. 1."

The verdict ignores the instruction of the court that the line cannot be west of AB. It is indefinite. What do the words "just west" mean? How far? A foot or two feet? No one knows.

The judgment on the special verdict signed by the clerk spells out that "the northwest corner of which division line is 295.02 feet west of the center of Highland Drive, and extends thence south 165 feet between the property of plaintiffs, and the property of defendants, which are involved herein which said point is likewise about two feet west of an existing fence . . . " The judgment then goes on to specifically describe the property involved. The first part of the description, it will be noted, is the same as that in the amended answer and counterclaim which has two starting points and describes two different areas. The latter part of the description ties to the "east bank of the irrigation ditch *existing* between the properties of the plaintiffs lying west of said point and those of the defendants lying east of said point . . . " (Emphasis added).

The uncontradicted evidence is that the ditch relied upon as the boundary was destroyed in 1954. It is not "existing". There is no evidence of a tie of 295.02 feet from the center of a county road. Exhibit P1 shows by the irregularly shaped areas in red pencil and plain pencil, the confusion caused in the description of defendants' land by the two starting points in the de-

scription, one being "at a point North 1010.60 feet and East 1134.15 feet from the Southwest corner of the Southeast Quarter of the Southwest Quarter of Section 33", and the other being "at a point South 14° 24′ 30″ East 717.26 feet from a county monument in the intersection of two county roads." There is absolutely no evidence in the record to support the description contained in the judgment. Also, the judgment is void because it goes beyond the special verdict, purports to interpret the meaning of the words "just west" and purports to make findings, conclusions and a decree, all of which are judicial functions. It is signed by the clerk.

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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