

1929

Patrick Sullivan and Elizabeth Sullivan v. John G. Condas : Brief of Appellant

Utah Supreme Court

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G.M. Sullivan, E.D. Hatch; attorneys for appellants.

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

PATRICK SULLIVAN, et ux.,
Plaintiffs and Appellants.

vs.

JOHN G. CONDAS,
Defendant and Respondent.

4922

ABSTRACT OF RECORD

GEORGE M. SULLIVAN AND EDWIN D. HATCH
Attorneys for Plaintiffs and Appellants

Service of copy of the within Abstract admitted

this 23 day of September, 1929

(Sgd) L. B. Hempstead, J. E.
STEWART, ALEXANDER & BUDGE AND D. B. HEMPSTEAD

Attorneys for Defendant and Respondent

IN THE
SUPREME COURT
OF UTAH

PATRICK SULLIVAN, et ux.,
Plaintiffs and Appellants.

vs.

JOHN G. CONDAS,
Defendant and Respondent.

} 4922

ABSTRACT OF RECORD

COMPLAINT
PLAINTIFF COMPLAINED OF THE DE-
FENDANT AND ALLEGE

1.

That the plaintiffs are now and at all of the times herein in this complaint mentioned have been husband and wife and have been and now are the owners of the following described lands in Summit County, State of Utah, to-wit:

All of lots seven (7) and (8) of section one (1) in Township Two (2) South of Range three (3) East of the Salt Lake Meridian. Containing ninety-seven (97) acres more or less, together with water and water rights thereunto belonging or in any wise appertaining.

2.

That the defendant at all of the times herein mentioned has been and now is, as plaintiffs are verily informed and believes, the owner of and operating large bands of range sheep within the state of Utah and so operates said his bands of sheep and grazes them part of the year in each year within Summit County, Utah.

3.

That the defendant since the year 1925 and including said year has been and now is owner of certain lands adjoining the above described lands of the plaintiff and uses his said lands for the purpose of grazing his sheep hereinbefore mentioned.

4.

That the said lands of plaintiffs is partly cultivated, and partly grazing or pasture land, that is to say, approximately twenty-seven (27) acres of said land of the plaintiffs is under culti-

vation, viz; about seventeen (17) acres being used for the raising of hay and about ten (10) acres being used for the production of grain; that on said lands of the plaintiffs each year is grown an abundance of grass, weeds, browse and other feeds of considerable value for the raising of cattle and sheep, thereon, and that the said cultivated lands of the plaintiffs, before the growing season for the making of hay and after harvesting of hay therefrom during each and every year mentioned have produced grass, and weeds, and other feeds valuable for a like purpose.

That the reasonable rental value of the said twenty-seven (27) acres of land under cultivation for the spring feeds growing thereon is the sum of \$1.00 an acre and that the value of said lands for the purpose of grazing after harvesting the hay and grain therefrom in the fall of each year is \$2.00 per acre: That the remainder of the lands of plaintiffs are of the reasonable rental value of (\$.75) seventy-five cents per acre for spring grazing and \$1.00 per acre for fall grazing.

6.

That in the spring of the year 1925 and in the fall of said year the defendant without the consent, over the protest, and against the will of

the plaintiffs, and well knowing the boundary lines of the lands of the plaintiffs aforesaid, wilfully and maliciously came to, on to, upon, and across and over the said lands of plaintiffs approximately five thousand six hundred head of ewe sheep and five thousand head of lambs.

That the sheep belonging to the defendant as aforesaid, and being so brought upon the lands of the plaintiffs as aforesaid, took, ate, trampled down, and destroyed the spring and fall feeds aforesaid then and there at said times growing upon said lands.

7.

That by reason of the coming upon the lands of the plaintiffs' by the defendant with his sheep as herein aforesaid and by reason of the defendant wilfully, maliciously and wantonly coming upon the said lands as aforesaid, the plaintiffs have been damaged in the sum of not less than Two hundred Thirty-seven Dollars (\$237.00) said sum representing the feed rental values of said lands at the value hereinbefore named together with interest hereon at the rate of 8 per cent per annum from the 1st day of October 1925 until the date of the verification of this complaint.

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FOR SECOND CAUSE OF ACTION

1.

Plaintiffs allege and adopt and incorporate herein in this cause of action all of the allegations of paragraphs 1, 2, 3, 4 and 5 of the first cause of action herein in this complaint set forth.

That during the spring and fall of the year 1926 the defendant again, with sheep belonging to the defendant in the same approximate number and kind as set forth in the plaintiffs first cause of action herein, came to, on, over, across and upon the aforesaid lands of the plaintiffs and with his said sheep took, ate up, trampled down, and destroyed, all of the feeds growing upon the lands of the plaintiffs in like manner as was done by the defendant as set forth in plaintiffs' first cause of action herein, that is to say, the defendant as set forth in plaintiffs first cause of action herein, that is to say, the defendant then and there did against the will of, over the protest of, and without the consent of the plaintiffs, and in utter wanton, wilfull and malicious disregard of the rights of plaintiffs in the premises.

3.

That by reason of the aforesaid acts of the

defendant the plaintiffs have been damaged in the sum of not less than Two Hundred Twenty Dollars and eighty cents (\$220.80), said sum being and representing a reasonable rental value of said lands for the purpose of grazing during the seasons of the year aforesaid, together with interest at the rate of 8 per cent per annum from the 1st day of October 1926 to the date of verification of this complaint.

FOR THE THIRD CAUSE OF ACTION.

1.

Plaintiffs refer to, and adopt, and incorporate all of the allegations of paragraphs One, two, three, four and five of the first cause of action of plaintiffs herein in this action set forth.

2.

That during the spring and fall of the year 1927 the defendant, in like manner, again maliciously, wantonly, wilfully, and in total disregard of the plaintiffs in the premises and without consent of, and against the will of, and over the protests of plaintiffs and with approximately five thousand six hundred head of ewes and five thousand head of lambs, and with the horses, camps,

wagons, men, and employees, and complete outfits of said defendant came on, into, over, and across the said lands of plaintiff and thereby ate up, trampled down, and destroyed the feeds, grasses and vendure then and there growing upon the lands of plaintiffs' as aforesaid.

That by reason of aforesaid wanton, and willful coming upon the lands of plaintiffs by defendant with his sheep as aforesaid the plaintiffs have been damaged in the sum of not less than Two hundred and four Dollars (204.00) said sum being and representing the amount of damage done to plaintiffs without interest.

FOR THE FOURTH CAUSE OF ACTION.

1.

Plaintiffs adopt, and incorporate herein all of the allegations of paragraphs: One, two, three and four of plaintiffs first cause of action herein this action set forth.

2.

That the defendant in the year 1926 during the fall of said year came on to, and across an old, almost obliterated wagon road running across the lands of plaintiff herein described and near

to and over his own lands aforesaid, and to and from his herds of sheep aforesaid along said roadway and over and across lands of plaintiffs' without the consent of, over the protest of and against the will of the plaintiffs and in so doing as aforesaid and said defendant tore down, laid aside and destroyed a part of the fence belonging to plaintiffs. Said fence at said time then and there belonging to the plaintiffs and enclosing part of the lands of the plaintiffs.

3.

That at said time the cattle then and there owned by the plaintiffs were being by plaintiffs grazed and pastured on and within their said lands enclosed by fence aforesaid.

4.

That by reason of wantonly, maliciously, and wilfully letting down and destroying of the part of the fence of the plaintiffs' as herein aforesaid by the defendant the cattle of the plaintiffs' herein aforesaid went out of and escaped from the enclosure of the plaintiffs aforesaid and went on to and upon the lands then and there belonging to William Archibald, whereupon said William Archibald seized and held the said cattle of the plaintiffs for the damages done to the lands of

the said William Archibald by the said cattle of the plaintiffs and that to recover back their said cattle these plaintiffs were required and did pay to said William Archibald the sum of (\$25.00) Twenty-five Dollars, claimed by Archibald as aforesaid and that said sum of \$25.00 represented the reasonable damage done to the lands of said Archibald by the said cattle of the said plaintiffs.

5.

That the plaintiffs have been thereby as herein aforesaid damaged in the sum of \$27.00 by reason of the aforesaid wilful, wanton, and malicious letting down and destroying of the fence of the plaintiffs by the defendant as herein aforesaid, said sum being, and representing said \$25.00 paid by the plaintiffs together with interest thereon at the rate of 8 per cent, per annum to the time the verification of this complaint.

XI.**FOR THE FIFTH CAUSE OF ACTION.**

1.

Plaintiffs adopt, refer to, and incorporate herein all of the allegations of paragraphs One, two, three, four and five of plaintiffs' first cause

of action herein in this complaint set forth.

2.

That on and across the lands of plaintiff herein described and on and across the lands of the defendant herein mentioned there is an old wornout, unused, except by the defendant for the three years last past, a roadway or wagon tracks, but that such roadway or track has not been used by anyone other than the plaintiffs, and the defendant for more than twenty years last previous to the year 1924 nor has such roadway been so used by the defendant herein for a period greater than four years last past and that said roadway or trail is not a county or State Highway, nor is the same a public Highway in any degree at all, nor has it ever been such.

3.

That the plaintiffs use and operate their lands herein mentioned as a dairy ranch, and keep thereon dairy cows, calves, and milk the said cows and sell the dairy products therefrom and that said lands are essential and necessary for the plaintiffs for the feed and grazing of their said cattle, and have been such for and during all of the times herein in this complaint mentioned.

4.

That during the spring and fall of each year prior to hay and grain growing seasons, subsequent to the harvest season thereon the plaintiffs use, or attempt to use their lands aforesaid to graze their said cattle as aforesaid, but have been for a number of years deprived of the same in the use thereof by the defendant as in this complaint set forth.

5.

Plaintiffs are informed and believe and therefore allege that the defendant has come into, and upon the lands of plaintiffs' as in this complaint set forth under a pretended and fictitious, and known to be void, and without merit claim to the aforesaid roadway, or trail, as right of way belonging to the defendant for the crossing of the lands of the plaintiffs with his sheep and outfits as herein above set forth in this complaint.

6.

That the plaintiffs greatly fear and are justly and reasonably apprehensive that the defendant will continue to so claim said void and unmeritorious purported claim of right-of-way and will in the future come into, and across the aforesaid lands of the plaintiffs' and will thereby do

and continue to do irreparable damage to the plaintiffs and their lands aforesaid, unless the defendant be by this court enjoined from so doing.

7.

That the plaintiffs are without any plain, speedy or adequate remedy at law in the premises.

WHEREFORE, the plaintiff prays that judgment and decree of this court be entered in favor of the plaintiffs and against defendant as follows, to-wit:

In satisfaction of the plaintiffs' first cause of action requiring the defendant to pay to the plaintiff the sum of \$237.00, together with interest thereon at the rate of 8 per cent, per annum from the date of verification of this complaint until paid.

In satisfaction of the plaintiffs' second cause of action requiring the defendant to pay to plaintiffs the sum of \$220.80 together with interest thereon at the rate of 8 per cent. per annum thereon from the date of verification of this complaint until paid.

In satisfaction of plaintiffs third cause of action requiring the defendant to pay to plain-

tiffs the sum of \$204.60 together with interest thereon at the rate of 8 per cent per annum from the date of verification of this complaint until paid.

In satisfaction of plaintiffs' fourth cause of action requiring the defendant to pay to plaintiffs the sum of \$27.00 together with interest thereon at the rate of 8 per cent. per annum.

VI.

In satisfaction of plaintiffs' fifth cause of action that the said defendant be by this court permanently enjoined from coming, into, upon, over or across, the lands of plaintiffs in this complaint described, or any part thereof, without first having obtained the consent of the plaintiffs thereto in writing.

In further satisfaction to plaintiffs that the defendant be required to pay to plaintiffs as exemplary damages the sum of One Thousand Dollars (\$1,000.00.)

And further requiring the defendant to pay to plaintiffs the costs, and expenses by plaintiffs herein in this cause expended.

HATCH and HATCH, Attorneys
for Plaintiffs.

By Edwin D. Hatch.

STATE OF UTAH }
 COUNTY OF SALT LAKE } ss.

Patrick Sullivan being first duly sworn on his oath says that he is one of the plaintiffs' in the above entitled action that he has read and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are set forth on information and belief, and that on such matters he verily believes same to be true.

Patrick Sullivan.

Subscribed and sworn to before me this 7th day of October, A. D. 1927.

Edwin D. Hatch,
 Notary Public.

(Seal)

Residence: Salt Lake City, Utah.

My commission expires November 20, 1930.

(Title of Court and Cause).

AMENDED ANSWER AND COUNTERCLAIM

Comes now the said defendant, and leave of Court being first had and obtained, makes this

his Answer and Counterclaim to the Complaint of the plaintiffs on file herein.

1. The defendant denies each and every allegation contained in the first paragraph of the of the First Cause of Action in said Complaint.

2. Defendant admits the allegations contained in the second paragraph of said First Cause of Action.

3. The defendant admits that he is the owner of certain lands in White Pine Canyon, Summit County, State of Utah.

4. The defendant denies each and every allegation contained in the fourth paragraph of the First Cause of Action in said Complaint.

5. The defendant denies each and every allegation contained in the fifth paragraph of the First Cause of Action in said Complaint.

6. The defendant denies each and every allegation contained in the sixth paragraph of the First Cause of Action in said Complaint.

7. The defendant denies each and every allegation contained in the seventh paragraph of the First Cause of Action in said Complaint.

8. Answering the Second Cause of Action al-

leged in said complaint, the defendant denies each and every allegation contained in the incorporated paragraphs thereof numbered 1, 3, 4 and 5, and admits that the defendant is the owner of and operating range sheep, and also admits that the defendant is the owner of certain lands in White Pine Canyon, Summit County, Utah.

9. Answering the second and third paragraphs of said Second Cause of Action, the defendant denies each and every allegation therein contained.

10. Answering the Third Cause of Action alleged in said Complaint, the defendant denies each and every allegation contained in the incorporated paragraphs thereof numbered 2, 3, 4, and 5, and admits that the defendant is the owner of and operating range sheep, and also admits that the defendant is the owner of certain lands in White Pine Canyon, Summit County, Utah.

11. Answering the second and third paragraphs of said Third Cause of Action, the defendant denies each and every allegation therein contained.

12. Answering the Fifth Cause of Action alleged in said Complaint, the defendant denies each

and every allegation contained in the incorporated paragraphs thereof numbered 1, 3, 4 and 5, and admits that the defendant is the owner of and operating range sheep, and also admits that the defendant is the owner of certain lands in White Pine Canyon, Summit County, Utah.

13. Further answering said Fifth Cause of Action in said Complaint defendant denies each and every allegation contained in paragraphs numbered respectively 2, 3, 4, 5, 6, 7 in said Fifth Cause of Action.

14. For a further answer and defense to said Fifth Cause of Action the defendant alleges that he is the owner, entitled to the possession and in possession of certain lands in White Pine Canyon, Summit County, State of Utah, and that various other persons are the owners of other tracts of land in said canyon, both above, below, and adjoining the said lands owned by this defendant. That there is now and has been for more than sixty years past, a well traveled road up said White Pine Canyon, branching from the main State Highway and running through and beyond the said lands of the defendant and through the lands owned in said canyon by said other persons. *That said road is a public highway and has*

been used continuously by the defendant and by his predecessors in interest and by the aforesaid owners of land in said White Pine Canyon and vicinity and by the public generally, and especially by the residents of Park City and of Summit County, State of Utah, for more than sixty years past. That the defendant does claim the right to use said road for ingress to and egress from his said land in White Pine Canyon. That said road runs through a portion of the tract of land described in the first paragraph of the plaintiff's complaint herein, and is the same road as the road referred to in the Fifth Cause of Action of said Complaint.

15. Further answering, the defendant alleges that the said road referred to in paragraph 14 of this Amended Answer was at the time of the commencement of this action a public highway by prescription and by having been used continuously, openly, notoriously and under a claim of right by the public generally and by the defendant and by his predecessors in interest for more than twenty years.

16. Further answering, the defendant alleges that he has invested more than Sixty Five Hundred (\$6500.00) Dollars in purchasing lands

and improvements, including a dwelling house, and in making improvements on said land so purchased by him in said White Pine Canyon. That said lands comprise Thirteen Hundred Sixty Six (1366) acres and that the sole and only means of ingress to and egress from said lands and improvements and said dwelling house, owing to the topography of the country, is over the said road described in paragraph 14 of this Amended Answer, and that said road is absolutely necessary to the proper enjoyment by the defendant of his lands, improvements and dwelling house in said White Pine Canyon, and said defendant will suffer irreparable damage if he is deprived of the free use of said road for all purposes.

17. Further answering, the defendant alleges that the said plaintiffs and their predecessors in interest in the lands described in the first paragraph of plaintiff's Complaint herein, which lands plaintiffs claim they own, but which claim of ownership defendant denies, with full knowledge thereof permitted and acquiesced in the free use of said road described in paragraph 14 of this Amended Answer by the public generally and by the defendant and his predecessors in interest in driving livestock over said road and in using said road for all kinds of vehicular traffic

and that said plaintiffs and their predecessors in interest with full knowledge thereof permitted and acquiesced in the free use of said road by the defendant and his predecessors in interest in hauling building material and supplies over said road to be used in the construction of defendant's said dwelling house, barns, blacksmith shop, and other out buildings, fences, and etc. well knowing that the defendant and his predecessors in interest had no other means of access to his said lands, improvements, and dwelling house, and by reason thereof the defendant alleges that the plaintiffs are estopped from now claiming that the said road is not a public road and are also estopped from now claiming that defendant has not the right to use said road for all purposes as a means of ingress to and egress from his said lands, improvements, and dwelling house.

COUNTERCLAIM.

By way of counterclaim against the said plaintiffs the defendant alleges:

1. That defendant is now and for several years last past has been the owner, in possession and entitled to the possession of the following de-

scribed lands in Summit County, State of Utah :

All of Lots 9, 10, 11, 12, 13, 14, 15 and 16, Section 1, Township 2 South, Range 3 East, S. L. M., Comprising 629 acres.

Also 120 acres in Section 12, Township 2 South, Range 3 East, Salt Lake Meridian ;

Also 120 acres in Section 12, Township 2 South, Range 3 East, Salt Lake Meridian ;

Also Lots 6 and 9 in Section 6, Township 2 South, Range 4 East and 520 acres in Section 7, Township 2 South, Range 4 East, Salt Lake Meridian, comprising altogether 1366 acres.

2. That said Lots 9 and 10 in Section 1, Township 2 South, Range 3 East, immediately adjoin lots 7 and 8 of said Section 1, which are the lands described in the first paragraph of plaintiffs' Complaint herein.

3. That all of the aforesaid lands are situated in what is known as "White Pine Canyon" two or three miles northwesterly from Park City, in Summit County, State of Utah.

4. That various other persons, in addition to the defendant, own other tracts of land in said White Pine Canyon both above, below and adjoining the said land owned by the defendant. That the major portion of said land is suitable solely for grazing livestock thereon, and a small

portion thereof is susceptible of cultivation and suitable for the raising of hay.

5. The defendant alleges that he is the owner, entitled to the possession and in possession of certain lands in White Pine Canyon, Summit County, State of Utah, and that various other persons are the owners of other tracts of land in said canyon, both above, below, and adjoining the said lands owned by the defendant. That there is now and has *been for more than sixty years past a well traveled road up said White Pine Canyon*, branching from the main State Highway and running through and beyond the said lands of the defendant and through the lands owned in said canyon by said other persons. That said road is a *public highway* and has been used continuously by the defendant and by his predecessors in interest and by the aforesaid owners of land in said White Pine Canyon and vicinity and by the public generally, and especially by the residents of Park City and of Summit County, State of Utah, for more than *sixty years past*. That the defendant does claim the right to use said road for ingress to and egress from his said land in White Pine Canyon. That said road runs through a portion of the tract of land described in the first para-

graph of the plaintiffs' Complaint herein to-wit:

Lot 8, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian.

6. The defendant alleges that the said road referred to in paragraph 5 of this counterclaim was at the time of the commencement of this action a *public highway by prescription* and by having been used continuously, openly, notoriously, and under claim of right, by the public generally and by the defendant and by his predecessors in interest for more than twenty years.

7. The defendant alleges that he has invested more than Sixty-five Hundred (\$6500.00) Dollars in purchasing lands and improvements, including a dwelling house, and in making improvements on said land so purchased by him in said White Pine Canyon. That said lands comprise Thirteen Hundred Sixty Six (1366) acres and that the sole and only means of ingress to and egress from said lands and improvements and said dwelling house, owing to the *topography* of the country, is over the said road described in paragraph 5 of this Counterclaim, and that said road is absolutely necessary to the proper enjoyment by the defendant of his lands, improvements and

dwelling house in said White Pine Canyon, and said defendant will suffer irreparable damage if he is deprived of the free use of said road for all purposes.

8. The defendant alleges that the said plaintiffs and their predecessors in interest in the lands described in the first paragraph of plaintiffs' Complaint herein, which lands plaintiffs claim to own, but which claim of ownership defendant denies, with full knowledge thereof, permitted and acquiesced in the free use of said road described in paragraph 5 of this Counterclaim by the public generally and by the defendant and his predecessors in interest in driving livestock *over said road* and in using said road for all kinds of *vehicular traffic*, and that said plaintiffs and their predecessors in interest with full knowledge thereof permitted and acquiesced in the free use of said road by the defendant and his predecessors in interest in hauling building material and supplies over said road to be used in the construction of defendant's said dwelling house, barns, blacksmith shop, and other out buildings, fences, and etc., well knowing that the defendant and his predecessors in interest had no other means of access to his lands, improvements, and dwelling house, and by

reason thereof the defendant alleges that the plaintiffs are estopped from now claiming that the said road is not a public road and are also estopped from now claiming that defendant has not the right to use said road for all purposes as a means of ingress to and egress from his said lands, improvements, and dwelling house.

9. That in the month of February, 1928, the defendant had stored on his said lands in White Pine Canyon, about ten tons of hay, which he sold to a neighbor. That when the purchaser of said hay tried to travel over said road hereinbefore described, where the same runs through a portion of said Lot 8 in Section 1, Township 2 South, Range 3 East, S. L. M. for the purpose of taking said hay from the premises owned by the defendant, the said plaintiffs, their servants, agents and employees, by threat of violence and force and erecting fences and a gate across said road and by locking said gate, forcibly prevented the purchaser of said hay from using said road for access to the said lands and premises owned by the defendant and hereinbefore described and thereby forcibly prevented him from hauling said hay from the premises of the defendant.

10. That the plaintiffs have forbidden the

defendant to in any manner use said road where the same passes through said Lot 8, Section 1, Township 2 South, Range 3 East, S. L. M., and have threatened the defendant with violence if he attempted so to do.

11. That defendant greatly fears and is justly and reasonably apprehensive that the plaintiffs will in the future continue to interfere with the free use of said road by the defendant and by persons with whom he has business, and by the public generally for vehicular traffic, and for the driving of livestock thereon and will thereby do and continue to do irreparable damage to the defendant and his lands and improvements, aforesaid, unless the plaintiffs be by this honorable Court enjoined from so doing.

12. That defendant is without any plain, speedy or adequate remedy at law in the premises.

WHEREFORE, defendant prays as follows:

1. That the plaintiffs take nothing by their Complaint herein and the same be by this honorable Court dismissed.

2. That the said plaintiffs, their servants, agents and employees be by this Court permanent-

ly enjoined from obstructing or in any other manner interfering with the free use by the defendant, his servants, agents and employees and by the public generally, of the road running through Lot S. Section 1, Township 2 South, Range 3 East, S. L. M. in Summit County, State of Utah, and leading into the premises of the defendant in said Section 1 for the purpose of vehicular traffic and driving livestock over said road. That in the meantime and until a further order of this Court, the said plaintiffs, their servants, agents, and employees be restrained from doing any of the said acts.

3. That said road hereinbefore described be declared by this Court to be a public highway, and that the right of the defendant to the use of said highway for all purposes, including the driving of livestock over the same quieted and confirmed.

4. For such other and further relief as may be just and meet in the premises and for defendants' costs of suit.

D. B. Hempstead,
Stewart, Alexander & Budge,
Attorneys for Defendant.

STATE OF UTAH
COUNTY OF SALT LAKE, ss.—

John G. Condas, being first duly sworn, deposes and says: That he is the defendant in the above entitled action: that he has read the foregoing Amended Answer and Counterclaim; knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated upon information and belief and that as to those matters, he believes them to be true.

JOHN G. CONDAS.

Subscribed and sworn to before me this
10th day of March, 1928.

D. B. HEMPSTEAD, notary public, residing at
Salt Lake City, Utah. My commission expires
June 21, 1928.

(Title of Court and Cause).

AMENDED REPLY

Comes now the plaintiffs and leave of Court being first had and obtained makes this their Amended Reply to the defendant's Amended Answer and Counterclaim on file herein, as follows:

1. In reply to paragraph 14 plaintiff denies each and every allegation, starting with the word "That" on the 6th line of paragraph 14 and ending with the word "past" in the 14th line of said paragraph, and admits the balance of said paragraph 14.

2. Plaintiff denies each and every allegation set forth in paragraph 15 of defendant's Amended Answer and Counterclaim.

3. Plaintiffs denies each and every allegation set forth in paragraph 16 and 17 of defendant's Amended Answer and Counterclaim.

4. In replying to defendant's Counterclaim, plaintiff admits all of paragraphs 1, 2, and 3 of said Counterclaim.

5. Plaintiff denies each and every allegation set forth in paragraph 4, 5, 6, 7, 8, and 9, except such matters as may be inconsistent with plaintiff's complaint on file herein.

6. Plaintiff admtis paragraph 10 of defendant's Counterclaim.

7. Plaintiff denies each and every allegation set forth in paragraph 12 of defendant's Counterclaim.

8. Further replying to paragraph 14 of defendant's Amended Answer plaintiff allege that the road now sought to be used by the defendant is not the road which defendant set up in said paragraph 14 as being a well traveled road up said White Pine canyon for more than 60 years last past, but that there was a logging road running through plaintiff's property up White Pine Canyon a number of rods east of the present road, which for the past ten or fifteen years more or less has been totally abandoned by any and all persons who might have a claim for the use of same, and that the road now sought by the defendant herein has been in existence for a period of less than seven years.

WHEREFORE plaintiff prays that the defendant take nothing by their Counterclaim and Amended Answer, and that the same be by the Honorable Court dismissed, and

That the Court grant such other and further relief as may be just and equitable in the premises.

HATCH & HATCH,
Attorneys for the Plaintiffs.

By.....

STATE OF UTAH
 COUNTY OF SALT LAKE ss.—

GLEN S. HATCH, being first duly sworn upon oath, deposes and says: that he is a member of the firm of Hatch & Hatch, attorneys for the plaintiffs herein; that he makes this verification for and on behalf of said plaintiffs by reason of the fact that plaintiffs, and each of them, are not in Salt Lake County; that he has read the foregoing Amended Reply and knows the contents thereof, and that the same is true of his own knowledge, information and belief.

.....
 Subscribed and sworn to before me this.....
 day of March, A. D. 1928.

Residing at Salt Lake City, Utah. My commis-
 sion expires.....

.....
 Notary Public.

Received a copy this.....day of March,
 A. D. 1928.

.....
 Attorney for Defendant.

(Title of Court and Cause).

RESTRAINING ORDER

Upon application of the defendant, John G. Condas, and good cause appearing therefor IT IS HEREBY ORDERED that the restraining order heretofore issued in this cause on the 13th day of March 1928, be and the same is hereby enlarged and extended in the following particulars, to-wit:

The plaintiffs, Patrick Sullivan and Elizabeth Sullivan, and each of them, their and each of their servants, agents, employees, representatives and attorneys, and all others acting in aid or assistance of them, and each of them, be and they are hereby directed and ordered to absolutely desist and refrain from in any manner interfering with the use and enjoyment by the defendant, his servants, agents, representatives and employees of that certain road known and referred to as the White Pine canyon road, running thru lot 8, section 1, township 2 South, Range 3 East, Salt Lake Meridian, in White Pine Canyon, Summit County, State of Utah, and passing through the premises of the plaintiffs and into the premises of the defendant, for the purpose of driving and trailing livestock along said roadway.

The original restraining order made and entered herein on the 13th day of March 1928, and this order enlarging and extending the same shall continue in force and effect until the further order of this court.

Dated this 14th day of September, 1928.

L. B. WIGHT,

Judge.

(Title of Court and Cause).

RESTRAINING ORDER

The defendant in the above entitled cause having commenced an action by Counterclaim in the District Court of the Third Judicial District in and for Summit County, State of Utah, against the above named plaintiffs, and having prayed for an injunction against the said plaintiffs, requiring them to refrain from certain acts in said Counterclaim and hereinafter more particularly mentioned. On reading said Counterclaim in said action duly verified by the oath of the defendant, John G. Condas, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction and that sufficient grounds exist therefor, and the necessary undertaking in the sum of

Five Hundred (\$500.00) Dollars having been given:

It is, therefore, ordered by me, the Judge of said District Court, that until further order in the premises you, the said plaintiffs, and each of you, and all your servants, agents, employees, and attorneys, and all others acting in aid or assistance of you, and each and every one of you, do absolutely desist and refrain from obstructing or in any other manner interfering with the free use of the road running through Lot 8, Section 1, Township 2 South, Range 3 East, S. L. M. in White Pine canyon, Summit County, State of Utah and leading into the premises of the defendant in said Section 1, by the defendant, his servants agents, and employees, for the purposes of vehicular traffic, including the use of the defendant's automobile by this defendant in going to and from his said premises.

And it is further ordered by this Court that one, Joe Raymond, be and he is hereby permitted to use said road for the purpose of hauling from the said premises of the defendant about ten tons of hay which he, the said Raymond, had heretofore purchased from the defendant, said hay to be hauled away before the 31st day of March, 1928;

And it is further hereby ordered that you, the said plaintiffs, do forthwith remove all padlocks from all gates which you claim to own and which now obstruct the free use of said road by the defendant and the said Raymond and the defendant is hereby ordered and required to close and fasten all such gates after using said road.

By the Court.

MORRIS L. RITCHIE,
Judge.

Dated this 13th day of March, 1928.

Received copy of the foregoing Restraining Order this 13th day of March, 1928.

HATCH & HATCH,
Attorneys for Plaintiffs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the court, sitting without a jury, upon the complaint of the plaintiffs and the cross-complaint of the defendant. Messrs. Hatch and Hatch and

George M. Sullivan, Esq., appeared as attorneys for the plaintiffs, and D. B. Hempstead, Esq., and Stewart, Alexander & Budge appeared as attorneys for the defendant. Evidence was introduced by the respective parties and considered by the court, and the court being fully advised in the premises, and having found in the issues in favor of the defendant and against the plaintiffs, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The plaintiff, subject to the roadway hereinafter described, is the owner of the following described property, to-wit:

Lots 7 and 8, Section 1, Township 2 South Range 3 East, Salt Lake Meridian, in Summit County, State of Utah, containing approximately 97 acres, together with all water rights thereunto belonging or in any wise appertaining.

Part of said land is valuable for the cultivation and raising of hay and the other part valuable for grazing purposes.

2. The defendant is and has been for many

years last past engaged in the sheep business and has owned and operated a band of sheep and grazed the same upon the lands of the defendant in White Pine Canyon, Summit County, State of Utah, which lands of the defendant adjoin plaintiffs' lands on the south.

3. The Court finds that the defendant did not, during the years 1925, 1926, and 1927, as alleged in plaintiffs' first, second and third causes of action, or otherwise or at all, wilfully and maliciously, or otherwise, go on to, and upon the lands of the plaintiffs with his sheep, horses, camps, wagons, men, employees and complete outfits, or otherwise, except that the defendant used the roadway across plaintiffs' land described in the 9th finding.

4. The court finds that there is a *roadway*, which is a public highway, passing over and across the lands of the plaintiffs, which said roadway has been used by the defendant and his predecessors in interest and by the public generally for more than fifty years last past, and that the defendant, on several occasions during the years 1925, 1926 and 1927, drove his sheep over and along said roadway, but in driving his said sheep over said roadway defendant did not trespass upon the

lands of the plaintiffs. That said roadway is and has been, for more than fifty years last past, the only means of ingress and egress to and from the lands of the defendant and his predecessors in interest and the territory known as White Pine Canyon, and the defendant and his predecessors in interest have made large and valuable improvements on defendant's said lands, and in the making of said improvements have used and depended upon said roadway in going to and from said premises and in transporting materials and farm products in the use and occupancy of said premises, all with the knowledge and acquiescence of the plaintiffs and their predecessors in interest. The court finds that the defendant did not use, or threaten to use, any roadway other than the public highway herein referred to.

5. The court finds the issues in favor of the defendant and against the plaintiffs on all of the first, second, third and fifth causes of action of plaintiffs' complaint.

6. Defendant demurred to the fourth cause of action in plaintiffs' complaint and the demurrer was sustained, and the plaintiffs having failed to amend their complaint, said cause of action was dismissed.

7. On defendant's counterclaim and cross-complaint the court finds that the defendant is now, and for a number of years last past has been, the owner, in possession and entitled to the possession of the following described lands, in Summit County, State of Utah, to-wit:

All of Lots 9, 10, 11, 12, 13, 14, 15 and 16, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian, containing 629 acres.

120 acres in Section 12, Township 2 South, Range 3 East, Salt Lake Meridian.

Lots 6 and 9, Section 6, Township 2 South, Range 4 East, Salt Lake Meridian.

520 acres in Section 7, Township 2 South, Range 4 East, Salt Lake Meridian.

All of which said lands are either adjoining or on the south of Lots 7 and 8, Township 2 South, Range 3 East, which said Lots 7 and 8 are lands belonging to the plaintiffs. All of said lands of the defendant herein described are located in what is known as White Pine Canyon, which is located about three miles northwesterly of Park City, in Summit County, State of Utah, and are valuable for cultivation and grazing purposes, but in the past have been used mostly for the grazing of sheep and other livestock.

8. The court finds that more than fifty years ago the inhabitants of Park City, Snyderville and surrounding territory, and the public generally, constructed and used a roadway up White Pine Canyon, through over and across Lot 8, Township 2 South Range 3 East, which lands now belong to the plaintiffs, and said roadway, as so constructed, was and has been, for more than fifty years last past, used by the public generally as a public highway, for the general purposes of traffic, including the hauling and transportation of logs, fire wood, lumber, mining timber, supplies for mining operations, and for the trailing of livestock, including cattle, sheep and horses, and for all purposes for which public highways, under similar conditions, are generally used.

9. That said roadway leads from that public highway commonly known as the Park City Highway, and passes over and along what is known as Trottmann's Lane, and thence on to the lands of the plaintiff, and the center line of said roadway, as it passes over the lands of the plaintiffs, is described as follows:

Commencing at a point North 1320 feet and West $44\frac{1}{2}$ feet from the quarter corner, east side, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian, and running thence

South 31 deg 40 min West 248 feet; thence South 54 deg 41 min West 154.3 feet; thence South 1 deg 27 min West 139.7 feet; thence South 64 deg 53 min West 144.6 feet; thence South 48 deg 3 min West 298 feet; thence South 63 deg West 136.3 feet; thence South 54 deg 21 min West 194.5 feet; thence South 45 deg 48 min West 203.3 feet; thence South 52 deg 22 min West 414 feet; thence South 42 deg 59 min West 52.3 feet, to the gate.

and the court finds that in the use of said roadway *the public generally and the defendant and his predecessors in interest have used and occupied said roadway to the extent of one and one-half rods on each side of said center line above described, making said roadway three rods wide, as the same passes through the lands of the plaintiff,* and the court finds that three rods is the width of said roadway, and that said width has been and is necessary in the enjoyment of said roadway for the purposes for which it has been used and is now being used by the public generally and by the defendant and his predecessors in interest. The court finds that *said roadway has been used by the public generally openly, notoriously, continuously, uninterruptedly, adversely and under claim of right for more than fifty years last past, and that the defendant and his predecessors in inter-*

est have relied, and do rely upon said roadway as a public highway, and as a means of ingress and egress to and from the lands of the defendant, above described, and that said roadway is the only road leading to and from the lands of the defendant, and is the only means of ingress and egress to and from the lands of the defendant and he and his predecessors in interest, relying on said roadway and their right to use the same, purchased said land and have constructed valuable improvements thereon, in the form of dwelling house, barns corals, blacksmith shop, fences, scales and other improvements, all necessary in the use and occupancy of said land, and the defendant and his predecessors in interest have, for more than fifteen years last past, from year to year and from day to day, used said roadway in going to and from the lands of the defendant and in hauling materials for the construction of the improvements thereon and for the transportation of supplies and products and for the trailing of sheep, cattle and other livestock, and with full knowledge thereof the plaintiffs and their predecessors in interest permitted and acquiesced in the free use of said roadway by the defendant and his predecessors in interest and by the public generally, well know-

ing that the defendant and his predecessors in interest had no other means of access to said lands and improvements and were relying upon said roadway as a means of ingress and egress to and from the lands of the defendant.

10. In the month of February 1928, and thereafter during the said year up to the trial of this action, the plaintiffs wrongfully and unlawfully and in violation of the rights of the defendant and the public generally, obstructed and interfered with the use of said roadway by the public and by the defendant, his agents, representatives and employees by constructing gates, fences and other obstructions across said roadway, and by threats of violence and force attempted to and did prevent the defendant, his agent and employees, from using and occupying said roadway for the trailing of sheep along and over said roadway, and other purposes, and in the general use thereof, and plaintiff threatens to continue to obstruct and interfere with and prevent the defendant, his agents, representatives and employees, from using said roadway.

CONCLUSIONS OF LAW

As Conclusion of Law the court finds:

1. That the plaintiffs are not entitled to any relief, whatsoever, as prayed for in their complaint.

2. That defendant is entitled to a decree holding that there is a roadway, which is a public highway, across and over the lands of the plaintiffs, as in these findings described, and that the plaintiffs are estopped to deny the same; and that the defendant, his agents, representatives and employees and successors in interest, and the public generally, are entitled to use said roadway as the same passes over and through the lands of the plaintiffs, and that the defendant is entitled to a decree perpetually enjoining the plaintiffs, their agents, representatives and employees and their successors in interest, from in any way obstructing or interfering with the use of said roadway by the defendant, his agents, representatives, employees and successors in interest, and the public generally.

3. That the defendant be awarded his costs herein incurred.

Dated this 4th day of December, 1928.

L. B. WIGHT,
Judge.

Attest: ALONZO MACKAY,
Clerk.

By S. A. ABBOTT,
Deputy Clerk.

(Title of Court and Cause).

DECREE

This cause came on regularly for trial before the court, sitting without a jury, upon the complaint of the plaintiffs and the cross-complaint of the defendant. Messrs. Hatch & Hatch and George M. Sullivan, Esq., appeared as attorneys for the plaintiffs, and D. B. Hempstead, Esq., and Stewart, Alexander & Budge appeared as attorneys for the defendant. Evidence was introduced by the respective parties and considered by the court, and the court being fully advised in the premises, and having found the issues in favor of the defendant and against the plaintiffs, and having made Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by reason of their complaint herein, and that it be and the same are here-

by dismissed on the merits.

It is ordered, adjudged and decreed that the plaintiffs, subject to the roadway hereinafter described, are the owners of the following described land, to-wit:

Lots 7 and 8, Section 1, Township 2 South, Rangs 3 East, Salt Lake Meridian, in Summit County, State of Utah, containing approximately 97 acres, together with all water rights thereunto belonging or in any wise appertaining.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant is the owner in possession and entitled to the possession of the following lands, to-wit:

All of Lots 9, 10, 11, 12, 13, 14, 15, and 16, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian, containing 629 acres.

120 acres in Section 12, Township 2 South, Range 3 East, Salt Lake Meridian.

Lots 6 and 9, Section 6, Township 2 South, Range 4 East, Salt Lake Meridian.

520 acres in Section 7, Township 2 South, Range 4 East, Salt Lake Meridian.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is a roadway, which is a public highway, leading from the highway re-

ferred to as the **Park City highway**, beginning at a point where a lane known as **Trottman's Lane** intercepts said **Park City Highway** and running thence over and along said **Trottman's Lane** southerly towards **White Pine Canyon**, until said roadway reaches the north boundary line of plaintiffs' said land, and thence over and across **Lot 8**, above described, belonging to the plaintiffs from the north boundry, to the south boundary thereof; and said roadway, as the same passes over plaintiffs' said land is three rods wide; that is to say one and one-half rods on each side of the center line thereof, which said center line is described as follows, to-wit:

Commencing at a point North 1320 feet and West $44\frac{1}{2}$ feet from the quarter corner, east side, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian, and running thence South 31 deg. 40 min. West 248 feet; thence South 54 deg. 41 min. West 154.3 feet; thence South 1 deg. 27 min. West 139.7 feet; thence South 64 deg. 53 min. West 144.6 feet; thence South 48 deg. 3 min. West 298 feet; thence South 63 deg. West 136.3 feet; thence South 54 deg. 21 min. West 194.5 feet; thence South 45 deg. 48 min. West 203.3 feet; thence South 52 deg. 22 min. West 414 feet; thence South 42 deg. 59 min. West 52.3 feet, to the gate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, his agents, representatives and employees and successors in interest, have the right to use said roadway hereinbefore described for the driving of sheep, cattle and other livestock, and for all kinds of traffic, in the use, occupancy and enjoyment of said lands belonging to the defendant, and/ or his successors in interest.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs, and each and all of their agents, representatives, employees and /or successors in interest are perpetually enjoined and restrained from in any manner obstructing or interfering with the use, occupancy and enjoyment of said roadway by the defendant, his successors in interest and their agents, representatives and employees, and by the public generally, as the same passes over and across the plaintiffs' said lands hereinbefore described.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant recover his costs in this action incurred.

Dated this 4th day of December 1928.

L. B. WIGHT,

Judge.

Attest: ALONZO MACKAY, Clerk.

By S. A. ABBOTT, Deputy Clerk.

Received copy of the foregoing Findings of Facts, Conclusions of Law and Decree this 28th day of November, 1928, at 4:15 o'clock p. m.

HATCH & HATCH,
G. M. SULLIVAN,
Attorneys for Plaintiff.
By G. S. Hatch.

(Title of Court and Cause).

NOTICE OF MODIFICATION OF FINDINGS
OF FACT, CONCLUSIONS OF LAW
AND DECREE

To the said plaintiffs and to Hatch & Hatch and G. M. Sullivan, their attorneys:

You and each of you are hereby notified that the above entitled Court on its own motion, under the provisions of Section 6828 C. L. of Utah, 1917, modifies the Findings of Fact, Conclusions of Law and Decree heretofore on the 4th day of December, 1928, entered in the above entitled cause, in the following particulars, to-wit:

1. The Court modifies the 3rd Finding of Fact so that the same reads as follows:

‘The Court finds that the defendant did not, during the years 1925, 1926 and 1927, as alleged in plaintiffs’ first, second and third causes of action, or otherwise or at all, wilfully and maliciously, or otherwise, go on to and upon the lands of the plaintiffs with his sheep, horses, camps, wagons, men, employees and complete outfits, or otherwise, except that defendant used the roadway described in the 9th Finding herein, and depasture, eat up and destroy the feed and forage thereon, or otherwise damage or trespass upon the lands of the plaintiffs, as set forth in the complaint herein.’

2. The Court modifies the first Conclusion of Law so that the same reads as follows:

“That the plaintiffs are not entitled to judgment or to any relief whatsoever, as prayed for in their complaint herein.”

3. The Court modifies the second paragraph of the Decree so that the same reads as follows:

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by reason of their complaint herein, and that said complaint be and the same is hereby dismissed *on the merits*.

It is ordered, adjudged and decreed that the plaintiffs, subject to the roadway, hereinafter described, are the owners of the following land, to-wit:

Lot 7 and 8, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian, in Summit County, State of Utah, containing approximately 97 acres, together with all water rights thereunto belonging or in any wise appertaining.”

Dated December 28, 1928.

STEWART, ALEXANDER & BUDGE,
D. B. HEMPSTEAD,
Attorneys for Defendant.

Service of copy of the foregoing modifications is hereby admitted this 28th day of December, A. D. 1928.

Attorneys for Plaintiffs.

(Title of Court and Cause).

DECREE

Amendment to the Findings

The defendant, having submitted findings of fact, conclusions of law and decree, and the plain-

tiff having filed objections thereto, and neither party having offered or submitted a finding which reflects the record in this particular, the Court, of its own motion, makes the following amendment to said findings.

The plaintiffs having at the opening of the trial, waived their action, or causes of action, for damages resulting from the trespasses complained of in the complaint, and no evidence having been introduced either to support or disprove said allegations, and it appearing from the record that it was the intent and purpose of plaintiff to dismiss said claims without prejudice and not on the merits, the court makes no findings as to the allegations of the complaint bearing on said subject matter, anything hereinbefore stated to the contrary notwithstanding.

(Signed) L. B. WIGHT,
Judge.

(Title of Court and Cause).

MOTION FOR NEW TRIAL

Come now the above named plaintiffs and move the Court to vacate the Findings of Fact,

Conclusions of Law and Decree heretofore, to-wit, on the 4th day of December, 1928, made and entered herein in favor of the defendant and counter-claimant, and against the plaintiffs, and to grant plaintiffs a new trial of said cause, upon the following grounds and for the following reasons, to-wit:

1. Insufficiency of the evidence to justify the findings of fact herein.
2. Insufficiency of the evidence to justify the conclusions of law made and entered herein.
3. Insufficiency of the evidence to justify the judgment and decree made and entered herein.
4. That the findings of fact, as made and entered, are not sufficient in law upon which to base the judgment and decree complained of.
5. That the findings of fact, conclusions of law and decree seek to adjudicate and determine certain issues of law and fact, which, during the course of the trial, was by the Court, upon motion of plaintiffs, dismissed *without prejudice* and was therefore not involved in the trial of this cause and not submitted for final adjudication and determination upon their merits.

6. Error of the Court in failing to make findings upon the essential and material issues of fact raised by the pleadings and covered by the evidence in this case, and particularly in failing to make findings as to the location of White Pine Canyon road in common use prior to the issuance of the patent for Lot 8, (plaintiffs' land), and in failing to make findings as to the metes, bounds, variations, courses and distances of said White Pine Canyon road, if any, used by the public prior to the issuance of the patent to said Lot 8, belonging to plaintiffs.

7. Errors in law occurring at the trial and duly excepted to by the plaintiffs.

8. Irregularity in the proceedings of the Court and adverse parties in this to-wit: That the findings, judgment and decree as made and entered herein, are not in accord with the copy of the proposed findings, judgment and decree served by defendant upon the plaintiffs herein.

9. Irregularity and abuse of discretion in the proceedings of the Court, and surprise to plaintiffs, which ordinary prudence could not have guarded against, in this, to-wit: That defendant was permitted, at the close of the trial and over

plaintiffs' objections and exceptions, to prove, under the guise of "sur-rebuttal," by the witness Stewart, the metes, bounds, variations, courses and distances of the roadway described in the findings and decree, but not set out in the counter-claim.

10. The Court erred in permitting proof, and in making its findings, judgment and decree as to the metes, bounds, variations, courses and distances of the roadway as set forth in the judgment and decree, because same was not involved in the issues framed in this case.

11. Irregularity and abuse of discretion on the part of the Court during the course of the trial in issuing its so-called "enlarged and extended" restraining order, and now keeping in full force and effect its said so-called "enlarged and extended" restraining order.

12. Error of the Court in failing to vacate, modify or qualify, or in any way limit the so-called "enlarged and extended" restraining order made on the 14th day of September, 1928, during the course of the trial.

Said motion is based upon the records and files herein, and upon the testimony and other proceedings had upon the trial.

EDWIN D. HATCH,
GEO. M. SULLIVAN,
Attorneys for Plaintiffs.

Received copy of the foregoing motion for
new trial this 8th day of December, 1928.

Stewart, Alexander & Budge,
D. B. Hempstead,
Attorneys for Defendants.

(Title fo Court and Cause).

ORDER DENYING NEW TRIAL

Plaintiffs' motion for a new trial having been
heretofore argued, submitted and taken under ad-
visement and the Court being now sufficiently ad-
vised in the premises, it is ordered that said mo-
tion for a new trial be and the same hereby is de-
nied.

L. B. WIGHT,
Judge.

Dated December 29, 1928.

(Title of Court and Cause).

MOTION TO VACATE THE ENLARGED AND
EXTENDED RESTRAINING ORDER
MADE HEREIN ON SEPT. 14, 1928

Come now the plaintiffs and move the Court to vacate and set aside the restraining order made and entered herein the 14th day of September, 1928, enlarging and extending the restraining order theretofore, to-wit on the 13th day of March, 1928, made and entered herein, upon the following grounds and for the following reasons, to-wit:

1. Said *enlarged* and *extended* restraining order is indefinite and uncertain in this, to-wit: The so-called "White Pine Canyon Road" running through plaintiffs' property has never been located or established as a public highway so far as the proofs show.

2. No improvements have ever been made upon said so-called road from public funds, so far as the proof shows.

3. The location, direction and width of said so-called road, or any road in White Pine Canyon, has never been fixed and determined, and is not fixed and determined in the pleadings herein, or in the said enlarged and extended restraining order referred to.

4. That the scope of the restraining order, or the limitation or rights of the plaintiffs herein to protect their culinary water, their growing crops, to-wit: alfalfa, potatoes and timothy hay, under the verbiage of said restraining order, is indefinite and uncertain, and it cannot be ascertained therefrom what effort or attempt on the part of plaintiffs to protect their lands, their growing crops, their culinary water, or their home from the trespass of defendant's animals, would or might be construed as a violation of said extended or enlarged restraining order.

5. That it cannot be determined from said restraining order to what extent, if any, plaintiffs may protect their said property from the driving and trailing of livestock by defendant along said roadway, nor the restrictions to which plaintiffs are subjected by said restraining order in preventing the trespass by defendant of all of Lot 8 of plaintiffs' real property.

6. That if by said restraining order it was intended that defendant in trailing his livestock over and along said so-called White Pine road or roads, could take all the time desired in trailing and grazing same, and all the space required in trailing and grazing same, then said restraining

order would operate as a violation of plaintiffs' rights to protect their property from the trespass by defendant.

7. That under the terms of said restraining order plaintiffs are necessarily in doubt as to how much trespass in point of area, or as to how much trespass in point of time, defendant may commit before plaintiffs would be permitted under the terms of said restraining order to interfere with or prevent said trespass.

8. That if the intent and purpose of said restraining order is to permit defendant (and under the language of the order such is a reasonable interpretation thereof) to trail his livestock promiscuously over and upon plaintiffs' land, and to eat the grass and crops growing thereon, then the same is unconstitutional in that it is sought to forcibly take the *private* property of one person for the *private* benefit of another.

9. That said enlarged and extended restraining order is in excess of the application for same, and there is no showing whatever of the necessity for same.

10. That said enlarged and extended restraining order was made before plaintiffs' evidence in

rebuttal was all or any substantial part introduced.

11. That there is no evidence in this case to support the claim of claimant that a public highway has been in continuous and uninterrupted use as such public highway for a period of twenty years immediately preceding the commencement of this action. On the contrary the proof is conclusive from Government records, to-wit, field notes of the survey made in June, 1902, and plat accompanying same, that the only roads across this property at the time of said survey was one road leading up White Pine Canyon on the South and East side of the creek, and another road entering this property from the North line about 20 rods distance west of the Northeast corner of the Sullivan property, which road presumably led over from what is commonly called "The Red Pine Canyon Road" and approached the Condas land in close proximity to the present buildings thereon.

12. The proof is further conclusive that each of these roads have been abandoned for many years and are not now in common use by the public or anyone.

13. Such evidence furnished by the Govern-

ments records is corroborated and emphasized by the testimony of Mr. Street, and is not contradicted by the testimony of any witness in this case, save from the conclusion of Mr. Archibold to the effect that the road leading up White Pine Canyon on the south and east of the creek was a private road, belonging to Mr. Jim Williams, a squatter on a tract of land, afterward entered by one Snyder.

14. Plaintiff's proof is further made conclusive by the testimony of himself, of Pat Lake and of one J. Riley Lake, his brother, to the effect that since 1915 the private road leading from the Northeast corner of the Sullivan premises to the Sullivan house was inclosed by gate and bars at the entrance of said road to the Sullivan property, to-wit: at the northeast corner thereof, and has always been improved by the private efforts and private expenditures of Sullivan and Lake, his predecessor.

15. The proof further shows conclusively that the private road above referred to, until within the last two or three years, was some distance, to-wit, from one to four rods south and east of where it is now situate. That is formerly went diagonally in a southwesterly direction over what

is now Sullivan's meadow land, and that he, Sullivan, and his predecessor, Lake, changed it to go along the foot-hills so as to make more acreage for meadow lands and to make a better road.

16. That there is no written evidence of the abandonment or dedication of the roadway over the Sullivan land, and no evidence of any public funds ever having been expended upon said road.

17. The proof shows conclusively from the testimony of Sullivan and abstracts and deed:

(a). That there was no reservation of any easement or roadway in the deed from Lake to Sullivan, which shows a failure of any intent on the part of the grantor, Lake, to have abandoned or dedicated a public highway across the land.

(b) That Sullivan first saw and leased the land in 1922, at which time the private roadway, now sought to be claimed as a public highway, was intersected by gate or bars at the point where it enters the Sullivan land at the northeast corner, and that at all times since, and particularly when Sullivan obtained his warranty deed for the land in 1924, said gate at the entrance of said road to the Sullivan land was intact and kept continuously closed, showing conclusively that it was the intent

of Sullivan and his predecessor to make said road and hold the same as a private roadway, as distinguished from a public highway, and that the travel, if any, over said road since 1922 until about the time of the commencement of this action has been by the permission of Sullivan and not against his will, all of which tends to negative the idea that Sullivan and his predecessor was abandoning this or any other road over his land to the public and for use by it as a public highway.

Attorneys for Plaintiffs.

(Title of Court and Cause).

NOTICE OF APPEAL

To the above named defendant, to Stewart, Alexander & Budge, and to D. B. Hempstead, his attorneys:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the Supreme Court of the State of Utah from that certain judgment and decree heretofore, to-wit: on the 4th day of December, 1928, made, ren-

dered and entered herein, and from the whole thereof.

Plaintiffs further appeal from the order thereafter, to-wit: Made and entered on the 29th day of December, 1928, overruling their motion for new trial in said cause, and from the order made and entered on or about the 29th day of December, 1928, modifying said original judgment and decree, and from the whole thereof .

This appeal is taken upon questions of fact and questions of law.

E. D. HATCH,
G. M. SULLIVAN,
Attorneys for Plaintiffs and Appellants.

Received copy of the foregoing Notice, and accept service of same this 28th day of June, 1929.

Attorneys for Defendant, John C. Condas

THE TRIAL

101 Statements of counsel for the several parties
to and orders, rulings, and comments of the court.
115

Mr. Sullivan, for plaintiff, states that plain-

116 tiff will move to dismiss all claims for damages
set out in the pleadings.

THE COURT: "So it may be understood that
motion has been made and the rulings so far as
the evidence is concerned will be made."

117 MR. SULLIVAN: "Yes, I would dismiss at
this time, except a careful study of the complaint
is that certain parts rely upon other part * * * "

THE COURT: "The court so understands it
* * * "

PATRICK SULLIVAN, one of the plaintiffs,
sworn, and on direct examination by Mr. Sullivan,
Esq., testified as follows:

I reside at Park City, Utah. Came first to
Park City in 1917. Have resided there since 1920.
I am familiar with the land described in para-
graph one of my complaint. I first became
interested in that land in 1922. I had a lease on
118 it. I leased from Mr. Lake. I afterward contract-
ed to purchase. I had Reddon's ranch in 1924. I
I went into possession of the Lake land under that
contract and have been in possession ever since.
119 That is the land counsel and I visited yesterday.
I first went into possession of this tract of land in
120 1922, as lesee in 1924 under the contract

to purchase. I owed about five hundred dollars on the contract at the time this suit was begun.

121 We paid \$325.00 on it this morning. The indebtedness is represented by a note and mortgage. The defendant, Mr. Condas, owns the land immediately adjoining my land below and above it. Of my land, 27 acres are under cultivation, seventeen

122 acres hay; ten acres grain and crops. Hay grown there is timothy and alfalfa. We grow oats and potatoes. After harvest I use my land for pasturing sheep, cattle and horses.

In the summer of 1925, the defendant's stock went right through my land. I did not consent to

123 it. My wife objected to it at the time, I was working some then. The defendant has used my land for travel back and forth with his vehicles. I never gave him permission. My land is fenced. I fenced it in 1928. A four-foot fence. I had my land surveyed before fencing and built the fence on the lines furnished by the surveyor. I put up gates. In 1926, I gave a key to Mr. Condas. Our cattle then in the hay. I told him if he was going through to close the gate, my cattle was going out.

124 Mr. Condas took the key. I had a wire gate at that time. A different gate now. I had a big chain and lock on the gate, the chain going around

the post. I went out one morning and the gate was cut down—taken right away. I never saw the
125 gate again. There was an old trail there then, leading through my land to Mr. Condas' house. That was the end of the trail. I spoke to Condas about the gate—in 1926—on the ranch. Condas said he (Condas) was going to have the right of way and tear out gates.

Then I brought this suit to enjoin him from going over my premises.

126 On cross examination by Mr. Stewart, the witness testified as follows:

In 1922 and 1923 and every year to the present time I work night shift in the mines. I would work half a day on the ranch. I quit the mines at cropping time. I quit around the first of May and around the first of August each year. I didn't work around that time in the mines at all. I would work about a month or six weeks putting in the
127 crops. It took about six weeks to put up the crops. During the time I was putting in my crops and harvesting them I didn't work in the mines at all. I raised some grain right above the cabin, below the alfalfa. We never threshed, but fed the grain
128 to the cattle. Cut it with a mower.

There was a gate across the roadway when I first came there, about 1922. The gate was then up by the house—about 25 feet or so above the house across that trail. I had a man there in 1922; 129 leased the Condas ranch; kept my cattle there. I didn't live there. I have never lived on the ranch. A man was there 1922 and 1923. I put in grain 130 in 1923. I grazed the land; I put up hay in 1923. I didn't keep my cattle there in the winter of 1923. I brought the hay into town.

I first saw Condas in 1925. I saw him walking through the grain. We were cutting trees above the cabin. No one lived on the Condas ranch. 131 prior to 1925. I leased it from Redden in 1925 and cut hay on it. Mr. Condas was back and forth that year. He came in with his sheep in 1925. Was there in 1926, 1927 and 1928. He went through my land with his sheep feeding on my land before he went to his land. He came up the land; let 132 them (the sheep) go right through everything. He went all over the place—right through my hay in 1925. Drove through my spuds. I went to Condas' house and warned him to keep his sheep off my land. Condas said nothing in 1925 about any 134 right of way. Condas always claimed roadway, 135 1925, 1926, 1927. I stopped Condas myself in 1926,

about the 15th of June. I saw him go down with his sheep on about August 25th, 1926, also saw
 136 him bring his sheep down in 1927. I was not there in 1925.

I put up a fence in 1928. Before then the lane was fenced. I didn't see any fence there before across the road from Trottmann's Lane,
 138 leading to my house. There was an old gate there when I first came there, below my land, and one
 139 up above the house.

I first put a lock and chain on the gate in 1922
 143 when I first came there. It was all closed up when I came there. The gate was locked when I went
 144 there first. I put a lock and chain on the gate in 1926. Condas had one key, we had another. I gave Condas a key in 1926. The lock and chain
 145 was put on the gate going out of my meadow lands. There was no road there; a trail.

Plaintiffs' exhibits "A" and "B" offered
 147 and received in evidence, "A" being an abstract of title to the Sullivan land, "B" being a contract to purchase between the plaintiffs as purchasers and Lake as seller.

147 Here the plaintiffs rested.

Mr. Wm. Archibald, being sworn as a witness

for defendants, on direct examination, testified as follows:

Up to ten years ago I lived at Synderville in Summit County nearly all the time from 1872. I have been ranching; a contractor in stone and timber, and merchandising. For the last few years I have been working for the state. I was born in 1852. I have known White Pine and Red Pine Canyons since about 1870. I know the Sullivan ranch and the Condas ranch. They are both situated in the mouth of White Pine Canyon. Sullivan's ranch is down north of Condas, ranch. Land north belongs to me. I join the Sullivan ranch on the north with 99.3 acres.

There is a roadway leading from the Park City highway up to plaintiffs', that is up to Sullivan's and Condas' ranches. It starts down what we call the Trottman residence and parallels the section line until it gets within about 20 rods of the township corner, where it turns southwest into Sullivan's place and crosses the corner of my land. It then runs along pretty close to the foot of the bench, up past what is now the Sullivan house and runs on up there to the Condas ranch. It goes right up White Pine Canyon into the basin.

The road has been changed may be a rod or
 152 two rods in places there. About 1876, I believe
 there was a sawmill there. I worked for Gibson at
 the sawmill. I was shipping clerk and foreman.
 They changed the course of that road up a little
 further toward the bench. Farther west.

Q. How long have you known, to your own
 knowledge has there been a roadway leading up
 along in a general way the present course of the
 road which we saw yesterday?

MR. SULLIVAN: Just a moment; this, if
 the court please, gets us down to the crucial test
 of the law of easements. We object incompetent,
 153 immaterial, irrevelant, * * *

(Argument)

THE COURT: The objection may be over-
 ruled, at this time, without prejudice to your sub-
 mitting authorities and motion to strike after-
 ward.

MR. SULLIVAN: Save an exception.

Since 1873. For hauling lumber, for driving
 livestock up in the hills, and for hauling wood and
 general building material for the settlement in
 shape of timber. This road has been used gener-

ally by the public for those purposes during that
154 entire period. The road has run in the direction
of the present road. Frank Lake and Mr. Redden
moved the road from the meadow over to the west
side of the meadow. I cannot say when that was
done. Approximately 12 years ago. While I have
known this road it has been well defined and a well
traveled road. There is no means of ingress and
egress to White Pine canyon other than along the
course of this road. There is no other way for
Mr. Condas to reach his ranch over any other
road. The other way is all fenced up. This road
is named White Pine canyon road.

On cross examination the witness Archibald
testified as follows:

155 I am in the employ of the state Fish and Game
Department.

I know somewhat of the topography of the
156 territory surrounding White Pine Canyon, and of
the Sullivan and Condas ranches. I think it is not
three or four but about one mile from Park City.
157 (Exhibit "C" here called to witness' attention).
This dotted land here is mine. I think I got the
deed in 1902. I dispute the correctness of that
158 map. Where the word "Gate" appears shows

the crossing of my land. I see Road "A" here. (Following map: Ex. "C"). As near as I can see that correctly represents the present line of travel from the entrance to the Sullivan land up to his ranch. From there up to where Road "A" leaves the Sullivan land at the point "Gate" it is substantially correct in its line over the Sullivan land. (Road "B" on Ex. "C" called to attention of witness). I am quite familiar with Road "B." It is on the ridge between White Pine and Red Pine canyons. Road "B" leads (contacts with) right into the lane that leads to the public highway—Trottman's lane.

(Road "C" on Ex. "C" called to attention of witness). I am familiar with an old road used a very great deal a good many years ago that extends up the southeast side of White Pine Canyon. I knew that road as used by privates and individuals to go in there with their cattle, into what we called Big Hollow to the south and west—I never knew it as a public road. (Road "C," aforesaid, again called to witnesses' attention.) I haven't known that as a road. I have been familiar with the canyon since 1873. They hauled lumber down road "C" from a sawmill. Mr. Sullivan: "When I say "they" I mean the public."

Well then the public didn't. About twelve years ago there was a road that ran up the canyon on what is now the meadowlands and that road was moved. That road ran about a rod in there in a little higher ground and goes right to the identical same spot where the road now is, this is on the
165 side of Sullivan's place cut across it. And the road was cut to make meadow land. No one objected to the road being moved. I have been over the trail leading from the gate at the entrance to Sullivan's land up to the Condas house every year for forty years. I was over it last fall, and this last spring, and the year before, up to the Condas
166 place and above it to White Pine Basin to the source of the creek, traveling that country as a fish and game department member. And traveled all the other roads and trails behind the house. Up to the source of and down Thane's Canyon. Prior to being an officer of fish and game department went up there, a neighboring canyon, hunting. There is no possibility of automobile travel beyond the Condas place. There was a good road
167 above the Condas place when we were logging. In 1903. The road there was used for logging clear to the Salt Lake County line. The logging ceased in 1903—1906. The logs were cut up by the sawmill right on this flat, just in front of that little hollow

169 that runs up this side of Mr. Sullivan's house, and on the Sullivan tract. At that time the purpose of the road was for hauling wood and lumber, and driving cattle up into White Pine basin and McDonald basins and over to Dutch basins. We could drive our cattle over any part of the country most practicable. There were no fences. They done that. Swift's sawmill was in Robinson hollow about a mile above the Condas house. The other sawmill was on Mr. Sullivan's land. The Swift
170 mill one mile above, early date, more than thirty years ago. The upper mill ceased operations about 1877 or 1878. It was moved down to above Park City in Empire Canyon about 1877 or 1878.
171 Approximately 50 years ago. There has been no occasion to bring lumber down from the upper mill for fifty years. People hauled lumber up to establish cabins on mining claims, and also up Iron Canyon from Park City. During the time the upper mill was operating there was quite a little traffic up and down the canyon, hauling lumber. The lower mill moved up the canyon maybe a
173 quarter of a mile on to the Condas place in the eighties. It operated there maybe a couple of years. The mill operated there until it got all the lumber possible to bring out. It didn't operate

any after 1896. After 1896 no mill produced lumber in White Pine Canyon. There has been no mill above or below the Sullivan place for more than 30 years. Later, timber was hauled down to the mill at Snyderville. They formerly used the road to haul wood to the Ontario and the Marsac mills till the mills closed 20 years ago. Some wood came to Salt Lake but not much, since then. I don't know who brought the wood down, when it came down, or how much came down. My teams brought some down. There has been no wood come down that White Pine canyon to my knowledge within the last fifteen years. My teams brought wood to Salt Lake from White Pine canyon less than fifteen years ago. Fences begun to be put up in that country of late years. About 20 years ago fencing was generally commenced. I drove stock up the White Pine canyon, horseback. The country then not much fenced. We took the best trail, we took the bottom of the canyon. We drove them over the ground that is now the hayfield. I haven't driven any up in the last twelve years. I know of lots of sheep driven back and forth for eight or ten years. In the early days cattle and some sheep driven, some horses. The trail—Road "B" on Exhibit "C"—has been there for forty years. It was used for bringing out timber. Wood also

180 hauled over it. If they wanted to go to McDonald
 or Dutch Basin they would take that road. It was
 not connected with the other road past the Sul-
 livan and Condas places. I know of no connection.
 Part of logs to lower mill came over trail in the
 locality where it now is; part from Red Pine
 182 canyon over the trail on the side hill north and
 west of the lower trail. The timber was cut on
 hills and brought in, anyway we could get them
 there. There is no road above the Condas ranch
 passable to automobiles or wagons, it would be a
 hard job to get there with a wagon, but it used to
 be. I haven't tried that trail the last 20 years. I
 183 know of no one trying to take a wagon up from the
 Condas house for the last fifteen years.

For the last five and probably fifteen years
 there was no road at all that would lead from the
 present location of the Sullivan house to the pres-
 184 ent location of the Condas house, no wagon road,
 I didn't mean the trail. There has been a road
 there all the time.

H. P. Workman took up the Condas land as a
 185 desert claim about the year 1886, no the Sullivan
 land. Mr. Redden took up the Condas land about
 1912 to 1914. Wagons went up from Sullivan's

place to Condas place prior to 1914. There was a little piece changed there where it crossed the creek a little bit, change on the upper end. The road along the foot of the bench then and now there. Then in about its present location. Most of it the same now and prior to 12 or 13 years ago. The Condas house has been practically on the same place ever since I seen it. Before Redden squatted there, there was a house above that flat Condas cultivates. The present house has been there only from the time Redden squatted on the homestead. I don't know where that house was, I don't know where they got the material for the Redden house. There was at one time a house that stood where it crosses the field near the creek and that would be south and east of where the present house stands on the Condas place. The original house was three or four hundred yards from the present Condas house. It stood right down on the side of the creek on the southeast direction from the present house. The roadway then went to that house. The roadway was from the Sullivan house. The old house was not far from the creek bed maybe 50, 20, 30, 40 or 50 feet. I know it was close. There, at that time, was a trail or road from the Sullivan to the old Condas

house. I would say running east of south, and goes where some of the meadow land is now situated. Not any of that old trail would be identical with the trail from the Sullivan to the Condas house. That was absolutely separate and distinct from the trail that goes across the Sullivan place now. It was on the other side of the creek.

On re-direct examination Mr. Archibald testified as follows: —

This road that runs up to the Sullivan's ranch and thence up into Condas ranch was the main traveled road. The old trail was merely a little trail.

The farmers generally furnished wood to the mills for roasting ores until close to 1900.

This White Pine road passes up thru my land, not very much maybe 50, 75 or 100 feet. No interference with the use of this road or any obstruction until Mr. Sullivan got up there. The White Pine canyon road is well defined. If people had any business in there that is the road they took.

White Pine canyon is 3 miles in length, White Pine canyon is not precipitous or steep. A good many mining claims located in that section. They

took materials to operate and build shacks on the claims up White Pine canyon thru Sullivan and Condas places. Since the sawmills ceased operating the country there has been used generally for
 193 grazing sheep and cattle. The sheep and cattle always trailed over the White Pine canyon road.

On re-cross examination witness Archibald testified:—

A man can go almost anywhere with a wagon. The road above the Condas place is not a good wagon road. There is a passable wagon road up past the Condas place until you get to the slide,
 194 that is for 300 or 400 yards. I have went on worse roads with a wagon. I wouldn't say it had been used by the general public as a wagon road for fifteen years. I have used it from the Sullivan to the Condas place. We used to drive our flocks up to that raspberry patch. It has been used for driving sheep from Salt Lake, Wasatch and I believe Juab counties. I know of no other use of the road for the last fifteen years. I now limit my testimony as to use by the general public to going to the raspberry patch and grazing and driving their sheep for the last fifteen years. That is the
 195 only use of the road I know of for the last fifteen years. The raspberry patch is probably 300 to 400

yards above the Condas house. For driving sheep the road has been used for 2½ to 3 miles. The sheep might cross the creek. They would have quite a time climbing around the raspberry patch. The bottom of the canyon there is 100 to 500 feet wide. The sheep wouldn't be limited to 10, 12, 16 or 18 feet. Many of the people might have
 196 brought their supplies and materials up thru
 197 Thyane's Canyon where there is a public highway. They also take sheep up Thayne's Canyon.

Thomas L. Powers, a witness for defendant, being sworn, on direct examination testified as follows:

I live and have lived for 35 years at Snyder-
 ville. I ranch. My ranch is north of White Pine
 198 Canyon about a quarter of a mile. I know where
 White Pine and Red Pine Canyons are. I have
 known White Pine canyon for 35 years. I have
 dealt some in livestock, not very largely. I know
 the White Pine canyon road. I drove cattle in
 there 33 years ago. Anybody who wanted to go
 up there used the road. Since I have known the
 road it has been used just to haul some timbers
 out and to drive livestock back and forth, to haul
 logs and fence poles. It has been used by the public
 198 since I've known it, continuously. I know where

the road now runs. Except for a slight change, it runs substantially in the same place it always has been as it passes through the Sullivan and Condas places. It has been moved closer to the north side of the canyon, that is it has been moved from the meadow a short distance from the westside toward the house. (The witness here must have meant to-
199 ward the west, rather than *from* the west, (for a moving from the west would have been *away* from the house). It is the same road I have always known. I have never known of any interference with or obstruction. Mr. Lake may have put up a gate, but it was so it could always be opened. After the gate was there it was so it could be opened, so the public could go through just the
200 same. That was the main road we used with cattle. Since the timber was taken out the country up there has been used for grazing—of late years for sheep. In my time it was probably used for cattle. I know cattle were trailed through there. I never trailed any sheep.

On cross examination, Mr. Powers testified:

I think Redden took up his place about 1912. I am not sure. Mr. Lake then owned the Sullivan place. I think gates were made about that
201 time. I guess the gates were made to permit Red-

den to go up from the Sullivan place to his place. I couldn't give you any facts about placing the gates there. I didn't know the facts. I know there was one gate there. I don't know whether on Sullivan's or Archibald's land. I would say at the
202 northeast corner. I hauled hay for Condas in the spring of 1926. There was a gate there.

203 It was before people settled there that I drove cattle up White Pine Canyon. They generally drove them along the trail, took the bottom of the trail road, the road that was traveled. We would go up to Redden's or the Condas place. Through the Redden place we had to take the road—it was all brush. Through the Sullivan place there was a couple of paths—on both sides of the creek. As a rule the cattle traveled on the north or west side of the creek. If they spread out they would travel the other way. It was a beaten road for a wagon. There was no occasion for people to
204 travel it except to get out logs and fence posts. I haven't driven cattle in the canyon since Redden homesteaded. Eleven or thirteen years. I started driving cattle there about 1896. I drove the last about 1912 or 1914. During that time no timber, but some logs were hauled down to Snyderville,
205 some to Park City. The road went as far up as

Iron Meadow and White Pine meadow, later than 1912. The road has been slightly changed from where it was, to nearer the foothills. Probably a
 206 a rod, to two rods—some parts in the same place. I wouldn't call it a complete change. I guess the entire road has been moved farther up the hillside to make more room for the hay land below, since Redden and Lake went in. In 1926, it was in its present location. I don't know when it was moved.
 207 I recall the first house Redden built there down near the creek above the Sullivan place.

On re-direct examination, Mr. Powers testified: When the road went out into the meadow
 208 it was put back against the hillside.

On re-cross examination, Mr. Powers testified:

I meant the entire road clear up to the Sullivan house was changed from one-half to two rods.

DAVE SNYDER, being sworn, testified for defendant as follows: On Direct Examination: I live at Snyderville and farm as a business. I have
 209 lived there 61 years. Also in the livestock business. I am 61 years old. I have known Red Pine and White Pine canyons practically all my life. There is a road leading up White Pine canyon. It

has been there ever since I can remember. It has been used by the public since I have known it for hauling wood, driving stock, hauling logs and mining timbers and cordwood. "Q. And has it been
210 used generally by the people of Snyderville and by employees of mining companies during that time. A. I suppose it has, I couldn't swear to that. very much, there are mining claims in there, I believe." The road through the Sullivan place has been changed a little west, nearer the hill, to afford more meadow for the owners. After this change the road has been used generally just as it had been theretofore. In the logging days the road was wide enough for teams to pass. It was never closed up. Teams going up and down did
211 pass each other. We used to take our livestock right along the roadway, through the Sullivan ranch.

On cross examination, Mr. Snyder testified:
213 There are no homes and no farming up the White Pine Canyon.

There is no mining up the canyon that I know
213 of. No industry of any kind. There is a road up to about one-half mile beyond the Condas place.
214 I was up there last year. I could go with an automobile for half a mile above the Condas place.

There is a sheep coral at the end of the road. I suppose it is Mr. Condas'. And I think a half mile from the house. I didn't take an automobile up. It is on the south side as you go up. I remember when there was sawmills up that canyon. The sawmill was just a little east of the Sullivan place. It was a little northeast of his house at that time. There is a big tall sage brush there. I know the lines of the Sullivan land. I know the shape of his tract. This map correctly shows its shape. I cannot point out on the way something near where the sawmill was. The sawmill used to be about 200 feet from the east line. It was right on the creek bed on the north side.

“Q. If you don't know about the sawmill, how can you tell me so much about the road? A.— I hauled wood on the road when I was a little boy.” The road was west of the sawmill. They hauled the logs from the road to the mill. The road did not go right close to the mill. The road was 200 feet from the mill. The logs were hauled on carts and wagons from the road to the mill. The road they hauled them on was the main canyon road. They carried some of the logs on their shoulders, generally on carts and wagons.

220 The house on the Lake land stood near where

the north gate is now. I don't know when the road was constructed across the Condas land. Twenty-five years ago I hauled wood and logs over the road above the Condas land. All of the land was then under the government.

I don't know whether there has been any
 221 change in the location of the road of White Pine
 in the last 30 years. From just below Mr. Con-
 das' house it has been changed, put west. Not
 on Sullivan's land at all, on Condas'. There has
 been no change on the Sullivan land. I heard Mr.
 Powers say it had been changed slightly on the
 Sullivan land. It might have been moved without
 my knowing anything about it. I know the road
 222 used to go on the lower part of the Sullivan land.
 It doesn't go now. I know it has been moved on
 the Sullivan land during the last ten or fifteen
 years. It has been moved from the lower land to
 give place to meadows, to the foothills. Just at
 the northwest corner below the Sullivan house.
 That removal has continued clear on down to the
 lower part of the field up to the old road. It has
 223 not been moved up by the Sullivan house.

Years ago the road went from the Sullivan
 224 house down to the then Redden house. That was
 in a different direction than it now goes. Part of

of the road from the Sullivan house to the Condas house after Redden house was moved up from the creek to where it now is, has been moved. About one-third of it. The third down by Sullivan's house. I occasionally go in there, sometimes hauling out a little firewood. I have not gone above the Sullivan house for firewood in the later years. Probably not in fifteen years. I was up
 225 to the Condas place and back a year ago with horses. I was up to Redden's with horses and wagon on business with Mr. Redden.
 226 That is the present Condas house. I went through gates to get up there. One gate south of Sullivan's house and one gate north of Sullivan's house—one at a point where you go into the Sullivan ranch, one at the Sullivan house. Six or seven years ago.

R. J. BAILEY, a witness for defendant, on direct examination, testified as follows:

I am 64 years old. I reside at Mill Creek.
 227 Have resided there 64 years. I am a sheep raiser. I have known White Pine canyon 26 or 27 years. When I first became acquainted with it there was a fair trail, fair road for a wagon up that canyon. I don't know the Lake and Redden places. They didn't own it when I went through there. About

24 years ago I first took sheep through there. We went up Trotman's Lane, turned to the left, then During that period we went up that canyon in 228 June of each year, and out in the fall. Went up and down the canyon frequently with a cart—the front wheels of a wagon—for supplies and hay for the sheep. For eight or nine years. Quite a while ago. Along about 18 or 19 years ago. My 229 last trip in there was in 1919.

In driving sheep up the canyon we have one herder take a bunch on lead and start them up the road to drive them, the rest run along behind and the other herder, the camp tender, would stay right behind to keep them out of the brush. You cannot let them spread out because you lose the lambs.

230 “Q.—And was there a well defined road during that period you went up with your sheep? A.—Yes, I could get along.” The road was 2 to 3 rods wide. We were never interfered with. I know other sheep men that trailed sheep up that canyon. Others trailed their sheep up that road. I would not consider this road generally a good canyon road. You couldn't get up to the lake with the wagon.

On cross-examination, R. J. Bailey testified:

At that time Vic Gill lived farthest up the canyon, a little south of Trottmann's lane. There
231 was a little fence on the east side of Vic's place.
In 1919 I come down on horseback. "Q.—Now, the
Sullivan place was taken up before that?" A.—
232 I just rode by. I didn't inquire who owned it.
The boy took the sheep up there. I took my cart
right up to the Western Monitor mine, the head of
Iron canyon.

About five miles. It was a public highway.
Its destination — the Western Monitor mine in
Iron canyon at the head. You can go up that road
if you want to. In 1919 you could go up with a
a cart, not a car. We could have done the same
233 in 1914, 1915, 1916, and 1917. I cannot recall when
we last went up there with a wagon as described.
234 It was earlier than 1910. I haven't been up with
a cart since 1900. I could have gone with a cart
in 1919. I could not have gone with a cart in 1919,
I haven't seen any cart pass along that road since
235 1900. At the time I was up there it was govern-
ment land.

MR. TRACY WRIGHT, a witness for defen-

dant, on direct examination, testified:

I live at Salt Lake City. Lately have been in the sheep business. Since 1913. I have known White Pine canyon road since 1919. We have
 236 taken our sheep over part of it since 1919, also provisions and wagons. It passes through the Sullivan place, and has ever since I have known it. I would call it a good wagon road. I have met lots of people going up and down. I wasn't acquainted with them. I have seen men going on horseback above the Condas ranch. I have seen
 237 automobiles at the Condas ranch, but not above it. Since 1919, I know of only two cases of trailing sheep. I know there has been travel by horses and vehicles the remainder of the year. Will Jordan from Heber City, trailed sheep up there in 1923. Sheep trailing up that canyon, the bulk, I don't think, would spread out over four
 238 rods, it would be governed largely by the brush. They wouldn't spread 4 rods along this road where the brush is thick.

There has never been any obstruction until Mr. Sullivan got up there to travel by horseback and with packs. It is absolutely necessary to have a road to have this road in order to get up White Pine canyon and utilize that country.

On cross examination, Mr. Wright testified:

239 I took my sheep up the Red Pine road. The
road branches at the head of Trotman's Lane,
one going through the meadow, one right on up
Red Pine, and I went to the right. I haven't asked
Mr. Sullivan's permission to cross his land. I first
met him about 1925. He and his wife were walk-
ing down the road. I was not then taking sheep
in. We met before we come to the forks of the
road. We had a conversation. I had some horses
240 with me. (The court here refused to allow the
conversation to be gone into. Exception taken).
I have been going up there since 1913. We have
been using the upper trail that goes over the Sul-
livan land through the brush, for the sheep. I have
used the other for automobile, horses and pack
outfits. That went up by his house and to Con-
das'.

241 There has never been any objection by Mr.
Sullivan. There have been gates. I opened and
closed them. The gate was there before Sullivan
owned it. There was no gate there in 1920. If
the gate was closed, I would close it, if it wasn't
I wouldn't stop to put it up. In 1921, we leased
Mr. Redden's ground that Condas now owns. I
242 remember there was a very hard gate to open.

That was the gate into the Sullivan place. I remember Mr. Lake being on the Sullivan ground.
 "Q.—If there was a gate there and you went through by opening or closing a gate then you recognized you were going through by permission of the owner, didn't you? MR. STEWART: I object to that, conclusion of the witness not proper evidence at all. (Argument). THE COURT: Objection sustained.

MR. SULLIVAN: "We take an exception."

243 Continuing the witness stated: Referring to Sullivan's land, White Pine canyon, "there has always been a gate, I suppose was there, sometimes it was up, sometimes I didn't notice any gate at all."

257 THE COURT: I don't think we are getting anywhere, we have . . . I think that the defendant may have the order permitting him to take his lambs across there. You may have an exception to the ruling of the court. The bond which has heretofore been filed on the part of the defendant may be subject and the defendant will be liable on
 258 the bond by any damages occasioned by the trespass of the sheep, until it is found the roadway be found a public highway.

MR. STEWART: May we have that as a

written order?

THE COURT: You may reduce that to writing.

MR. HATCH: Give us an exception to the ruling of the court.

THE COURT: The court has already entered an exception for you.

DELBERT H. REDDEN, for defendant, testified, on direct examination, as follows:

I live at Park City, I have lived there about 30 years. I have been acquainted with White Pine
258 Canyon since about 1900. Since then there has always been a road leading up White Pine canyon. It took off the main Park City highway at Trotman's ranch, about a mile east of the Sullivan ranch. It leaves the main highway—a lane—goes
259 westerly west to the end of the lane, then turns southwesterly up through Sullivan's place straight on up the canyon on the right hand side up to the Condas ranch. The Trotman Lane is fenced on both sides. McPolin's and Porter's farms on the
260 right, Trotman's and Raymond's on the left. Since my acquaintance with it, this highway, it has been used for hauling logs, timbers and poles, and by stockmen and sheepmen, myself included.

- “Q.—How about the farmers in that locality? A.—All the farmers.” I never knew of much mining operations up and down the canyon. I was at one time interested with Frank Lake in the Sullivan property, 1906 or 1908. Once had possession of it. We were jointly interested for about a year.
- 261 At that time the road through the Sullivan land was practically in the same place it is today, except a few feet on the lower end. At the lower end the road was moved five or eight feet to get more meadowland. Mr. Lake moved it further west along the foot of the hill, at the lower end.
- 262 The public used that the same as it had used the the road before. (This last objected to, overruled and exception saved).

- After disposing of my interest with Lake, I homesteaded the Condas ranch. I first located it in 1912, and lived on and occupied it until 1923.
- 263 I rented it to Pat Sullivan one year, then sold it to Mr. Condas. I improved my homestead, built a cabin 16x20 of logs about 150 feet east of the the present house. “Q.—And how far east of the highway was it passing by there? A.—Fifty feet westerly from the main road, then up the canyon.”
- 264 I got the materials for my cabin right on the ground of that house. I did some fencing. Got

the materials right on the ground. During this time, I used the highway through the Sullivan tract in going back and forth. "Q.--When next did you make improvements; how much did you transport and over what road did you take the equipment, the materials? MR. HATCH: I object to that, duplicitious; calling for several answers, assuming things not in the record, leading. THE COURT: There is nothing leading about it, the question is whether or not; I think he may answer that. MR. HATCH: Exception." Continuing the witness stated: I bought that log house Mr. Condas has now in Park City, off Mrs. Stanley. I tore it down. I hauled it down White Pine canyon, half a mile or so along the bottom of the canyon and cut those logs and built those two barns. All came down the bottom of the canyon, except the log house, that came from Park City, and my milk cellar was all cut right in the canyon. I fetched shingles from Park City. I used
265 the road down White Pine canyon, where it is to-day through Sullivan's place down Trotzman's Lane to the County road. The public usually used that road. (Last moved stricken, denied, exception).
266 During the summer I observed sheepmen using the road all the time. I saw lots, a few traveling over towards Ogden, during the chick-

en season for ten or fifteen years seen at my house nearly every year. I see two men in court that have used that trail. Wright traveled up and down that canyon all the time I lived there. Mr. Hempstead came up and camped at the house with the car and children about 1914. I never saw the road obstructed during that entire period. (The last over objection and exception). I was on the road from day to day. During this time, no one questioned my right or obstructed my use of the road. (Last over objection and exception). In 1921 I got \$500 worth of timber in the right hand fork of White Pine, and hauled them to the Daly Judge mine. That is the most heavy hauling I ever done down that road, then the Sullivan place. I did hauling from time to time up and down the canyon through the Sullivan place prior to that, each year. I hauled firewood to Park City and sold it during the time I was on the ranch. Above the ranch White Pine canyon is used generally for cattle and sheep grazing; mostly sheep and White Pine canyon road is the only way, the only access. (This last over objection and exception). Since I have been up there that canyon has been used by the public and private persons for grazing livestock. (This over objection and exception). In my grazing of the White Pine territory the livestock

was trailed up and down the bottom of the canyon. (This over objection and exception). With reference to the bottom of the canyon the road runs right through the Sullivan and Condas places and down Trotzman Lane to the county road. I last saw the Sullivan ranch yesterday. I observed a fence along its north boundary line. This fence
274 will close the road running up White Pine and also the road up Red Pine Canyons. There is no other way of getting into Red Pine or White Pine canyons other than passing along the road which flanks the one going to Red Pine and the other going to White Pine. This fence obstructs and prevents the public and individuals
275 going up White and Red Pine Canyons. That fence crosses the White Pine Canyon road at the
276 gate. I didn't see if it is across the Red Pine road. I didn't go up there. The road through the Sullivan ranch is about 2 rods wide, wider in places.

On cross examination, Mr. Redden testified:
277 The road is 2 rods wide down at the gate to the Sullivan place. You could go out as far as you wanted to. It isn't 40 rods wide on my theory. I resided at the Condas place from August 1912 to 1918. The first house I built there was out near the creek. Built in fall of 1912. I moved it in

1914 or 1915. Before the house was moved the trail or roadway, on line of travel, whatever it was, went from the Sullivan house or place up to your house, situated near the creek. From the lower end of the Condas field it was a different line of travel from where it now exists. I made the new road myself. I didn't do it all in one year. It was pick and shovel work. I did it after the the house was put there. The original road that went up to my house near the creek is the road I spoke of as White Pine road. The road was changed two or three rods. The old and new house locations are about 125 feet different. The old road went to the original house and the new road goes to the present house. That would be a difference of about 125 feet. At that time there was a traveled wagon road, above my homestead. I made a road. I constructed the new road there. I wouldn't say about 1915. It was after 1912. I cannot say for sure that the old house was moved to the present location earlier than 1914. I could not say, I have no recollection of it. At that time there was a traveled wagon road up White Pine canyon above my homestead, the present Condas place. I made a road above the house. Q—* * * When did there cease to be a wagon road up the canyon above the Condas house? A.—I was just

going to tell you. Q.—All you need do is give the
 282 year. (Objection, Sustained. Exception). I don't
 think there is a wagon road up White Pine Can-
 yon now.

I don't think there is a wagon road up White
 Pine Canyon now. There is a road. I built a road
 282 half a mile above but since Condas bought my
 place, he ran a road higher up and cut a road. I
 don't suppose you could get up with a wagon up
 to 1923, they built a road.

MR. STEWART: You have asked this wit-
 ness whether or not there was a wagon road up
 White Pine canyon, I take it you mean above the
 Condas ranch.

283 MR. SULLIVAN: Well, the witness is asked
 it, I don't think he needs any coaching.

(More argument between counsel as to coach-
 ing.)

Well, in all my time there I never knew of a
 a wagon going up half a mile above my house, not
 the kind, not a wagon, you understand, a four-
 284 wheeled wagon, I know of course * * *

About 1918 or '19 I should say there was a
 wagon road on the right hand side of the canyon

285 about half a mile above Condas house and also an old road in the canyon. "Q.—You mean in the bottom, above the Condas house? A.—All the way up the canyon. Q.—So, if I understand it, you say in 1918 there was a wagon road extending above the Condas house, White Pine Canyon, about half a mile? A.—Above the house." The old road continued up the bottom. To my personal
 286 knoweldge, a wagon road extended above the Condas house up White Pine Canyon clear to the top. It was always there. The old road from the Condas house to the top of White Pine Canyon. It was always there while I lived there. I don't know if it is there now. It extended about five miles above the Condas ranch to the Western Monitor mine. It did when I was last there in 1923.

A man can, at the present time, with reasonable safety, drive a four-wheeled, two-horse wagon, up White Pine Canyon about half a mile above the Condas place. I never knew a time when a man with reasonable safety could so drive such a
 287 wagon half a mile above the Condas place. I built the road myself above the Condas place half a mile. Up to that time, so far as I know, there never was a wagon road capable of being traveled by a four-wheeled wagon that extended above the
 288 Condas place at all. The road was not navigable

289 above the Condas house with a four-wheeled wag-
 on. That half mile of road was maintained until
 1925. I don't know if maintained afterward. I
 understand the common accepted meaning of 'pub-
 lic highway.' I don't know if there is at the pres-
 ent time a public highway above the Condas house
 in White Pine canyon. As I construe the word
 there is a public highway from the Trottmann Lane
 to the Condas house. Two or three rods wide. 12
 or 15 feet wide at its narrowest place. I know of
 291 no factories or settlements up there. Hunters and
 fishers, sheepmen and cattlemen came direct to
 my place and they go to the tops of the mountains,
 sometimes with their fishing tackle, guns, cattle
 and sheep. I would call the canyon to the tops of
 294 mountains public highways. Q.—Would that make
 it a public highway in your estimation? A.—Cer-
 tainly, in a public place. I would tell the court the
 295 Condas place is a public place. That is where
 people stopped it is as far as they could go with
 automobile; not with horses. They could go as far
 as Brighton with sheep, cattle and horses. They
 did. I suppose there was a public thoroughfare
 296 from White Pine Canyon over to Brighton; it was
 used. I want the record to show that there was a
 public thoroughfare from White Pine canyon to

Brighton.

On redirect examination, Mr. Redden testified:

Archibald, Powers, Johnson, all of my neighbors hauled wood, posts, poles out and drove cattle
 297 up and down White Pine canyon during 1898 to 1908, while I lived at Snyderville. We then drove the cattle right up and turned them loose in the canyon, there wasn't a fence in the canyon above Cannon's. At that time it was Orlando Johnson's,
 298 not Cannon's. After I changed the road, I never stopped anybody traveling on it.

On re cross examination Mr. Redden testified:—

Wright Bros., Bailey, Jordan, Murdock and Lindsey—I saw them graze their sheep up that canyon. I could not tell if over all those years. They leased from me. They werent grazing on
 299 my meadows. The canyon was public land, after they got off my land. They were using that for grazing sheep. They fetched them up and took them down and used the mountains for grazing. And used the canyon up and down when they could do it without trespassing on private lands. They paid me for the use of my land, you bet they paid a rental when they moved their sheep from my

land and upon my land. They each paid me a
300 substantial rental each year they brought the
sheep over my land.

On re-direct examination Mr. Redden testified:

They paid just for grazing on my land.

John G. Condas, the defendant, testified on Direct examination:—

301 I am the defendant here, I am a woolgrower.
in the summer I live at Park City. In the winter I
move to Salt Lake. I have lived in Salt Lake
County since 1908. I am acquainted with White
Pine canyon. I first became acquainted with it
in the fall of 1924. I went up in my car to see
Mr. Redden. I drove up to his house. I left
the highway at Trottmans Lane, followed it
straight west. One road goes to Red Pine and one
to White Pine. The White Pine Road was more
driven. I finally located Redden's place. No
one interfered with me going up to Redden's place.
It was a good automobile road up to Redden's
place. I went two or three times that fall, in
the same way. There were no obstructions along
the road. The road was well driven and traveled,
I saw the road the following year. In the spring

303 the water gets in the road and it gets a little wet
in some places, but a good road. In the fall of
1924 I leased Mr. Redden's ranch for 1925. In
1925 I bought the ranch. I occupied the ranch
and used it in 1925, for raising sheep and grow-
ing a little hay. In 1925 I sometimes went up and
down the road two or three times a day, if I had
to go around Thaner Canyon and up, nobody ever
obstructed or told me anything.

I took supplies up to my camps and the Red-
304 den ranch over the same road leads off Trotman's
lane. Other people came up in 1925. The pub-
lic generally have traveled up that road, in 1925.
I have improved the land with fences, built coralls
there for sheep and platform scales, some near
the house and some southeast from it. These
are right along the course of the road as it passes
the Sullivan place up into my place. I have no
other means of getting to and from my ranch
305 than through this White Pine canyon road as it
passes down through Sullivan's ranch. I never
have been interfered with in the use of this high-
way. The first I knew was when served with
certified paper at my house. I wasn't there then.
There was a gate across the highway below Sulli-
van's on the Archibald land. That is the gate

we drove through day before yesterday when we drove into the Sullivan meadows. That gate of planks was put there last spring, but there was a wire gate there, ever since I went up there. That was a full wire gate, had a rider on each side of the post where the gate hooked on; the purpose of that gate Mr. Sullivan had a gate there to keep other stock from going into the hayland and also to keep his own outside. The neighbors had no place to keep their cattle and they turned them on Trottman's lane until they get their crops off the land, then they bring them in again and turn them into the fields. The cattle go every direction around there. This gate was put up to keep them from entering Sullivan's hay land. I had a talk with Mr. Sullivan in 1926 relating to the gate. "Somehow I didn't remember the conversation". "Mr. Sullivan wants to keep that gate locked, temporary for a few days, had no man to watch the cattle, he hands me key, I said alright you give me a key, I can go up and down, what about other people. He said, "I don't care for other people", so next day I go in to Stewart and Alexander's office and they write a letter.

After that the gate wasn't kept locked. I continued to go up and down through there.

In the spring I take my lambs back of Sullivan's house along the dugway, also the sheep;
 308 250 lambs I always take on the road there in front
 of Sullivan's house and also my bucks.

In 1925 I talked with Sullivan; he wanted me to drive my sheep back of his house. I cannot drive my sheep on the road in front so that don't interfere with his hay crop, and after that I drove large bunches of sheep west of his house, but took the small herds and other traffic the main road.

Mr. Sullivan put up the north boundary line fence in May 1928, that is the wire. In September or October he put the posts up. It obstructs
 309 the Red Pine and White Pine roadway. Sullivan at no time said anything about my not having a right to the use of the road or objected to my use of it.

There is no other feasible or practical road to get to my place.

“Q. What width road is necessary in order
 311 to trail the sheep thru there?” A. The wider the better; at least two to four rods. I generally have 2, 3 or 4 men, two on each side, one behind. I string the sheep along the road. The sheep will trail.

On cross examination Mr. Condas testified:—

On taking my ranch the first fence I built
 313 east and west between me and Sullivan, surround-
 ing 50 acres. The roadway leads from that
 fence. There was a gate there. It was a four
 wire fence, a tight wire fence. There was a
 gate there. I am maintaining the gate, and it
 goes across the road, if there is a road, leading
 up White Pine canyon. The gate is usually open.
 If it is necessary I fasten it. I didn't lock the
 gate. I fastened it. If there is a public high-
 314 way there I have a gate, a fence across it. I close
 it by my fence. A gate and a fence was there
 when I bought it, and there was a fence and gate
 at Sullivan's place before we enter. When I
 went up there in my earlier trips if I found it
 closed I left it closed, if I left it closed; if I found it
 open I left it open. I didn't question if Sullivan
 had a right to keep it closed if he wanted to, if I
 found it open I left it open, if shut, I shut it.
 When I found it shut I had in mind that Sullivan
 didn't want some animals to get in and go out,
 and that that was his property and he had that to
 keep the animals out.

I have been in the United States twenty years.
 315 I have traveled all over the western states. In

some cases I expect to find a public highway fenced up and the traveling public required to open and shut gates when they go through; in farmer towns, farmers accomodate one another, there may be a highway, we will put a gate here and keep our stock up one before you and me, then if the the public goes up they open and close it again. I couldn't say as to what the distinctive features of a public and private roadway are with respect to gates.

Q. Well, my question is this, if you have two roadways that you find necessary to travel and in the course of traveling around, one plain
315 open roadway without gates and another narrow road with gates, do you regard them both as public highways, the one without the gates a public highway and the other with gates a private road?

A. It depends on which one, and the way they leads; you see one of the open roads leads out to a place you dont intend to go and you see another road, gate there, you open the gate and go into that road, it is a public highway when anybody goes up either one of those roads whether a gate or not a gate on there.

A private roadway, my understanding is that you had property you own the road leads thru

316 there, you get a gate and the first man that leads up there unless he has dealings with you, how did you get in here, what are you up here for, that is my understanding, private.

Q. What is your idea of public?

A. Going thru, nobody interferes with you, if you farms up there you open and shut it and go there and no one tell you whether you can go or not.

Sullivan had a talk with me and gave me a key to the gate in the fall of 1926. I did not understand he regarded it as a private driveway. I said 'how about the rest of the public?' he said, 'I don't care about them going in and out'. I would expect anyone coming thru my gate to shut
317 it again. The fact that I expect people to shut the gate to a pasture is because I exercise control over the gate and pasture. Because I own the land, but I cannot prevent anybody going thru there. I take it is a public highway. They are welcome to go thru. (The next question relating to his ideas of others bringing stuff into his pasture lot objected to, objection sustained, and exception saved)

I had some trouble with Wrights. Wright was claiming the right to drive sheep over land I

320 leased for my sheep. We had a row, it didn't
amount to much.

325 I don't drive my sheep by way of the Archi-
bald land in the fall.

After Sullivan gave me a key I went and
326 talked with my attorneys I told them to write
my letters and ask him to remove the lock I
don't bother the lock. The gate was open the
next day when I went back. I don't remember
327 where the key is now. I did not instruct my man
on the ranch to tear down the gate. It was per-
haps a few days before I went back. The gate
was locked last spring again.

My coralls and sheds do not shut off what
might otherwise be a trail or road up the canyon.
I have a trail outside of my coralls. When they
come up with sheep they have to go around.

Here the defendant rested.

J. D. Sawyer a witness for plaintiffs testified :

I reside at the Silver King Mine, Park City,
Utah, I vote in Summit County, Utah. I am in
the employ of the Silver Kings. I am acquainted
328 with Mr. Sullivan one of the plantiffs. My work
is engineering. My employment causes me to go

over the upper part of White Pine Canyon. I have been over there approximately thirteen times on horse back and stayed there at the Western Monitor Mine for two days within the last month. I have had occasion to look at the geological surfaces and the high way up White Pine Canyon. I am familiar from personally traveling over the country, with the foot paths and road ways up White Pine Canyon above the Condas ranch. Starting at the Condas ranch the

329 trails and roads are passable up the canyon approximately a thousand feet with a wagon. When I spoke of the ranch I meant where Mr. Condas house in an air line. From that point on up it is impassable at the present time, with a wagon or a two wheeled vehicle without work done on the road until you get to a point approximately four thousand feet up the canyon from the Condas house in an air line. From that point on up it is passable with a wagon now. It was made passable since August 31st by employees of the Silver King Mine. There is some evidence that from

330 the Condas ranch up, there might years ago, have been an old road it is hard to tell. The stream has eroded away where the trail is so at the present time, it is just wide enough for horses to get up.

I have occasion by request, to make a survey
331 of the line of the Sullivan property.

I have since observed that fences have been constructed along the lines of my survey. I have made a map, a plat, showing the general lines of the road ways, streams, paths and etc., of the Sullivan land. (Exhibit "C" shown to witness).

That was prepared by me. It is a print of the original I made. I procured this blue print to be made from that original. (Witness pointing to the map exhibit "C") These parallel lines starting at the northeast corner of the Sullivan ranch running in a southwesterly direction, along this line marked road "A" to the gate at the south side of said line of the Sullivan ranch. Marked number 2, on exhibit "C" approximately shows
333 where the Sullivan home or buildings are situated.

"MR. STEWART: I am not questioning the accuracy of the map".

Continuing the witness testified: There is a road going down from Lot One crossing the land at the Sullivan ranch, this runs southwesterly. It
334 is marked "D". I presume, it is the road to Red Pine Canyon.

Road "B" starts a little west of the northeast

corner of the Sullivan ranch and runs in a south-westerly direction, approaching White Pine road. Part of it is a road and part a trail. It is the one the court walked over. It is at the intersection of road "A". At a point by the Sullivan house, where the road leaves the Sullivan land, for the Condas land. Starting on road "B" at the south portion of the road way it takes up the White Pine road as it is now there is some brush cut. It travels along the side of the hill over a ways. This is nothing more than a trail on the side of the hill. When it gets near the crest of the hill, above the Sullivan ranch, it takes the form of a road, and joins and passes through the northeast corner of the Sullivan ranch. That is the road just back of the Sullivan house on the west and north. Speaking of road "B" as it crosses the Sullivan land, there is a slight grade leading to the crest of the hill. When it gets to a point behind the Sullivan ranch house, north-westerly, it starts down on a slight grade and from that point there is a section that is just a trail, then as it approaches the present White Pine road, there is a slight grade. The brush is cut on that point. The approximate position of the Condas Corrals and ranch house is at that point, opposite the "5" in the northeast corner near the line of

Lot Ten. This road that runs behind the Sullivan ranch around the northeast corner, and back of the Condas ranch, starts in the crest of the ridge upper starts in the corner of the Sullivan field, when it gets to the point of the Condas ranch or just below the Condas ranch, it is approximately one hundred feet high from the road. 337 The northeast corner of section is farming and fairly level land. The land running northeast, from the northeast corner of the Sullivan tract, travels up and down a few low hills that is the land running east, westerly direction. It stops this side of some high mountains. I mean from the west end of the Sullivan ranch.

Starting on the south side of the ranch, at the east corner and running west to the quarter corner, is up a slight hill. The hill is not very high, probably sixty or seventy feet above the level of the creek, it goes along the sidehill, here parallels the Condas ranch to a point where the road up White Pine canyon where the line crosses the fence, from that point on you ascent a hill which is probably one hundred twenty-five feet in elevation above the road and you proceed along that hill until you get to the southwest corner. (Witness still referring to exhibit Road "C" is

not a well defined road. As I went over it, it appeared there was a road at one time, in other places obliterated and the extent of it I cannot say. Exhibit "C" so far as it purports to show roads and streams, section lines and boundary lines, is approximately correct. The map was prepared by me; is practically a copy in the general land office. The survey has nothing to do with the map, except I surveyed Lot 7 and 8 last year. The map is a copy of the map of the general land office with the condition of the purposed road "C" which was added I put in behind the house the approximate location of the Sullivan and the Condas buildings and ranch. The road marked "D" is a duplicate of the road on the map in the

GALLEY NO 34 VIC

U. S. land office. The creeks are as they were in the U. S. land office. I made the survey only for determining the boundaries of the land. I have consulted the county map in the office of the county recorder of Summit County, and have made this conform as near as practical, with that (Exhibit "C" offered in evidence)

On voir dire by Mr. Stewart, the witness testified:

Road "D" does not purport to be the White

Pine road which passes from the Trottman lane up through the Sullivan ranch to the Condas ranch. This road is supposed to be the road leading up to Red Pine creek. This is just a copy of the map I got over in Coalville. Road "B" purports to be the one following along back of the Sullivan ranch until it gets to a point about in there, then it is a trail down to where either
340 Sullivan or Condas started to cut away the brush up to meet it. Road "A" is the present road Sullivan and Condas are using from the Trottman lane to their respective ranches. This is not shown on the map at Coalville. The map in the U. S. land office shows a road taking approximately here at the northeast corner and going directly across about in here. The road as shown on the map of the U. S. land office comes in the northeast corner, where the present road is coming down in a southwest direction, it keeps on the left hand side of the creek down to a point in here where the road is not further marked. It would come down and meet, but where it intersects road "C" I don't know. None of this map was taken from the U. S. Land office. What I quoted from the U. S. Land office I quoted about that road which
341 ran from the northeast corner in a southeasterly direction."

“MR. STEWART: Do I understand your honor, it is only admitted for the purpose of illustrating the testimony of this witness?”

THE COURT: “Yes.”

“THE COURT: I am not going to indicate any limitation, I am not going to pass on your evidence, beyond I have admitted it, that is your record.

MR. STEWART: We take an exception to the ruling of the court for admitting this evidence for any purpose whatsoever on the ground stated”

On cross examination the witness Sawyer testified:—

I am not a graduate engineer of any institution, I have spent a little better than four years in the engineering department of the U. S. Smelting Company, and have been a year and ten months with the Silver King. I made thirteen trips up White Pine canyon this last summer. The Western Monitor Mine is located at the head of White Pine canyon at a place known as Iron Hollow. Going out to the survey camps I passed over this road. These thirteen trips were made supervising some work at the Western Monitor

and supervising some work of two crews of surveyors doing work in White Pine and adjacent canyons. These crews of men did not come up
 346 through White Pine Canyon. None of the supplies. There is no road that could be gotten over at the lower end. They might have walked over it or come over horse back.

“THE COURT: You mean the lower portion about one thousand feet above Condas”?

A. To a point four thousand feet above.”

On one occasion, I left some groceries at Mr. Condas' barn because the wagon couldn't go over the road. I carried some meat over myself. presume the cook and somebody else came down and
 347 carried the rest up on their backs.

I went to the Condas ranch in an automobile. Twice, over the White Pine canyon road, thru the Sullivan tract, with permission. I asked permission. I believe of Mr. Condas' brother. That was the only permission I asked.

On re-direct, the witness testified:

348 Practically all of the provisions were taken from the head of White Pine Canyon down the canyon in a wagon, from the top of the mountain

to a point four thousand feet above the Condas ranch house. That is as far as the wagon could get, and we had to cut a road at that point.

Questioned by the Court the witness testified:

From the Western Monitor down to the point at the head of Iron Mountain there is no road, but it is passable with a wagon from the head of Iron Canyon to a point about 4000 feet above the Condas ranch house. There were portions in the trees where a road had been cut out and the rest of the way they took axes and brush hooks and
 349 they cut their way down the road and took their stuff down this road to the cabin, and from the cabin to the Condas ranch for about 3000 feet is impassable with a wagon. That was done on the 30th of August last summer. Of this year.

Patrick Lake, a witness for the plaintiff, on direct examination, testified as follows:—

I live at Park City. I am a meat cutter at the Star Meat and Grocery. I am nineteen years old. My father's name is Frank Lake. He at one time owned the Sullivan property. He sold to Sullivan. I am familiar with that property. I
 350 spent the summers of 1917, 1918, 1919, 1920 and 1921 on this property. I remember distinctly go-

ing there when I was five years old. 1913. The first gate that was there that I remember was a four bar affair, four bars high, that was at the bottom of the Sullivan property. There continued to be bars or a gate there from 1913 up till we sold it in 1924. The obstruction, gate boards or wire, required opening. Each summer from the time I was five years old I spent from the first of June till the first to the tenth of September upon that place. My parents lived on the place at the time. My father is in the court room. My mother is dead. I have a distinct recollection of bars or a gate there from 1913 on during the summer. The bars were there about three years when a wire gate was put up. Four strands of wire. Passers, as a rule, in going in and out closed the gates when they found them closed, including myself. I remember Patrick Sullivan having the Condas place under lease for the year 1924. Mr. Sullivan cut the brush out where we always refer to as the trail to bring the trail straight down to his present place from the Condas place. In the summer of 1924. The road or trail was very poor for hauling. I remember several occasions where automobiles had to be pulled with horses when they tried to get up

there. In 1924 no one else than Sullivan had occasion to use that trail. In 1924 I know of no hunter up there except myself. I was there one
354 week in 1924. There wasn't any change in the line of the trail at all in 1924. I remember when the house on the Condas place stood out near the creek. I stayed in it one night. I think that was in 1913 the year I was first on the place. I know when the line of road from the Sullivan house to reach the Condas house where it now
355 is was made. About 1915. Mr. Wright went up there and crossed the property in 1918, and 1920. I don't remember any other time. I know about this matter personally. I saw the sheep graze there in 1918 or 1920. I heard a conversation between my father and Mr. Wright who was with
356 the sheep. In 1920. I remember some instances between 1913 to 1920 when permission was solicited from my father by others to pass over this property with their sheep. "Shall I tell first the one when Mr. Wright, one of the Mr. Wrights, I am sure of it, used to travel with the sheep, he used
360 horses and traveled with the sheep, he came to our cabin one day with a load of wool; he also had another man with him, a man named Joe Sherman. He asked if he could store the wool for

the summer. He said 'I have an empty house here, you can store it' to him; then my father asked him if he was carrying the sheep thru and he said 'Yes, but I am not the man who carries the check' bearer. He said 'Can't you give me an order on the store at Park City,' he said 'We aren't trading in Park City, we traded in Salt Lake'." That order was an order for the fee for grazing the sheep across the ground. During the years 1915, even as early as 1913, the bars or gate were kept closed while we were living there. They were kept closed at the suggestion or order of my father. The residence of our family there was limited to the summer time. The snows get pretty deep there in the winter. I only remember of one year when people made their home either at the Sullivan or Condas place. There was no hauling of logs and wood while I was there in the winter season. There may have been in the early days.

On cross examination Mr. Lake testified:

364 I was never there in the winter season. I took several trips down there in the winter time. I never lived there in the winter time. I went to the head of Thayne's canyon once in the winter time. We came down White Pine with skii.

There was none hauling logs there that winter. I went up on the left side once. Those are the only two times. Both the same winter. I think about 1921. We went up Thame's and came
365 down White Pine. We sat on the Condas porch and ate lunch one time. We had no lunch the other time. I have a good memory. My father has always maintained a home in Park City both winter and summer during the last nineteen years. He first moved out on the Sullivan ranch for the summer time in 1917, right after I got out of school, about the first of June. I stayed there that summer until school started. Father moved
366 there in the summer of 1918, and in 1919, 1920 and 1921. I was nine years old in 1917. Father was in the saloon business before he moved to the ranch. I went out with my mother and spent Sunday or a couple of days there. I grubbed brush there in 1917. I first saw sheep going along the roadway thru my father's ranch in the
367 spring of 1917. I was not there in the fall, I was in school. I don't know how many herds came in 1917. Mr. Bailey's herd and a combination herd from Heber City going under the name of Clyde,
368 went up. There were three other ways to get into those hills. I should say the same herds

went through in 1918, I am not positive.. There might have been other herds that I dont know of. I suppose the herders tenders and camp outfits went through at that time. Camp outfits
369 and supplies were hauled thru White Pine Canyon very seldom, because there is another road going up Red Pine canyon where the sheep men could get up more easily and get thru the same hills. The supplies to camps in White Pine canyon were usually taken up Iron Canyon. They get to that road from Snyderville. I have never seen sheep
men hauling supplies up Iron Canyon, I have seen
370 them come down. I didn't follow them. I talked to the herders. I herded sheep half a day in McDonald Basin. I have gone up White Pine Canyon Creek many times, hunting and fishing. I had a gun when I was first on the ranch. When
371 I was nine years old. I first went hunting about 1918. Some hunters came up thru the ranch. Most of them stopped in the lane. I didn't see cars pulled out of the mud by Redden. That was told to me. I have seen them pushed out by man power. I have seen a good many of them pushed out. They usually got stuck before they got to
372 our place. That was in the spring. Fishermen seldom came up there in the fall. In years I can

safely say there has not been more than six loads of automobile fishermen per year come up there.

373 From 1917 till 1921. I have never counted them or kept track of them. There were many cars came up to the Redden place each year at the opening of the hunting season. And so from then on till the close of the hunting season. And

374 those men would hunt up thru the White Pine canyon country. Sometimes they would stay for a day to a week. Mr. Redden either went up there in a buckboard or on horseback, as I recollect it. I remember no hauling by him of hay down. If he did half of it was on the brush and trees when he got to the bottom. The only thing I ever saw him bring out of there was a load of stove wood. I

375 helped to plant and dig potatoes, and put up hay on the ranch. The conversation that my father had with Mr. Wright was in 1918 I believe. I distinctly remember what was said. It might have been in 1919. It wasn't in 1915. It took

376 place in front of our cabin. It was neither of these two people here. I don't know the Mr. Wright's first name. The man was in the court room day before yesterday. He sat in the front row over there. Not Mr. Bailey. I am not sure the man's name was Wright but I think it was. I

377 dont remember how often I was at the ranch in

1918. And that is true of 1915, 1916 and 1917. I
spent the summer there in 1917. I may have
spent a night or two a week at Park City in the
summers of 1918, 1919, 1920 and 1921. I re-
378 member the pair of bars there in 1913. I was at
379 the ranch last Sunday. I went with the purpose
380 of showing Mr. Sullivan around. (Referring to Geo.
381 M. Sullivan of counsel.) There were four bars
They are the first and only bars I remember. I
remember a fence going down across the meadow
practically where the fence is now. At the south
end of the land. Southeast. I remember only
the one fence. At five years of age I let down
two of the bars and had to call my father to let
down the other. That is how I remember they
were there, the first time I went there. We were
in a buggy. I got out to let the bars down as
we were going up. I got out at my own request,
382 I wanted to see if I could do it. I wouldn't have
to carry the heavy poles, we just pushed the bar
back thru the slot. I saw Mr. Redden on the
Condas ranch from 1913 up to 1921 each year. He
383 worked his ranch. In going to and from his
ranch he came down from our premises. Most
of the time he came thru the trail, some times
down the roadway, through the premises. Mr.

Redden followed the road to do what hauling he
 384 did. Mr. Redden moved his house about 1915.
 I saw him changing the road near his house in
 1918. I didn't see him hauling any materials up
 there. I saw him building his house, in 1915. I
 was down there visiting with my father, with my
 mother, at that time. Some Sunday.
 On redirect examination Mr. Lake testified:—

After looking at the map and your calling my
 attention to it I say the bars were at the point Gate
 Number One. The northeast corner. I was
 385 mistaken when I used the word "southeast".
 The bulk of the cars that were parked up there
 during the hunting season were parked in Trott-
 man Lane, where the road turns to the left going
 up. That would be northeast of the from the
 386 present northeast corner of the Sullivan land. I
 said on cross examination there had been no work
 done on the road since 1921? No. Mr. Stewart
 asked me if I had seen any work done on the road,
 1921. I answered 'No). I stated before that
 387 Mr. Sullivan had done some work on the road, but
 I seen him not. Mr. Sullivan told me what he
 was doing, on the farm.

On recross examination Mr. Lake testified:—

I seen the bars, sir. Nobody told me there

388 were bars there in 1913. I seen them. It is
from my conversations with Mr. Polins and Mr.
Workman that I am telling about the bars.

On re direct examination Mr. Lake testified:

“Q. You mean you are testifying about the
bars you saw in 1913 from what this man, those
men, told you, or from what you saw? A. From
389 what I saw.” I have talked with you and Mr.
Polins and Mr. Workman and Mr. Sullivan about
the bars in the early days.

MR. EZRA WORKMAN, a witness for plaintiff,
on direct examination testified:

I reside at Park City. I have lived at Park
City since 1900, prior to that I lived at Snyder-
ville, coming there in 1884. I am at the present
a stationary fireman at the Silver King Mine. I
was born in 1875, the 2nd of May. The family
went to Snyderville in 1884. I am married. My
father and mother are both dead. My father died
390 about 1896. My mother died in the forepart of
September, 1910. In the summer of '87 we lived
up near that gate you are talking about in White
Pine canyon, and on through the summer months
391 until I think about '90. My father once had a
Government entry on the Sullivan land. He

filed it about '86. I am pretty sure. My father's name was Hiram D. Workman. At the time—summertime — we lived there some months my father was in the log, cord-wood business. There
 392 was a barn for the horses and a house where my mother cooked for a few men there that was working for my father. The boarding house ran east and west very close to the line of that fence on the left hand side of the gate we went through the other day. I am not familiar with the map. The boarding house was right at the left of the
 393 gate and ran west and east. The house was on that line where the pointer points and the barn was about two hundred feet above the Raymond ranch. The house on the line and the barn in the neighbor's land. Father had a garden there in about 1888. It was enclosed with a separate pole fence. At that time there was a bar up across the road at the lower end. I couldn't say for what purpose the bar was put there. I re-
 394 member taking and bringing cows thru the bar. The bars did not connect with the garden enclosure.
 395 It had nothing to do with the garden. The brush on each side of the bar was heavy for cattle to have to get through.

We lived in Snyderville from 1884 till 1896 when

my father died. The house stood about five or six hundred feet south of the Power's home now, just across the road. About a mile from the Sullivan ranch. That would be southwest from our
403 house. We had no farm there. My father and mother lived on the Sullivan ranch only during the summer months. From '88 till around about '91 and '92. I am not exact as to the time. That is the only time they lived there. Father operated the year round in that business; but in the winter time he couldn't use the ox teams in the hills, so he usually sent those out on the farm to have wintered. Our barns was down on the lower place for the horses in the winter months. Father did very little work in White Pine canyon, most of his work was out of Red Pine, McDonald Basin.
405 When I was fourteen years old I was hauling timber to the Ontario Mine with four head of horses. I hauled it from the barn through there, the Sullivan Place. I hauled thru the summer months. Father never allowed me to drive the teams through the cold weather, never allowed me to go to the hills. I hauled longer than two summers. I think I hauled up until those mills shut down. If I remember right, they shut down in '95. I never hauled a stick of lumber. I

hauled from the Sullivan ranch to the Ontario Mine as late as 1892. From '88 to '92 we was in White Pine canyon quite a bit. I never did any hauling down White Pine canyon. Father hauled a few timbers down that way. Very few down White Pine canyon. We didn't haul down White Pine Canyon, we went out down Iron Mountain Canyon. I never worked at the saw mills. I can't
 406 say when they ceased to work in White Pine canyon. I would say in after '90. I remember them operating up until 1890, that is the mill was there. There was no lumber work up and down that canyon other than this mill, from 1888 to '91. I would say this mill was about a mile above Sullivans, probably a little farther. There was only one mill up that canyon, that I remember. I would say father's garden there was about two
 407 acres. We took our water out of the creek. The garden was north of the house. More east than west. The land on the north was sage brush at
 408 that time. I couldn't say who owned it. I would say it wasn't farmed at that time. It is owned today, I think by McPolin and Tom Powers, (Porter)

Those bars were there from '88 until about

'90 during the summer months. In those days the road went on the southeast side of the canyon, on the southeast side of the creek, I recollect no sawmill in those days down at Snyderville. There was a sawmill further up the gulch there and that road that then ran on the south side of the creek was used mostly for bringing the lumber down. I am familiar with the course of White Pine canyon, and with the line of the present roadway thru the Sullivan place now. I have been over it. I am not familiar with its use, in late years. The old road on the south side of the creek come right
396 down out of the canyon across through on the southeast side until it got to what was known as William's house, a house and barn there owned by a man named Jim Williams, then the road went northeast to the corner of the Trottmann lane, what you would term the Trottmann lane. The road extended south and east of and parallel with the creek up the canyon up to the foothills where the hills start to get high back in the canyon. Not
397 up to the mill. You asked me how far this road extended. The mill was between the big hills in that canyon. "Q. From the testimony of the witnesses there was a mill, a mill or two up the creek in the early days? A. That is the mill. Q. What I want to know is whether that road be-

side or near the Sullivan ranch ran on the south and east of the creek, whether it continued southeast clear up to the mill or whether it crossed the creek. A. Yes, it did." The road by the creek on the southeast side of the creek was there from approximately 1888 until 1895, to my best recollection. In those days my father hauled cord-wood and timber. I was a sort of a jockey boy working for the outfit. Father had four horse teams and three yoke of oxen. My mother conducted a boarding house for his men, the teamsters that drove the teams and my father. My two older brothers drove team. They are living. Herman at Preston, Idaho, and John at Park City. I had an uncle who lived in the Snyderville country. He got logs out of there, too. I did not work with my UNCLE at any time.

On cross examination Mr. Workman testified:
 I haven't been up White Pine Canyon since 1900 until recently. My knowledge of conditions up there is prior to that.

All those ranches north of the Sullivan place were occupied from 1888 to '91. I don't know when Archibald and Powers lands were taken up. The bars were then down where you enter the thick brush. I think a fence goes close there now.

The bars were just after you make the turn going back up to the Sullivan ranch. I would say less than a quarter mile back from the north boundary line of the Sullivan ranch, somewhere in the Trottmann lane. There was no such thing as the Trottmann lane in my time. I first saw these bars about 1888 to 1890. I don't know who put them there. I have taken cows thru those bars. I distinctly remember driving cattle up from my ranch and thru those bars. I don't remember seeing those bars at any time except in the summer months. I could safely say there were three pole bars.

On redirect examination the witness testified:—

With reference to the garden you go right straight out of the gate to the upper part, straight down that road less than a quarter of a mile, then bars across there. They were about a quarter of a mile from the present gate. With reference to the old road that paralleled the the creeks on the southeast side, I would say it connected with the present road up Trottmann lane just above the Trottmann home where those bars is. At that time that was the main traveled road from those saw mills. That road was at its nearest point to the boarding house about a quarter mile away

with the creek between the boarding house and
413 the road. There were two roads there at that
time one on the northwest side of the creek.

SAMUEL JOSEPH BILLINGS, witness for
plaintiffs, testified on direct examination:

414 I have lived at Park City for 25 years, I am
forty years old. I lived at Snyderville before I
went to Park City. I was between 12 and 14
years old when I came to Snyderville. I have
been familiar with White Pine Canyon for 25 to
27 years. My uncle used to haul logs down thru
those canyons. I helped him. About 1893. At
that time there was a road on the southeast side
of the creek extending up White Pine Canyon to
415 the saw mill. At that time there was what they
called the Trottmann Lane up there that was the
last thing, now there was a trail, no road, what
you would call a road used to have to bring logs
down, take the cattle up and let the bars down,
there was brush there during that time. At that
time there was no road on the north and west of
416 the creek. The trail that led up Red Pine canyon
come down from Snyderville to the lower sawmill.
That is where they brought the logs down I re-
member hauling logs and timber down the can-
417 yon in 1901 to 1903. The bars were there at that

time, just before you make that turn, left hand side below the Sullivan place.

On cross examination the witness testified:—

My testimony is confined wholly to my observation made prior to the time I moved to Park
 418 City. During the two years I lived at Snyder-
 ville I lived with my uncle about two miles, or a
 mile and a half from the Trottman Lane, east and
 across the railroad tracks. I hauled a few logs
 421 before coming to Snyderville.

(At this point the Court signed the restraining order requested by defendant, over the protest
 421 to and argument of counsel for plaintiff). (Excep-
 426 tion taken by plaintiffs.)

(Mr. Sullivan of counsel for plaintiffs served
 427 with a copy of the Restraining order.)

Resuming cross examination of Mr. Billings, he testified:—

I wish to correct my statement in that I lived at Snyderville from 1902 to 1903,—two years. I
 428 rode along with my uncle in hauling logs. That
 is the extent of my work up the canyon. I have
 429 a recollection of the road, and which side of the
 creek it was on. It was a trail. You wouldn't

call it a wagon road. That road does not lead up the canyon today. The only building I remember were down near Trottmann's. I recall
430 none further up the canyon. When I drove up with my uncle we came up past the Sullivan place across the tract on the left hand side of the creek going up, and the creek was on the right hand side. I don't remember how many times I went up, I know I went up several times. I didn't keep track of them I know I have gone up more than five times. I went up in 1902. In January. and later on, in June. Hunting coyotes, or
431 anything that comes along. I have no definite recollection of going up with my uncle in 1903. I have
432 been up there lots. Sometimes I would go up there hunting for a cow. I recall going up for a cow in 1902 distinctly, along in May. The sawmill wasn't
434 running when I went up in 1902. The old mill was up by the Condas' place, I would judge about 100 yards, above and to the left of the Condas' house. We was hauling to the sawmill in Snyderville. The road was on the left hand side of the creek going up. I recall that absolutely. We got on that road at Trottmann's Lane, where the bars were. The bars were just before you make the turn to go into the Sullivan place. We drove to the left of the Sulli-

van place then. We did not cross to the west
 435 side of the creek. Left hand side. There was a
 trail up where the present road now runs. (Objec-
 tion.) The trail on the west side then ran close
 to the creek, not where the present road now runs.
 I went up the left hand side, the creek is on the
 436 right. The only road I was on was the old road.
 I have never been on the present road.

(Defendant requests an order permitting de-
 438 fendant's surveyor to make survey of present
 road without interference.

(Exhibit "D",—Govt. Field Notes of survey
 of east and north lines of Sec. 1; Exhibit "E"—
 439 —Gov't plat of Tp. 2, R. 3 East, S. L. M., offered
 by plaintiff in evidence)

EDWARD H. BURDICK, a witness for
 440 plaintiffs, on direct examination, testified:—

(Map posted by baliff.)

441 (Objection to introduction of Ex. "D".

442 (Ex. "D" received in evidence over objection
 and exception.)

My name is Edward H. Burdick. I reside at
 Salt Lake City. I am a mining engineer and ge-
 ologist. Have been practising such for 8 or

443 9 years. I am acting State Geologist for the State of Utah. I have examined the original field notes from the government office here and the plat of those field notes involving Sec. 1, Tp. 2 So., R. 3 East, within the last five days.

I have also examined the certified copy of each that have been offered in evidence here, Exhibits "D" and "E".

(Here the baliff tacked Exhibit — map — on board). (Ex. "F").

Exhibit "F" is a map prepared by me following the original field notes and official plat of the township showing only the course and distances of the boundary lines, the stream pattern
443 the road and fence lines in the northeast corner of the section. Sec. 1, Tp. 2 S., R. 3 E.

Q. Does Exhibit "F" show anything more than what is shown by the Government plat and the Government field notes, and, if so, indicate what additional you have placed on that map.

A. In giving the distances from the initial corners on survey I have given the distances first in chains, as shown by the field notes, and have followed those distances in chains with its translation into feet in parenthesis. I have also col-

444 ored Lots 7 and 8, of Section 1, with the red shading, and the narrow strip of land in the northeast corner of Lot 1, or the east side of lot 1.

Q. You refer to where I designate with my pointer?

A. Yes, sir; with a brown coloring, and the words 'cultivated land'; I have also placed on the map for convenience in reference, the letter "A" on the road extending north and south thru lots 1 and 8, and the letter "B" on the road extending north and south thru lot 8, in addition I have designated the northermost branch of Snyder creek with the letter 'C' and the middle branch with the letter 'D' and at the bottom of the map I have placed the interpretation of the scale of the map.

Q. Calling your attention to the strip of land as shaded in yellow on the east border of lot 1, east side of lot 1, will you state what the field notes and plat, or either of them or both of them combined, indicate that strip of land to have been at the time the survey was made.

(Objection by defendant, overruled, and exception saved)

445 A. I can perhaps qualify that by saying that

the little line crosses, connect with the fine line on the west border and the south border on the area marker 'cultivated land' is the official indication of the fence line. The field notes going north on the east boundary of section 1, record the intersection of the fence line and its direction east and west and again going west on the north line they record the intersection of the fence line going north and south, and refer to the area as cultivated land within those lines.

Mr. Sullivan: Now the plaintiff offers in evidence as exemplary exhibits, 'D' and 'E', the map and the plat; Exhibit 'F', to be used and considered in conjunction with Exhibits 'D' and 'E'; E and D field notes, original government map, 'f' is enlargement of Section 1, as it appears in that map and is referred to in the field notes and
 446 from that it is not claimed he knows anything about the physical condition of the ground, but it is his reading and interpretation of the field notes and the plat as exemplified by his evidence now and by Exhibit 'F' as an assistance to the court and any counsel that might subsequently want to inform themselves as to any facts gleaned from the government evidence.

MR. STEWART: Mr. Burdick, I under-

stand you didn't go up on the ground and make any observations or surveys, whatever?

A. No sir, none whatever.

447& (Objection made by Mr. Stewart, overruled,
448 and exception.)

(Exhibits received in evidence as offered.)

No cross examination.

GEORGE HENRY STREET, a witness for plaintiff, on direct examination testified as follows:—

I live at Park City. I am 51 years old. I was born in Wyoming; came to Park City soon afterward. I know the lands claimed by the Sullivans is in White Pine canyon. I have lived upon that land. I was about eight years old at the time we moved there and 12 or 13 when I moved away. I was on the land last night. The house in which I lived there stood on the south-
450 east corner of the land possibly 200 feet south of the creek, on the south side of the creek. The house couldn't have been over 10 or 15 feet from the east line, from the southeast corner. I went on the land yesterday and designated as nearly as I could where the house stood, that I lived in. It

stood southwest of the creek. There was a road
451 right in front of the house. On the north side of
the house. On the south side of the creek. Be-
tween the house and the creek. That road ran
right down the creek on the south side. It also
went up the creek. There was no road that I
know of at that time at a point where the new road
is now situated leading from the entrance to the
property up to the Sullivan house. The house that
I lived in as a boy there stood maybe ten or twelve
feet from the corner of the present fence. There
452 was a barn across the road north from the house,
northeast a little bit. I believe the barn would
be below the present fence or the Sullivan land.
As far as I remember that road running on the
south side of the creek was the only road that led
up the creek at that time.

On cross examination the witness testified:

I was born in 1878. I was eight years of age
453 when I lived on the Sullivan land. I haven't
figured my age at that time until the last few days.
I have no way of determining how long I lived
there. There were no fences there in those days.
They were then logging up there. Quite a few
454 loggers going up and down at that time. I re-
member no mills at that time being operated

There was some considerable logging and the farmers went up and down the canyon to get their logs. That was true during the entire period I lived there. There was a log house there. Simon Street lived in it. He was my father. He was hauling logs for the Ontario Mining Company. Father built the cabin. I haven't been up to locate where the cabin stood until last night. Mr. Workman, Mr. Pat Sullivan, went with me. And that is the first time I have attempted to locate the where this house was since I left there. I have particular occasion to remember the conditions that then existed. My mother died there. I remember that. We lived there more than 2 or 3 years. It isn't true that Mr. Workman and Pat Sullivan told me where they thought that the house stood. I took them to it. Mr. Workman did not point out where the house stood. I remember the house was on the south side of the stream. The stream runs about east. The cabin was on the left side of the stream as you go up. There was another cabin up there. It was a little further up, on the north side of the road. There was no cabin on the west side. A lady by the name of Hopeliz lived there. Possibly 250 feet from our cabin. Our house was the upper one, the others were below, scattered along the

canyon, a few on the west side, right side of the stream as you go up. They were all below our cabin. They called that Rag town. Father did nothing else aside from hauling logs for the Ontario Mining Co., during all the time we were up there. We lived there winter and summer. I went only to the southeast corner of the Sullivan tract last night. Nobody lived to the south of the Sullivan tract at that time, on the Trotman lane. I haven't any idea how much land the Sullivan tract covers. Father's cabin was on
460 the Sullivan land about southeast from his present home. The present Sullivan house is about 200 or 300 yards from where our place was. Northwest. The only other families or boys that then lived up there were at Ragtown, across the creek. Ragtown was about 300 yards from
461 my father's house. There were six or seven. The loggers lived there. Some logged up White Pine and some up Red Pine. I paid no attention to how they went up Red Pine. I remember going quite a little ways above father's cabin as a
462 boy. I cannot estimate how far. The road then was on the north side of my father's house, right in front of it, possibly a rod.

On redirect the witness testified:

The road was north of the house and south of the creek. Ragtown was on a different road. I dont think there has been much change in the
463 course of the creek since I was a boy. I looked
for and saw evidence of the old road in the brush.
It is now just marked in the brush; it is aband-
464 oned. It has been abandoned for, I would say, 15
years. I was about 8 years old when I went in
there and about 13 when I left.

On recross examination the witness testified:

I had no occasion to pay attention to the
course or use of the roads. We was there for
465 five years. I have no distinct recollection of the
length of time I was there. I have no way of
fixing that period. I remember we lived there, I re-
466 member where the road went. I remember we
lived there and all about the road. Mr. Workman
and Pat Sullivan said nothing to me about what
they wanted me to say when we went up there last
467 night. Neither of them told me they wanted to show
that there was a road on the east and south side.
They said nothing about that. I first talked with
them 2 or 3 days ago about this matter. Mr. Work-
man told me he testified in this case. He told me
nothing about testifying there was a road on the
east side. I was at home, not at work when he

talked with me. He just wanted me to come
468 down. That is all he said. They asked me to
testify about the road. I didn't tell them what
I would testify. I told them I would come down
as a witness. I didn't tell them I would testify
469 about it. I knew right where the road was. I
didn't know where the Sullivans lived. I didn't
know where the road was with reference to the
Sullivan tract. There was something on the Sul-
livan tract that indicated where the house was. It
was the former cellar we used to have near the
house. At the south-west corner of the house.
There was that an a few rocks that would indicate
where the other house stood about 200 yards up
the canyon. I do mean to tell this court I say
470 there is something up there which indicates where
the old cellar was. I know there is. I took those
boys right to it last night. The old cellar is out-
side of the fence with reference to the south boun-
471 dary line. To the south. About 100 feet south
of the creek. Part of the house was inside of the
472 fence, I don't know but all, but the cellar was just
outside. There was no millsite in the canyon at
that time. The road from Ragtown come up
from Snyderville. I don't know of any road that
went from White Pine into Red Pine. There was

a road from Ragtown that went up into Red Pine.
 473 The farmers traveled it when I was there. The
 people in Snyderville took the road that went up
 Red Pine in getting their wood and logging. That
 was the only road into Red Pine. If anyone
 wanted to get into White Pine they would have to
 go back and take the other road. I don't re-
 member any road going from Ragtown up White
 Pine canyon. In 1890 all of the land south of the
 Sullivan tract was not occupied. Some might
 have been, but not all of it. I know Mr. Archi-
 bald. I don't remember him at that time. All
 474 of the land north of the Sullivan tract is not now
 occupied. I have no recollection of the condition
 of the land north of the Sullivan tract at that time,
 1889—1890. I have no recollection as to whether
 or not there was any road leading from Ragtown
 up White Pine Canyon. All I remember is a road
 475 ran up by my father's house on the south side of
 the creek. (By the Court's question) The stone
 quarry is north of Park City. (Questioned by
 Mr. Sullivan); the witness stated: I will take time
 off, if desired, and show you the point where the
 house stood and the point where the cellar was.

MR. STEWART: If the court please, I would
 like the order I asked for this morning made, so

we may have this description for the court correct.

Mr. Sullivan: Will you state just what you want that for, do you want to amend the complaint.

MR. STEWART: I want that description of that road so the court, when he enters, this decree, will have an accurate description of the roadway.

476 MR. SULLIVAN: We object at this time counsel in pushing into this trial, they have had a year, or nearly a year to get this suite ready for trial—my recollection is that the counterclaim was demurred to for being insufficient, and that the demurrer was overruled.—

(Continued comment between court and counsel.)

479 (Offer to furnish surveyor for surveying road withdrawn by plaintiff)

(Discussion.)

MR. STEWART: I want this survey so we may have definite description of the roadway by
481 metes and bounds.

(Discussion)

THE COURT:— I take it that counsel isn't consenting the court can take evidence after the

close of the case by considering a survey; that would be entirely improper and it would require an affirmative agreement on the part of the plaintiff. I think the order may be,—That the defendant have the right to complete that survey.

(Discussion)

DAN CLARK, a witness for plaintiff, on direct examination, testified*

484 I am 22 years old. I have never been on the Sullivan property except on surveys. I last was there for survey this morning. With Mr. Richard Sawyer, who testified here before. I am now familiar with the line of the road as it now exists at the Sullivan and Condas property, Northeast corner and extends in a southwesterly direction up as far as the Sullivan house. I am
485 familiar with the location of White Pine creek in White Pine canyon. Road 'A' on Exhibit 'C' is the present commonly traveled roadway from the northeast corner of the Sullivan place to a point up to the Sullivan house. I, with Mr. Sawyer, made measurements between Road "A" and the creek. The creek coming down the canyon bears northeast. Exhibit
486 "G" was prepared by me. It isn't drawn to scale. It was made from measurements made on the

ground today. Starting from the gate which enters right in the corner of the field we measured from the center of the road to a point in the center of the creek, due south along the east wing of the fence. The distance is 766 feet. That is from the gate straight south to the creek. We then measured from the gate to a point 500 feet out, where we established a point and turned at right angles. We measured from the center of the road again to the gate out 500 feet due south. Then we went
 487 west, at a right angle. (Figure 1 on the exhibit "G" shown as middle of road at gate. Figure 2 thereon shown as point 500 feet out.) From Figure 2 to center of stream is 266 feet, south. From 2 we ran west, 200 feet. Established another station (marked 3). (Station 5, stream directly south, established). From 4 to 5 is 477 feet. We
 488 ran west from 3 two hundred feet, to station 6 (marked). From 6 to 7 is 16 feet. (Station 8, south of 6 marked. From 6 to 8 is 400 feet. From 7 to
 489 8 is 416 feet.

THE COURT: I think you have made a mistake. I understand from station 6 to 8, four hundred feet.

A. Yes.

Station 7 is in the center of the road design-

ated on map "C," Exhibit 'C,' as road "A." Station 6 is 400 feet directly west of the east line of the Sullivan property. The distance between the stream and the center of the road, north of station six is 416 feet. Station 9 (marked) is 150 feet south of Station 6. From 9 we drive west 200 feet, to point 10, (point 10 marked). From 10 to the center of the stream (11, 12) we have gone 365
 490 feet Ten to eleven is 54 feet, and then to center of stream, making a total of 419 feet. From 10 directly west to the center of the road, 9, is 150 feet. (Designated point 13.) Now from the center of the road at point "A" to 13, directly south to (of, in tr.) the center of the stream is 316 feet.
 491 Point 13 is 45 feet from the Sullivan house.

(MR. SULLIVAN: The purpose of this is to show—by these figures that the roadway claimed as a highway is all the way from 300 to 600 feet
 492 from where the government map shows the highway to have been. We want later to offer this map in evidence.)

MR. CLARK, on cross-examination, testified:

In making this map I started at the middle of the gate on the north end of the Sullivan property. We took the center of the gate as the center of the

road. These measurements were made to determine the distance which this road, as it now exists, is from the stream known as White Pine canyon. And these measurements show the distances at various points along the road from the stream, Road "A". Each measurement is made directly
 493 south of the road. We used a compass. We made these measurements at 5 different points along the road. Point 2 is 500 feet from the road, south.
 495 Stations 1, 4, 7 and 11 are on the road. And 13. Point 1 is 766 feet from the creek. Point 4 is 477 feet from the creek. We haven't the distance
 496 from 1 to 4.

497 "MR. SULLIVAN: Is that the hypotenuse of two sides of triangles?"

"A. That is what we ran it for."

MR. STEWART, again questioning:

I haven't the distance between 4 and 7. The distance from point 7 to the creek is 419 feet. The distance from point 7 to the creek is 419 feet. From point 13 to the creek is 360 feet. That is
 498 the shortest distance. The road meandered all the way up from the gate to the south end of the Sul-
 499 livan tract. We did not select point 4 or point 7 because they were farther from the creek than

other points. We were on the ground about two hours and fifteen minutes this morning.

(Map: Exhibit "G" offered in evidence; objected to; discussion).

Question by the Court, the witness testified:

500 The lines from the road to the creek were run due north and south.

Again questioned by Mr. Sullivan, the witness testified:

501 My line ran exactly as my map indicated and as I testified on direct examination.

(Map—Ex. "G", again offered).

Witness, again questioned by Mr. Stewart, testified:

I can't make it clearer, we ran lines out, after going out 500 feet, set up measurements every 200
502 feet. I have worked along engineering lines. I just helped Mr. Sawyer. The map was prepared
503 by myself.

(Mr. Stewart objects again to the offer of Exhibit "G").

503 to 506 (Discussion).

(Exhibit "G" not received by the court, and

exception saved).

JOHN RILEY LAKE, a witness for plaintiffs, on direct examination, testified:

I am a brother of Patrick Lake. I am 29
 year old. A miner. Employed by Ontario Silver.
 507 I am acquainted with White Pine Canyon. I once
 lived there. The first time I set foot on the place
 I was 12 years old. I don't know how old I was
 when I moved off. About 19 years old. The fam-
 ily then was constituted of my father, my mother,
 my brother, Pat, and myself. I was on the proper-
 508 ty for a short time yesterday. The house stood
 possibly 500 feet below where it now stands when
 I first went there. It was moved from one spot to
 another while I lived there. When I came away,
 it was situated substantially where it now stands.
 509 We moved there in 1911 and moved away in 1918
 or 1919. My father owned the land at that time.
 We just lived there in the summer time. My
 time was occupied in plowing, cutting brush, build-
 ing barns, fixing fences. I assisted in moving the
 house from where stood in the meadows to where
 510 it now stands. As near as I can judge that was
 about 1916.

Q. 1916; now, have you any memory as to
 the change, if any, in the line of road that was

made when this new house was by the private road?

MR. STEWART: I object to this, this witness hasn't testified to any private road, the question assumes there was a private road, leading, suggesting and it assumes.

(Objection sustained; Exception saved).

The witness, continuing, testified:

There was no road above the old house. The house we tore down, I mean. We tore the old house down about 1916. I know the present method
511 of reaching the house, that is, the present road as it now goes up to the house. That road was not as established road at the time or prior to the time we built our new house in 1916.

Q. My question is now,—Was there another road over the line of the road now leads to the present house?

A. There was no road.

512 There were bars near the northeast corner of of the property when I was there, when I went there. In the same place as today. We kept them closed during the summer time. The bars were always up, to my knowledge, when I was there. We

were using the land to raise spuds and hay.
 513 Stock ran at large back in the hills. There was no travel during those years over the road leading to our house except that that went and came to our house.

On Cross Examination, Mr. Lake testified:

Q. There was traffic over that road during the entire period that you live there, wasn't there?

A. Inndeed not, sir.

Q. There wasn't?

A. Indeed not, sir.

There were a few hunters and horsemen up there every year. I wasn't there during the winter time. Livestock was not taken up White Pine canyon during the time I lived there. There was stock in White Pine Canyon. I didn't ever see a man going up there with a saddle or pack while I lived there.

I didn't see any teams go up there except our own. I wasn't looking for them. I paid no attention to who went up that road or who didn't.
 515 I kept no tract of the extent to which that road was used. I didn't see any sheep herders trailing back and forth up that canyon. I saw hunters and

516 horsemen. I know Dell Redden. I cannot tell
you when he moved up to the Condas place. I know
he was there, during the time I lived on the ranch.
Dell Redden drove back and forth along that road-
way without permission. Very few people went up
to see Dell Redden. I say "with our permission"
because it was our property. That is the only rea-
517 son that I say that. Nobody told me to say that. I
never saw automobiles go up to Dell Redden's
while I was down there. I mean to say I lived on
that ranch from 1911 to 1917. I was there every
summer except 1913. I was there only about six
weeks in 1917. I believe longer than six weeks.
518 I was up and down in 1918. I didn't live there
permanently. In 1919 I was not there all sum-
mer. In 1911 and 1912 I spent most of the sum-
mers on the ranch. I wasn't on the ranch in 1913.
I wasn't there in 1914. I lived there pretty stead-
ily in 1915. I was away most of the summer of
1914. From 1914 up to the time father moved
519 away from the place, I was there for three or four
weeks. "I would stay down there three or four
weeks, go back and stay two or three days, and
come back three or four weeks." I don't know Mr.
Hempstead. I didn't see any automobiles going
down or up to Redden's place in 1914 or 1915. I
believe I would say they didn't go, because they

cannot get up there. My brother, Pat, told me
520 that Mr. Hempstead tried and was pulled up with
a team of horses. He told me 3 or 4 days ago. I
found out that I was to testify here day before yes-
terday. I didn't see a camp wagon up there while
I was there. I saw horses. I didn't see pack
horses. I didn't see men pack up their supplies. I
paid attention as to who went up and down that
521 canyon when I was there, certainly. I do not wish
to change what I told Mr. Sullivan, that there
wasn't anyone that went up past my father's
house, I still say that I saw no one, except horse-
men, travel up that road past my father's house
while I was on the ranch. It wasn't a very small
portion of the time that I was there. I helped Mr.
Redden build a house on his place by my father's
place. I don't know he hauled his supplies up that
road by my father's house. Very few people went
up there. I don't know who they were, hunters
521½ and horsemen went up. I saw men go back and
forth on horses whenever they wanted to. Later,
in 1917 and 1918, I saw teams go up to Redden's
place.

Q. I have the record here that shows your
father didn't purchase the place until after 1911;
522 do you still say you were there in 1911?

A. Well, I made an awful big mistake. It was in the vicinity of 1911. I do not know.

523 I do know when I quit living there. I remember going to work, 1918. I was on there a few days in 1918. I couldn't tell if a month. I was work- at the Judge Smelter at the time. I would go up there every change day. I wasn't there in 1917. I still mean to say there were bars there across the road, the same place as now. One pair as you entered the field. When I went there we put the bars, gate, up after we were there. Shortly after the first summer. I couldn't say if the next summer. I made some fence there myself in 1915, 1914, sir. Where the cabin is now over across the
524 ditch east. Probably 500 feet long. There was a line fence there in 1915, on the southeast. I mean by the bars at the gate that divided our place from the ranch below it. The ranch of H. J. Cannons.
525 I don't know when that fence was put up. Before father got there, I think. I know there was bars there. I don't know what people did with their cattle, as to turning them up Trottman's Lane in the spring. I simply assume that the bars were
526 there to keep cattle from going in and out of father's place. I am sure father got his logs for the house from the old house and from Red Pine canyon. I remember that in changing the road,

father hugged the brush around the meadow. Far-
ther to the west, so as to save the meadow. The
527 road was changed before the new house was built.
The old house stood down there in the meadow. I
remember a road or trail, you couldn't call it a
road, leading up to Mr. Redden's place, and above
528 the old house. There wasn't any other road in that
canyon, but lots worse getting in there.

There wasn't any road there from Red Pine
to White Pine that I know of. I understand that
refers to the time I was up there for a couple of
529 weeks in 1920, working for my father.

On re-direct Examination, the witness Lake
testified:

The fences and gate were about the same as
they are now in the spring of 1920. The gate was
then there. I do not know anything about the road
that arose going across into White Pine from Red
Pine canyon. No public officials helped in chang-
ing the road from the meadow to the hill side. No
public money was ever used on the road to my
knowledge.

On Re-cross Examination, Mr. Lake further
testified:

I have a brother-in-law named Giles. He

530 worked the ranch quite a while. I don't know how
long. Quite a long time. I lived with him a little.
I can't say exactly how long. I was there dur-
531 ing haying time with my brother-in-law, before
I went to work for the mining company. My recol-
532 lection is not very good on those years so far back
on that time.

MR. JOHN O'HAGAN, a witness for plain-
tiffs, on Direct Examination, testified as follows:

533 I live at Park City. I am a miner. Work
for the Three King Mining Co. In 1924 I helped
build the road with Pat Sullivan and a
couple more along the way of the road
as you get to the gateway, cut brush and
leveled up the road. At the time we commenced
work it was kind of a small trail, all grown over
with brush. Pat Sullivan employed me. I dug
534 out one side. Before that the road was not in
condition for a wagon to go up and down. This
work was done on the right hand side as you go up
from the gateway. We only worked the road to
the Condas land, not past the Condas gate. In
1924 Pat Sullivan was in possession and control of
the Sullivan land. We did not have teams; shovels
picks and axes were all we used.

On cross examination, Mr. O'Hagen testified:

535 I am not related to Pat Sullivan at all. I went

to work for Sullivan in August and worked about three weeks, in 1924. That is the only time I worked for him. I have been on the ranch several times. We cleared the road; cut branches. At that time there was a house on the Condas land.
536 Also barns. I never saw anyone but the employees of Pat Sullivan use the road up to Condas' place. I do not know if Pat hauled hay to Park City and
537 sold it. We moved the road a little further west, to give hay land to the east. I spent pretty near the whole three weeks on the road. Three men helped me on the road. They worked for the whole
538 three weeks. I never measured how far west we moved the road. I didn't pay any attention to the roads there. It was only a little trail through. I
539 don't know how wide. I was away from Park City about five years ago.

MR. D. B. HEMPSTEAD, called for plaintiff, on Direct Examination, testified:

540 I am an attorney for the defendant, Condas, and have been since the counter-claim was filed. I don't know whether any public funds have ever been spent on this road across the Sullivan property. I don't know whether or not there has ever been any acceptance by the County Commissioners or any records made by the County Commission-

ers showing this to be a public road.

On Cross Examination, Mr. Hempstead testified:

541 I have received information to the effect that people who used this road, volunteered their labor to repair this road and keep it in condition for traffic as early as 1890.

(The foregoing moved stricken by plaintiff).

(Motion to strike resisted. Discussion.)

542 (Motion to strike granted).

Here plaintiff offered in evidence Exhibit 'H', being deed from Frank Lake and wife to plaintiffs for the Sullivan ranch. The same was received.

543 WILLIAM ARCHIBALD, a witness for defendant, here testified on direct examination, as follows:

544 I heard the testimony of Mr. Street this morning as to a road on the left hand side of the creek as you go up the canyon. I referred to that road in my testimony as a private road. There was some sort of road going there in the early days. My reasons for stating that to be a private road are: On Trotzman's lane, the fence was up to with-

in a quarter of a mile of the line on Section line and James A. Williams owned that land and he drove oxen and he went over there into Big Hollow with those cattle and it was used at that time, particularly Big Hollow for grazing stock and working cattle, and anybody could go in there and use that
545 as a public road.

(That portion of the answer 'anybody could go in there and use that as a public road' moved stricken as a conclusion. Denied. Exception).

Williams made that road for his own purposes. You had to ask his permission.

Q. And you were saying anyone could use it without his permission?

A. Yes, sir.

Q. Is that the reason you called it a private road?

A. That is the reason I called it a private road.

Q. Did he have it fenced?

546 A. You had to go through gates to get into his place, a gate on the south side to get out.

Q. Two gates on his premises to get onto this

road?

A. Yes.

Q. And that is the reason you called it a private road?

A. Yes, sir.

There was not more than one road on the south side of the stream going up the canyon. There was a trail for people with stock at the West end of fence a quarter of a mile above there and getting over to Big Hollow. He would go in there with wagons. There was a road up that hollow. People were in the wood business. He went up that hollow himself. Gibson sawmill was located where Sullivan's hay meadow now is, that is, on a portion of it. While the saw mill was operating there, I went up there and bought cord-wood. The place that Mr. Street called Rag town was called Drag town. It was located maybe 150 feet South of Sullivan's line fence. After the mill left there, it was used by quite a number of people that had little cabins around it that were in the cord wood business. I bought cord wood and hauled it from there to the Ontario and Marsac mills. In hauling this wood I came right along the road from
547 Snyderville, where it goes through the gate on my

premises just this side of Mr. Sullivan's line, that was the saw mill right in there.

Q. You mean by that, the present road?

A. The present road, no I will modify that; I want to be square, that road has been changed to the West a little West, this side of Mr. Sullivan's house, down below the gate.

MR. SULLIVAN: State how far.

A. Well, from his line fence up to his house.

Q. How many feet has it been changed to the West?

A. Well, in one place, maybe ten or fifteen feet, and from that on it ran pretty close to the hillside, where the road is already located.

But from his gate down to the highway, it is practically the same as it is now. I bought wood
548 and hauled it to Park City as late as '90 or '91.
I hauled wood for fifteen years from that point
549 out to other points. No one ever objected to
my use of this road.

MR. SULLIVAN: Which road are you referring to now?

MR. STEWART: The road where he hauled

the cord wood from Drag town to Park City main highway?

A. No., sir; it was public lands there and unsurveyed.

The road was used by the public generally in addition to myself. John Knowlton, Holfeltz, Samuel Hair and his family, a fellow named Owl and brother's named McCurdeys, the McDonald brothers, and others whom I now cannot recollect—got timber at what they call Drag town, the timber being brought out of White Pine and Red Pine. There were enough people at Dragtown that they sometimes would have a party and the people from Snyderville would drive up and dance there. Mr. Street's father used to play the violin there. Everyone that wanted timber used the road. The residents of Snyderville used it. They used it steadily from '73 until the country got to be privately owned. Everybody that had any business up there of any kind used that road. Before the road was changed in the Sullivan field it would get bad in the Spring of the year. Everybody that was interested in the lumber business, wood business, would get together and fix the road up, sometimes there would be thirty men, choppers and haulers. I did not work on the road

550

myself, but I paid men to do it. That would be
 551 be done in the Spring time from '76 to 1893. After
 that we had a saw mill at Snyderville and we
 used to have to do work on that road to get
 timber down.

On Cross-examination, Mr. Archibald testi-
 fied:

Drag town with reference to the Sullivan land
 was not East. Mr. Street was mistaken. (Refer-
 ring to the road that approaches section 1, on the
 North, about half-way from the East to the West
 section 1, on the government map, and ask if that
 was there, the witness said): "The government
 plat is wrong, at that time there wasn't any road
 there." The road that lead from Snyderville up
 552 to Dragtown went clear up the canyon. The Wil-
 liams place would be in section 6, with in a quar-
 553 ter of a mile.

MR. STEWART: Can't you describe it with
 reference to the South boundary line?

A. The fence wasn't about clear to the line
 at that time, but it got there shortly afterwards.

Williams claimed that road as a private road,
 both he and Cannons had a fence across it. Wil-
 liams at that time, had squated on Government

553 land. Williams did not make proof on it. Simon
Street lived over to the south of Drag town, across
the creek.

554 Q. Mr. Street, who testified this morning,
testified that the road extended up the canyon be-
554 tween his father's house and the creek, as far as
you know, that is correct, is it not?

555 A. That trail, but those people drove their
cattle they used that to go to their cabins.

Q. He also told about a woman that lived
farther up, between the creek and the road, do
you remember her name?

A. No, I don't.

Q. Hofeltz?

A. Oh, yes; John Hofeltz.

I remember he lived up there just South of
Drag town, south of the creek. They all used this
Drag town ground to pile wood on. I don't know
of the road running pretty well up through sec-
tion 1, as shown by the government survey. And
I tell you that was Willaims' private road to get
his cattle up there. Mr. Sullivan's corner is just
below section 1, and in section 6. The evidences
of that old road are still visible on the ground. I

556 still say that is a private road. I call that a private road, because Williams had it fenced up and bars across it and nobody traveled it except himself. The other road was a public road because it was the public traveled road. Mr. Cannon used the Williams road eight or ten years ago.

On Re-direct Examination, Mr. Archibald testified:

557 Mr. Cannon used the road for driving dairy stock "instead of going up that driveway, going up that road, the house was located on the South side of the creek, on his own land, he just drove them across Southwest gate from the meadow up along this trail." Raymond owns it now and Johnson before him, and Snyder before him and Williams before Snyder. It was fenced in '88 and has been fenced ever since.

On Re-cross Examination, Mr. Archibald testified:

Mr. Snyder squated on the land directly east of the Sullivan land in section 6 and obtained title to it in about 1891.

Q. And because of Mr. Williams, when he squated on it, you claim it a private road?

A. A squater's rights are good.

Q. Well, it ceased to be a private road when Snyder took title to it in 1890, you say that leads up there, that is the road you call private road?

A. Yes, that is the road I call private road.
558 That is road "B" on the government map

MR. GEORGE HENRY STREET being recalled, on direct examination, testified:

I was in the court room when Mr. Archibald testified yesterday. I heard him testify that the old road leading up the canyon on the south of the creek belongs to Williams and was a private road. The facts are, there were no bars there. The road went on up the canyon past the saw mill.
559 I and my father used that road coming and going. Hofeltz used it, the people below used it. My father was a squater, it was government land. Hofeltz and Williams were squaters.

560 On Cross-examination, Mr. Stree, testified:

I am testifying to the period when I was about eight years old to thirteen—1888 to 1891. My
561 father got no permission, it was nothing but government ground. I don't know whether my father
562 got permission to go over that road or not. Father

took his timber farther down the canyon than Drag town. He hauled it on the South side of the
 563 creek. I went with my father on the wagon to Park City lots of times. There were no bars in that entire locality. It was open country. People would go where they wanted, where they pleased. Williams lived on the South side of the creek below and East of our house. He had a house and barn and work horses. He did not claim the land at that time. I don't know whether he claimed it at
 564 that time or not. My father had about eight teams, I don't remember Williams living on the south side of the creek. I haven't thought out those conditions from 1891 till I was called the other day.
 565

MR. PATRICK SULLIVAN, one of the plaintiffs on Direct Examination testified:

566 I first saw my property in 1922, in August. There were three people with me. My wife and a man named Sullivan. Sullivan is now dead. No one was there to point out the Lake land. It took me quite a while to find it. Lake had told me
 567 there was a cabin there. The cabin was in the same place as it is now. The road then as it led into my property, was down below the alfalfa
 568 patch. There was a gate where the road entered my property in August 1922, a wire gate. It was

locked when we went there. I didn't go in through the gate, I went through Mr. Workman's ground.

569 I next saw the property about a week afterward. Mr. Lake went with me at the time. He showed me the land, he showed me the lines (this last over Mr. Stewart's objection and exception).

Q. Now, I am willing to assume what Mr. Lake said to you, with reference to the lines of the property and as to the roadway?

MR. STEWART: I object, incompetent, hearsay.

THE COURT: Objection sustained.

MR. SULLIVAN: Exception. Plaintiff offers to prove by this witness at this time, that at the time, to-wit; about the month of August 1922, his predecessor, Mr. Lake, outlined to him the location lines of this property and told him in substance, this was a private roadway.

MR. STEWART: To which we object on the ground of hearsay, and not competent.

THE COURT: Objection sustained.

MR. SULLIVAN: Exception.

570 I next saw the property about a week later.

Mr. Lake and I made a bargain on the ground following his description of the road and the lines. I rented his property for the year 1922. I again rented it for 1923. I was trying to buy it in 1924.

571 I used it in 1922 for grazing the cattle and horses remained in there about three months in 1922. I

572 saw them every day. The gate was closed all that time. In 1923, I moved my stock on it about May or June—ten or twelve cattle and some horses. I was there every day in 1923. I have milked cows there and had a man in charge of them. I took the milk to Park City. I used the road from the gateway to the house in 1923. The gate was kept closed all the time. I was not bothered with trespassers. I took my cattle out when snow

573 started to fly. I bargained for the purchase of the property in 1924. (At this point it was attempted to show, what if any conversation was had by the witness with Mr. Lake respecting the public claiming a roadway over the property. Objected to. Objection sustained. Exception). After getting

574 the deed in September 1924, we started to clean up the brush, used dynamite to tear out the roots of big trees. We changed the road about August 1924. Mr. Lake and I had been talking about the

575 purchase of this property for quite a while, from

576 the time I first leased it. At that time the road

from the gate to the alfalfa patch, was a way
 over the field, but pretty near the same place
 it is now. I moved the road from the alfalfa patch
 down to the lower gate toward the hillside. I
 moved it ten or fifteen feet—about a third of the
 road. That was down to September, 1924.
 In 1925, May or June, as soon as the melting snow
 577 would permit, I moved the cattle, sheep, chickens,
 and a little of everything there, and had a man
 there all the time. The cows were milked every
 day. I had from nine to fifteen cattle; twenty-
 five or thirty hogs; 100 to 200 chickens, geese,
 ducks and rabbits. I increased the meadow land
 578 by grubbing out trees in 1925. There were about
 15 acres of meadow land in 1922. I kept my gates
 closed during the summer of 1925. Nobody both-
 ered me, nobody came to me in 1925. No one
 579 wanted to go over land. In 1924 I had the land now
 occupied by Mr. Condas. I fixed that road from
 580 that house of mine up to the Condas house. There
 was an old trail, I widened it out, dug the bank
 down. Wagons could go up. The road was fixed
 from my house to the Condas house in 1924, from
 my house to Mr. Condas' gate, 500 or 700 feet, the
 whole way. We moved it up the hill there. Three
 581 men were with me in making that road passable—
 Mr. O'Hagen, Mr. Jennings, and Denny Sullivan.

Patrick Lake did not help me. I had a man on the place all the time in 1926, and kept my stock there the year round. The gate was kept closed all the time. There was an interruption in 1926. Mr. Condas came in in 1925 and 1926. In 1925, he interrupted me. I went out one morning, he had the whole band right behind that house, the whole band right up to the house, I went right up to the house and told him to get his sheep out. That was around the 15th of June. Mr. Condas said he would do it. The gate was closed at that time. The sheep got in from Red Pine canyon on the North. Mr. Condas didn't say anything to me about a right to travel over my place. He had not been driving his vehicles up and down the private road at that time. He had got to his land at that time, way back of the cabin way, White
582 Pine canyon. He went through my property in 1925, not up the road, the other way. He came in from Red Pine canyon. That is the only conversation I had with Condas in 1925. I wasn't there when John came through with his sheep in 1926. My man and my wife were there. I went to the ranch every day in 1926. Sheep were not
583 brought through the lower gate in 1926 or 1925, either. Mr. Condas came in in the spring of 1925. In 1927, he came in again with his sheep from Red

Pine canyon on the North. In 1927, he did not go up and down through my place with his vehicles, 584 he went back of the cabin, there was no fence there at that time, in that country. In 1927, the 25th of August, my man comes to me at the mine; I was in bed. I got up about five or six o'clock in the morning. Mr. Condas was going through with a 585 band of sheep. I asked Mr. Condas who gave him permission. He told me he would take them. There was three or four herders there and they held onto me. This was on the hills back of the cabin. I stepped over to Mr. Condas. He had three or four men there who pulled guns on me, they were going to shoot me. He went through with the sheep. On the 30th of August, he came down through my meadow with another band of sheep. And I then went to Mr. Hatch and started suit. 586 (At this point plaintiff offered to prove the private roadway above the Sullivan house and the fouling of culinary water by the sheep of Mr. Con- 587 das. (Objected to; Objected sustained, exception saved).

On Cross-examination, Mr. Sullivan testified:
 I was not working in the mines when I leased the ranch in 1922. Up to that time I worked in 588 the Alliance tunnel. I leased the ranch after the

hay was cut in August, for the purpose of keeping
stock in there that fall. I didn't live there in 1922
589 at all, but I went there every day. I didn't work
in the Alliance mine in August, September, Octob-
er or November 1922. I wasn't working when I
590 leased the ranch, I know that. I built fences there
in 1922. The fence on the lower end was pretty
nearly all broke down and so was the North line in
1922. There was a fence there, but it would not
keep cattle in, so I fixed it up. The gate was locked
in 1922. When I went there. I got a key from Mr.
591 Lake. When I brought the cattle in I didn't cross
the creek at all. I took my cattle in on the east
side of the creek, on the right hand side of the
592 canyon. A fellow by the name of Tim Holland
helped me. I went through Mr. Raymond's ground
in 1922. I did the same in 1924. I was stopped in
1925. I got a permit from Mr. Workman to go
593 through in 1925. From 1922 till 1925 I drove all
my cattle up through Mr. Raymond's land. I drove
594 them on the right hand side of the creek through
that field. I entered at the left hand side of the
gate, about the center of that field. About 200
feet from the gate, I got into the Raymond field,
where the wood crosses that creek down Trott-
596 man's Lane. There was a road from the gate at
that time, but nobody traveled it. I couldn't bring

598 my automobile up. I hauled from my house down
from the Raymonds field 1922 to 1925. That was
the only road I used to 1925. The other road was
locked up above. I claim that the gate I found
locked was locked all the time 1922 to 1925. I know
599 Dell Redden. He went down there one time
through the center of my field. There was only
one time he came down from his house, that was
the only time he never used the gate. He went
through Workman's ground, that was in 1924. It
was the Raymond ground at that time. In 1925
John Condas came up that road. I was grubbing
600 out trees, he had nothing with him. Mr. Condas
was a little West quite a ways above my house.
That is the only time I remember seeing him on
the road. I had not seen him on it before, I have
601 seen him on the road since. I have seen him sev-
eral times since I saw him in 1925. I came to the
ranch at night time when I was on day shift, I
came at night when I was on night shift I worked
half a day. I had a caretaker on the ranch. There
602 was no roadway through that ground. I certainly
603 watch that ground. The road was too soft for my
team and my automobile to go through there. I
604 did not make the change in the road for the pur-
pose of making it more convenient for travel. We
have made all the road from the milk house up to

the Condas gate. There was no road there at the
605 time. There was a trail there. I made the change
in 1924. I made the change before I bought it.
There was an old road there, you couldn't bring a
wagon down, I fixed it to bring the hay down from
606 Dell Redden's ranch. I went up there every day
in the year, winter and summer to see that nobody
used the roadway and to see my cattle. I did the
607 milking and brought my milk to Park City. I went
there every day while I was leasing the place in
1922, to see how the cattle were getting along. I
608 didn't go there every day until 1925. The gate
was locked all the time I was there. It was around
the 25th of August, 1927, that someone drew a gun
on me. About 500 or 600 feet back of my house
609 toward Red Pine canyon. In 1925 I gave Condas
a permit to go through the gate and use the road.
He paid me one to five lambs, mutton, everytime
he came down. He did not drive his sheep up this
driveway. He gave me some pet lambs for driving
610 his sheep over my hill land.

On re-direct examination, Mr. Sullivan testified:

611 On my leasing the Dell Redden land, in 1924,
he turned over to me keys to the house and gate.
I got milk at the ranch for the hotel. I got butter
on the ranch, and the chickens I used on the table

at my boarding house. I killed hogs, sheep, cattle,
 ducks, geese and chickens. I brought the feed for
 612 the hogs and cows up in wagons. There was lots
 of waste from the hotel that I took up for the
 sheep and hogs. My purpose in going to the ranch
 were all these purposes, not just on account of the
 gate.

On Cross-examination, Mr. Sullivan testified:

During this period that I am testifying to, I
 ran a hotel in Park City, I am still running it. My
 613 wife ran the boarding house. We had quite a num-
 614 ber of boarders. It is a boarding and rooming
 615 house. We had from 15 to 60 boarders, they didn't
 all room with us. There is a gate at the top of the
 616 Trottman Lane. It has been there since I went
 there. There is a gate now at the top of the land.
 Pretty often men going up and down Red Pine
 canyon leave it open, when we come along we
 close it. That gate is at the West end of the Trot-
 man lane.

(Here the plaintiff rests).

MOTION TO VACATE RESTRAINING ORDER

617 MR. SULLIVAN: Comes now the plaintiffs
 and move the Court to vacate and set aside the re-

straining order made and entered herein on the 14th day of September, 1928, enlarging and extending the restraining order theretofore, to-wit; on the 13th day of March, 1928, made and entered herein, upon the following grounds and for the following reasons, to-wit:

(1) Said enlarged and extended restraining order is indefinite and uncertain in this, to-wit: The so-called White Pine Canyon Road, running through plaintiff's property, has never been located or established as a public highway so far as the proofs show.

(2) No improvements have ever been made upon said so-called road from public funds, so far as proof shows.

(3) The location, direction and width of said so-called road or any road in White Pine canyon, has never been fixed and determined, and is not fixed and determined in the pleadings herein, or in the said enlarged and extended restraining order referred to.

(4) That the scope of the restraining order, or the limitation or rights of the plaintiffs herein to protect their culinary water, their growing crops, to-wit; alfalfa, potatoes and timothy hay,

under the verbiage of said restraining order, is indefinite and uncertain, and it cannot be ascertained therefrom what effort or attempt on the part of plaintiffs to protect their lands, their growing crops, their culinary water, or their home from the trespass of defendant's animals, would or might be construed as a violation of said extended or enlarge restraining order.

618 (5) That it cannot be determined from said restraining order to what extent, if any, plaintiffs may protect their said property from the driving and trailing of livestock by defendant along said roadway, nor the restrictions to which plaintiffs are subjected by said restraining order in preventing the trespass by defendant of all of Lot 8 of Plaintiff's said real property.

(6) That if by said restraining order it was intended that defendant in trailing his livestock over and along said so-called White Pine road or roads, could take all the time desired in trailing and grazing same, and all the space required in trailing and grazing same, then said restraining order would operate as a violation of plaintiffs' rights to protect their property from the trespass by defendant.

(7) That under the terms of said restraining order, plaintiffs are necessarily in doubt as to how much trespass in point of area, or as to how much trespass in point of time, defendant may commit before plaintiffs would be permitted under the terms of said restraining order to interfere with or prevent said trespass.

(8) That if the intent and purpose of said restraining order is to permit defendant; and under the language of the order such is a reasonable interpretation thereof, to trail his livestock promiscuously over and upon plaintiff's land, and to eat the grass and crops growing thereon, then the same is unconstitutional in that it is sought to forcibly take the private property of one person for the private benefit of another.

(9) That said enlarged and extended restraining order is in excess of the application for same, and there is no showing whatever of the necessity for same.

619 (10) That said enlarged and extended restraining order was made before plaintiffs' evidence in rebuttal was all or any substantial part introduced.

(11) That there is no evidence in this case

to support the claim of claimant that a public highway has been in continuous and uninterrupted use as such public highway for a period of twenty years immediately preceding the commencement of this action. On the contrary the proof is conclusive from government records to-wit: field notes of the survey made in June, 1902, and plat accompanying same, that the only roads across this property at the time of said survey was one road leading up White Pine Canyon on the South and East side of the creek, and another road entering this property from the north line about twenty rods distance west of the northwest corner of the Sullivan property, which road presumably led over from what is commonly called "The Red Pine Canyon Road," and approached by Condas land in close proximity to the present buildings thereon.

(12) The proof is further conclusive that each of these roads have been abandoned for many years and are not now in common use by the public or anyone.

(13) Such evidence furnished by the Government's records is corroborated and emphasized by the testimony of Mr. Street, and is not contradicted by the testimony of any witness in

this case, save the conclusion of Mr. Archibald to the effect that the road leading up White Pine Canyon on the south and east of the creek was a private road belonging to Mr. Jim Williams, a squatter on a tract of land, afterward entered by one, Snyder.

620 (14) Plaintiffs' proof is further made conclusive by the testimony of himself, of Pat Lake and of one, Riley Lake, his brother, to the effect that since 1915 the private road leading from the northeast corner of the Sullivan premises to the Sullivan house, was inclosed by gate and bars at the entrance of said road to the Sullivan property, to-wit: at the northeast corner thereof, and has always been improved by the private efforts and private expenditures of Sullivan and Lake, his predecessor.

(15) The proof further shows conclusively that the private road above referred to, until within the last two or three years, was some distance, to-wit: from one to four rods south and east of where it is now situate. That it formerly went diagonally in a southwesterly direction over what is now Sullivan's meadow land, and that he, Sullivan, and his predecessor, Lake, changed it to go along the footholls, so as to make more acreage

for meadow lands and to make a better road.

(16) That there is no written evidence of the abandonment or dedication of the roadway over the Sullivan land, and no evidence of any public funds ever having been expended upon said road.

(17) The proof shows conclusively from the testimony of Sullivan and abstracts and deed:

(a) That there was no reservation of any easement or roadway in the deed from Lake to Sullivan, which shows a failure of any intent on the part of the grantor, Lake, to have abandoned or dedicated a public highway across the land.

621 (b) That Sullivan first saw and leased the land in 1922 at which time the private roadway, now sought to be claimed as a public highway, was intersected by gate or bars at the point where it enters the Sullivan land at the Northeast corner and that at all times since and particularly when Sullivan obtained his warranty deed for the land in 1924, said gate at the entrance of said road to the Sullivan land was intact and kept continuously closed, showing conclusively that it was the intent of Sullivan and his predecessor to make said road and hold the same as a private roadway, as distinguished from a public highway, and that

the travel, if any, over said road since 1922 until
 about the time of the commencement of this action,
 621 has been by the permission of Sullivan and not
 against his will, all of which tends to negative the
 idea that Sullivan and his predecessor was abandon-
 ing this or any other road over his land to
 the public and for the use by it as a public high-
 way.

(Discussion).

624 (Plaintiffs' case reopened).

PATRICK SULLIVAN BEING RE-
 CALLED, on direct examination testified:

All of my lands are now enclosed with a sub-
 stantial tight wire fence. It was constructed in
 1928, sometime around about June. The road de-
 scribed as being on the South and East side of
 the creek, is fenced at both ends. Both on Mr.
 Sullivan's land and on other lands adjoining. The
 625 road, which Mr. Redden testified about which used
 to go up by the house, which he described as hav-
 ing first occupied on the grounds, has been moved
 from that location over against the hill on the
 626 Southwest side.

THE COURT: * * *; but there is no question
 between them that the South end of that road,

where it goes up from plaintiff's land has been moved westerly.

627 MR. STEWART: To some extent, yes.

MR. DELBERT H. REDDEN BEING CALLED IN SUR-REBUTTAL, on direct examination testified:

Every year from 1915 till 1923, except 1921, I used to move to Park City, moved my cattle, horses and hauled my hay to Park City to feed them. In 1921 I lived on the ranch all winter and kept my cattle there. In hauling my hay down the canyon I took the road right where the present road is now, right from the house, right down thru the land, and right through into Trotman's Lane to the county road. This hauling was
628 done through the winter and late fall. I moved the road through the Condas field from the middle of the field over to the hill, where it is now, and built the road from 100 feet below the gate up to my house, and further up the canyon, I fenced it, then plowed that ground and made meadow land out of it. I think it was around about 1913 or 1914. There has been a change in the location of the road at that point where the gate is now dividing the Condas land from the Sullivan land. There
629 was a well defined wagon road there when I made

this change in 1913 or 1914. I had traveled it from
 1912 to 1923. I had to cut the brush that over-
 hung the road, every two years. The road was a
 a good traveled road ever since I was there. The
 630 road has never been changed up from Sullivan's
 house to the gate, up until the time I changed it,
 631 swamped to the hill. The location is just the same.
 The gate was first put at the Northeast corner of
 Lake's hay field, in 1915. Lake and myself put it
 there. After Lake and I got the fence built from
 the North end of Sullivan's land up to my gate,
 said, 'Have you any objection to putting up a
 fence,' I said, 'No, not in the least;' he said, 'It
 will keep our horses in and strays from coming
 from Snyderville.' He said, 'After we get the
 fence up we will open the gate and leave it open.'
 633 That is what happened. I never knew of a lock
 being on that gate. I never had a lock on the gate
 between Lake's place and my place. I gave Mr.
 Sullivan the key to the house, that was all. No
 key to any gate. Sullivan saw me pass up and
 down prior to 1923, he couldn't help it, I passed
 634 right by the door. I spoke to him.

On Cross-examination, Mr. Redden testified:
 635 I moved the road 100 feet on the Sullivan land
 in 1913 or 1914. I should judge I moved 300 feet

on a line of the road maybe 350 feet, something like that, and the distance that I moved it over, was about 150 feet, I am not positive. The first point above the Sullivan house that the removal commenced, would be about 100 feet North of Condas' gate, below the gate. I moved the road from that point up to a point about 150 feet above where the gate now is, making 350 feet in the line of the road. Part of the change was made on the Sullivan land and part on what was then my land.

637 I talked to Frank Lake about the change. I didn't talk to the County Commissioners about moving the road. I didn't talk to the local road supervisor about it. I didn't talk to any of the traveling public about it. I just talked to the two private owners. I made the change for the benefit of the private owners, myself and Mr. Lake. Mr. Lake helped a day or two, I personally did the work assuming all expenses of opening up the road over the new land. Part of the time the fence

638 that forms the partition between Raymond's and

639 Sullivan's land was down. When I found the gate open, left it open when I went through, and when I found it closed, I closed it, always, when I went through.

On Re-cross Examination, Mr. Redden testified.

640 Lake and I changed the road as joint prop-
erty owners.

JOHN G. CONDAS, the defendant, on direct examination, testified in sur-rebuttal; testified:

I never remember seeing Mr. Pat Sullivan up there on August 25th, 1927. I never had any sheep on this land in August, 1927. I do not bring them
641 down from the canyon that early. I know of no time that any of my employees pulled guns or pistols on Mr. Sullivan, while he was on his premises or at any other place. I have never at any time asked Mr. Sullivan for permission to cross his land. The pet lambs I was giving him, I wasn't paying for anything. Pet lambs I give to neighbors, they have no value to me. Lots of times I would go to Sullivan's place, I would get a gallon of milk; other times I give him mutton, other times Sullivan give me a piece of pork. Neither the lamb nor the mutton I gave him were in payment for grazing over the ground. (This last answer over objection and exception of plaintiff). I first
642 went to Dell Redden's place in my automobile, on the 25th of July 1924. The road was good, got
643 up very fine. I went up about a week later in my automobile. I had my family with me, the road was the same as before. When I went up to Red-

den's about the 3rd of August there had been no
644 work done on the road.

(Discussion).

MR. R. G. HEATH, a witness for defendant,
on direct examination testified:

I am a Civil Engineer. I have been employed
by Salt Lake City, Salt Lake County, State of
Utah and private engineering firms. I have made
647 a survey of the road which leads through the Pat
Sullivan land and have prepared a map showing
roadway. (Objection to evidence of this witness
made by plaintiff as not sur-rebuttal. Argument,
648 objection overruled. Exception saved).

649 (Map of Mr. Heath's marked defendant ex-
hibit 1).

(Objection by plaintiff, on various grounds.
Objection overruled. Exception saved).

I started on this quarter corner between sec-
tion 1 and 6. Then we ran true north along the
fence line 1320 feet, to the northeast corner of the
Sullivan property. Then we ran West 44.5 feet
to the center line of the roadway. Then we ran
650 down the center line of that roadway meandering
that road to the gate. The gate is on the line

between the Sullivan property and the Condas property. Then we ran a line along the Trottman Lane, meandering that lane clear out to the Park
651 City highway. (Witness then gives the distances and divergences of survey). That takes us to the gate, entering the Sullivan land from the south-
652 westerly direction. And this description that I have given you from that point as the roadway passes through the Sullivan tract, until it reaches the gate at the intersection of the Condas and Sullivan tract to the Southwesterly, is the center of the roadway. I crossed on that roadway from the Park City highway, marked on the map, along Trottman's land and thence from Trottman's lane through the Raymond property, and thence through a corner of the Archibald property until it reaches a boundary of the Archibald and Sullivan property. That is the correct line of the road. I haven't marked the courses or distances on the
653 map. In describing the map I will start where it entered the Archibald property. It runs through the Southeast corner of the Archibald property, then winds around in a Northeasterly direction and in a Northwesterly direction, and then in a Northeasterly direction to a point on the North line of section 1, township 2, south, Range 3, East, easterly prolongation of the north line of section

1, 2 south, 3 east. Then the lane runs approximately in an eastern direction 23.51 feet to the center of the lane, approximate center of the lane of the Park City highway. I located the present gate on or near the North boundary line of the Sullivan tract. The gate indicated on the map. I have also marked the gate on the map, where the roadway enters the Condas property. It correctly shows the locality of that gate. (The map, defendant's exhibit 1, offered in evidence).

On Cross-examination, Mr. Heath testifies:

654 I started at the quarter corner, common to section 1, township 2, south, of range 3 east, and section 6 township 2, range 4 east. There is a stone there marked on the face of it very distinctly, one-quarter. I satisfied myself, as an engineer, that that was a government quarter stone. I then
655 ran north 1320 feet. I used a fence line and compass. I didn't have the true north line, excepting the north of the Needle guage, which is not exactly accurate, but I changed the lining fence line, and used the fence line as north and south line. I ran 1320 feet in making that distance. To start with we go down quite a heavy grade, probably a third of the way. It is fairly level the balance of the way. I remember stepping over a little stream

but I saw no road. I didn't look for a road. I paid no attention to the stream, I did not run the distance from what I determined to be the corner of the northeast corner of the Sullivan land to the township line. The 1320 foot measurement took me south of the gate, on the road line it is 87.01 feet in the direction of the road. Dick Daley assisted me in making the survey. All I did was tie the road in with the quarter section. I remember passing the Sullivan house. The front about two rods and 30 feet south and east. I don't remember whether we went through a gate near the house in the roadway just above the house, or not. (Plaintiffs' objection to the introduction exhibit 1, renewed. Objection overruled. Exception saved). I followed the road only 100 feet beyond the gate between the Sullivan and Condas places. I didn't chain beyond the gate. I walked over it possibly 150 feet beyond the gate.

(Defendant moves to strike Exhibits "D" and "E". Denied. Exception saved).

(Discussion).

(Plaintiff moves to dismiss, without prejudice, the portions of their complaint seeking to recover damages at law. Objected to by defendant.

Motion granted. Exception saved by defendant).
(Discussion on motion for New Trial).

- 679 Reporter's Certificate, in usual form.
- 680 Certificate of Transcript as proposed Bill
of Exceptions.
- 681 Stipulation that proposed Bill of Exceptions
be settled.
- 682 Certificate and Order Stealing Bill of Ex-
Exceptions.

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Attorneys for Plaintiffs and
Appellants.