1963

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

Utah Supreme Court

E. J. Skeen; Attorney for Appellants;
Milton A. Oman; Attorney for Respondents;

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. 9860

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Third Judicial District for Salt Lake County
Honorable A. H. Ellett, Presiding Judge

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CASES CITED

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STATEMENT OF POINTS

1. The appellants did not agree at the trial that there had been acquiescence in the ditch as the boundary line.

2. The cases cited by the respondents are not in point.

ARGUMENT

THE APPELLANTS DID NOT AGREE THAT THERE HAD BEEN ACQUIESCENCE IN THE DITCH AS THE BOUNDARY LINE.

It is contended by the respondents that the appellants, in effect, stipulated that there was only one issue in the case and that was the location of the ditch which is claimed to be the boundary line. On page 6 of their brief the respondents refer to a few lines in the record which include the statement by the appellants' attorney, "Yes. The issue is where the ditch was."

A reading of the record before and after the remark was made will reveal that the trial court interrupted the cross-examination of B. H. Williams regarding a fence which had been built by a Mr. Hansen in 1951 and which was later removed.

> "THE COURT: Well, let me tell the jury that this isn't going to help them a bit. If somebody else thought the fence line was somewhere else, unless they too thought it many long years, it won't be of any help to you. We don't know and we aren't going to decide the question of whether or not the Hansens and the Fuocos sued one another, bought from one another, or mutually agreed. *We have only got a dispute between these two parties, and whether somebody else thought they were on the line or off the line won't help us.* (Emphasis added).
>
> MR. SKEEN: In view of Your Honor's remarks, I would move to strike the testimony I objected to then regarding the Hansen trans-

action. He put it on in direct examination you remember; testified that a fence had been built there, and the record now shows the fence was taken down.

THE COURT: I have told the jury it is immaterial. We are just wasting everybody's time when we talked about it before and when we continue to talk about it. Somebody else's idea will not substitute for the idea of this jury. This jury will determine whether this man used the land that was within the surveyed property of the Fuocos. If he did use it for the required length of time, he's got a right to have it.

Q. Now, Mr. Williams, you testified I think on direct that you had cultivated year after year the land down to this ditch that runs along the west side of your property. Is that right?

A. I used it, yes, and occupied it.

Q. And during that time there was no fence along the west side. It was bounded by a ditch, was it not?

A. Yes, sir.

Q. And so your testimony is that you cultivated and used the property down to the ditch?

A. That's right.

MR. SKEEN: That's all.

REDIRECT EXAMINATION

By Mr. Oman:

Q. You were asked on cross examination, Mr. Williams, about the fence that you took down last spring.

THE COURT: And I stopped him on that. That doesn't matter at all to this jury whether somebody else thought the fence line was elsewhere. We are only interested in this particular strip. Now, can we agree, Gentlemen, then that the only dispute is where that fence—where that ditch was? Do you admit that he used up to the ditch?

MR. SKEEN: Yes. The issue is where the ditch was.

THE COURT: That is the only issue then, isn't it? where the ditch was? He admits that the gentleman cultivated up to the ditch. You don't claim that he cultivated beyond the ditch, so the only issue is where the ditch was." (R. 76, 77, 78).

It is clear from a reading of the above that appellants' counsel agreed that the dispute was over the location of the ditch and not over the location of the Hansen fence, and that was the extent of the agreement. There is nothing to indicate that the appellants waived or intended to waive the issue of acquiescence which appears in the pleadings and in the pre-trial order. (R. 15, 20).

The only facts mentioned by the court were those regarding cultivation of the land by the respondents up to the ditch. Not one word was uttered by the court or counsel about the issue of acquiescence. The fact of cultivation to the ditch standing alone would not as a matter of law establish acquiescence in a boundary line. Acquiescence in a boundary must be by both parties, and there must be some marking of the line by

monuments, fences or buildings. Nelson v. DaRouch, 87 Utah 457, 50 P2d 273.

At the conclusion of the trial the appellants made a motion as follows:

> "THE COURT: You want to make a motion, Ed?
>
> MR. SKEEN: Yes.
>
> THE COURT: It won't do you any good, but go ahead and make it to save the record. I mean I am going to give it to the jury to answer.
>
> MR. SKEEN: Come now the plaintiffs and move for a directed verdict in favor of the plaintiffs upon the grounds and for the reasons that there is no evidence showing acquiescence in a common boundary line; that in the absence of such evidence the line established by the record title must stand.
>
> THE COURT: The motion will be denied, and I will submit it to the jury on special verdict. How much time will you gentlemen want to argue?" (R. 144).

This motion would not have been made if the vital issue of acquiescence had been knowingly and intentionally stipulated out of the case.

It should be noted that on pages 15 to 18 of the respondents' brief there are many statements made which purport to be statements of fact and there is not a single page reference to the transcript. They were not so referenced because there is no supporting testimony or other record. The following are mis-statements of fact:

"Attorney for appellants agreed with the Court and with counsel for respondents that the property line between the tracts owned by the respective parties was the east bank of the ditch which had been used to turn irrigaton water upon the Fuoco property lying to the west of that ditch." (P. 15).

* * *

"They knew of the sale ten or more years ago of 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 knew that the west line of the tract claimed and occupied by Hansen had been tightly fenced by him since his acquistion of that part of the Williams property; that said fence was in direct line with the fence constructed by respondents conveniently close to and on the east bank of the irrigation ditch of appellants, which had been acquiesced for nearly fifty years as the division line of these properties. Hansen had constructed a concrete wall and fence along the boundary of the property between the lot he had acqiured from Williams' parents and that of respondents." (P. 17).

* * *

"Appellants 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." (PP. 17, 18).

The location and removal of the Hansen fence mentioned in the last quotation from the respondents' brief was ruled out of the case by the trial court (R. 76), and

when the appellants agreed that the location of the Hansen fence was not an issue, the respondents have seized upon that statement of counsel as a waiver of the issue of acquiescence. The respondents then claim that the evidence regarding the same Hansen fence helps to establish the boundary line.

THE CASES CITED BY THE RESPONDENTS ARE NOT IN POINT.

The cases cited by the respondents, p. 11, are not in point. There is a vast difference between acquiescence in a fence line as a boundary, and in an irrigation ditch as a boundary. Fences are usually used to establish a boundary and irrigation ditches are not. There is no evidence whatever of mutual recognition of the ditch as a boundary.

It is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

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