

1929

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

Utah Supreme Court

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D.B. Hempstead and Stewart, Alexander & Budge; attorneys for respondent.

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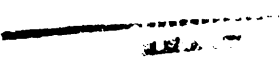
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No. 4922

In the Supreme Court of the
State of Utah

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OCTOBER TERM, 1929

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PATRICK SULLIVAN, AND
ELIZABETH SULLIVAN, His Wife,
Plaintiffs and Appellants,

vs.

JOHN ^{G.}/CONDAS,
Defendant and Respondent.

APPELLANTS' BRIEF.

G. M. SULLIVAN,
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Attorneys for Appellants.

In the Supreme Court of the State of Utah

OCTOBER TERM, 1929

PATRICK SULLIVAN, AND
ELIZABETH SULLIVAN, His Wife,
Plaintiffs and Appellants,

vs.

JOHN G. CONDAS,
Defendant and Respondent.

APPELLANTS' BRIEF.

Plaintiffs brought this action to recover damages from the defendant for the alleged unlawful trespass of defendant's livestock upon plaintiffs' real property, and for an injunction restraining defendant from further trespassing upon plaintiffs' land.

Defendant filed an amended answer in the way of a general denial, and by way of affirmative defense, commencing with paragraph 14 of defendant's answer, (Abst. 17), defendant alleges as follows:

"14. For a further answer and defense to said Fifth Cause of action, defendant alleges that he

is the owner, entitled to 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 plaintiffs' 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 plaintiffs' 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 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." (Italics ours).

Defendant, continuing said answer and by way of counterclaim (Abst. 20), alleges as follows:

"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 described 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 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 paragraph 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 dwell-

ing house in said White Pine Canyon, and said derendant 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 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 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 that the same be by this Honorable Court dismissed.

2. That the said plaintiffs, their servants, agents and employees be by this Court permanently 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 be quieted and confirmed.

4. For such other and further relief as may be just and meet in the premises, and for defendant's cost of suit." (*Italics ours*).

Plaintiffs filed their duly verified reply to the above affirmative allegations of defendant's answer and to defendant's counterclaim wherein they deny generally the allegations therein contained, and deny generally that any "public highway" ever existed

over the plaintiffs' land (defendants to the counterclaim).

At the beginning of the trial, plaintiffs expressly dismissed without prejudice their law action wherein they sought to recover damages, and offered proof in support of their equitable suit for injunctive relief, by introducing their abstract of title showing clear and unincumbered title, and failing to show any right of way, easement or public highway.

The allegations in respondent's answer and counterclaim upon which he apparently relies for an affirmance of the judgment below, is found in paragraph 14 of his answer, as follows:

“ That there is now and has been for more than sixty years past a well traveled road up said White Pine Canyon * * * That said road is a public highway and has been used continuously by the defendant and by his predecessors in interest and by the afore-said owners of land in said White Pine Canyon and vicinity and by the public generally, and especially by the residents of Park City and Summit County, State of Utah, for more than sixty years past.”

In paragraph 5 of respondent's counterclaim he alleges:

“ That said road is a public highway.”

He further alleges that the same has been used for more than “sixty years past” and that said road runs thru a portion of Lot 8, a tract of land belonging to plaintiffs.

In paragraph 6 of defendant's counterclaim he alleges (referring to the road described in paragraph 5) that it was “at the time of the commencement of this action a public highway by prescrip-

tion and by having been used continuously, openly, notoriously, and under a claim of right by the public generally and by the defendant and his predecessors in interest for more than twenty years.

The above, from our viewpoint at least, constitutes all, and the only material and essential allegations of defendant's counterclaim that in any way forms the ground-work or foundation for the Findings, Conclusions and Decree complained of.

Subdivision 3 of the prayer of said counterclaim is as follows:

“ 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 be quieted and confirmed.”

Defendant, in support of the foregoing allegations of his counterclaim, sought to establish by proof that there had been a *Public Highway for sixty years or more extending up and down White Pine Canyon*. The proof shows White Pine Canyon to be situate about three miles from Park City, extending in the northeasterly and southwesterly directions, and of a width varying from one-fourth of a mile to a mile and a half. While the proof of respondent and counterclaimant showed that there had been a means of travel, such as roadways for logging, paths for moving livestock, and for pedestrians up and down the canyon since the early settlement of Park City; it likewise showed that such roadways and paths had changed locations from time to time to meet changing conditions and requirements. There was no proof that the *particular Public Highway*, described in the Findings and Decree complained of and hereinafter referred to, was ever

used by the public, or in fact ever existed. The proof shows conclusively and without contradiction that in recent years there was laid out by plaintiffs and their predecessors a *private roadway*, which was used by others only by means of gates and only by plaintiffs' *express permission*.

After the testimony for both sides had been concluded, the defendant brought to the witness stand one R. G. Heath, an engineer whom the defendant during the course of the trial had induced to make measurements of the metes, bounds, variations, courses, divergences and distances of plaintiffs' private roadway, and plat the same, from the point where it enters their gate at the northeast corner of their land—Lot 8—until it passes thru the gate on the south side of their land, and thereupon asked and obtained leave to offer as *surrebuttal* the testimony of the witness Heath, in which he described by metes, bounds, variations, courses, divergences and distances, plaintiffs' said *private roadway* from the entrance of their property up to and beyond their house, and offered in evidence the plat (Defendant's Exhibit 1) of such *private roadway* so prepared by the witness during the period of the trial, which oral evidence and plat were admitted over plaintiffs' objection and exception.

This evidence was offered on the seventh — last day of the trial — and the objections and exceptions referred to appear on page 551 of the reporter's transcript, and on page 649 of this record as numbered and certified by the Clerk of the Court, as follows :

“ MR. SULLIVAN : If the Court please, I object to that, first upon the ground that the map, upon it's face to everyone familiar with

this controversy is self-explanatory. Second, if that map is intended to show what I apprehend, and what counsel stated yesterday, to show a survey of the roadway, then we object ~~on~~ various other grounds. One is, that the line of this road is not set out and contained in the complaint in this case, as it should have been, and the complaint in this case was demurred to as I remember. We object to it now as incompetent, irrelevant, immaterial, and not proper rebuttal, and in addition that there is not sufficient allegation in the complaint to admit the proof that is now offered.

THE COURT: You mean the counterclaim?

MR. SULLIVAN: Yes, counterclaim.

THE COURT: Objection overruled.

MR. SULLIVAN: Exception."

Thereafter the trial Court made Findings, Conclusions and Decree that this particular roadway — *plaintiffs' private roadway* — from the gate at the east boundary of plaintiffs' land, near the northeast corner thereof, was a public highway and decreed it as such, by metes, bounds, variations, courses, divergences and distances.

A portion of paragraph 9 of said findings is as follows :

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 plaintiffs, 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 plaintiffs*, and the Court finds that three rods is the width of said roadway and that said width has been and is necessary to 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 (referring to the one above described) *has been used by the public generally, openly, notoriously, continuously and uninterruptedly, adversely and under claim of right for more than fifty years last past, and that the defendant and his predecessors in interest have relied, and do rely upon said roadway as a public highway.*" (Italics ours).

The Court then enters its decree in part as follows :

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is a roadway which is a public highway, leading from the highway referred to as the Park City Highway, beginning at a point where a lane known as Trottmann's Lane, intercepts said Park City Highway, and running thence over and along said Trottmann's Lane southerly towards White Pine Canyon, until said roadway reaches the north boundary of plaintiffs' said land, and thence over and across Lot 8, above described, belonging to the plaintiffs, from the north boundary 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.”

Paragraphs 6 and 7 of appellants' Assignments of Error are as follows:

(6) The Court abused its discretion and erred in permitting the defendant at the close of the trial and over plaintiffs' objections and exceptions, to prove by its engineer Heath, under the guise of 'sur-rebuttal,' the metes, bounds, variations, courses and distances of the roadway described in defendant's Amended Counterclaim and in the Findings and Decree herein, but not set out in the original counterclaim.

(7) The Court erred in permitting proof by counterclaimant of the survey by his engineer Heath, made during the trial, over plaintiffs' objections and exceptions, and in making its Findings, Judgment and Decree as to the metes, bounds, variations, courses and dis-

tances of the roadway as set forth in the judgment and decree, because same was not involved in the issues as framed in this case, and was not involved in the trial of the case until all the evidence of both parties was fully completed."

Paragraphs 1 to 3 inclusive, of Appellants' Assignments of Error, are a challenge of the sufficiency of the evidence to justify the judgment and decree herein.

Appellants rely mainly upon two propositions:

1. The alleged Public Highway sought to be described in defendant's counterclaim was not described with sufficient certainty to justify the trial Court in admitting the evidence of the engineer Heath, or of admitting in evidence the plat prepared by the engineer Heath — Defendant's Exhibit 1 — nor was the alleged Public Highway described in in defendant's counterclaim with sufficient particularity to justify the Findings, Conclusions and Decree complained of.

(2) There was no evidence that the particular roadway described in the Findings of Fact and Decree was ever used by the public or the defendant, save and except by means of gates, and save and except for but two or three years prior to this suit, and save and except by plaintiffs' or their predecessors' express permission, thru and by means of gates.

At the time of preparing Assignments of Error herein, plaintiffs' counsel had the impression that counterclaimant and respondent had obtained leave of Court and filed an amended counterclaim setting forth with exactness the metes, bounds, variations, courses, divergences and distances of the roadway claimed, but now, upon an examination of the record, we find that no such amended pleading was

filed by respondent, although the record shows that the Court was quite willing, and even suggested that such amendment be filed; which accounts for some reference in our Assignments to the error of the Court in allowing such amendment.

We will discuss the two propositions above set out, in their order.

There was no sufficient allegations in defendant's counterclaim upon which the Findings and Decree here can be permitted to stand. The counterclaim wholly fails to sufficiently, and as required by law, describe by metes, bounds, variations, courses, divergences and distances, the alleged public highway.

In Volume 19, C. J., under "Easements," and at page 1001, Sec. 267, the law is announced as follows:

"DESCRIPTION AND LOCATION OF OF EASEMENT.—The complaint must describe the easement so as to show the nature, extent, and location of the right claimed, in order that a definite decree may be entered."

There are many cases cited in Corpus Juris in support of the foregoing text, among which is the case of *Leverone v. Weakley*, (Cal.), 101 P. 304. Subdivision 3 of the of the syllabus is as follows:

"EASEMENTS (Sec. 61*)—ACTION TO ESTABLISH — NECESSITY OF EXACT DESCRIPTION IN PLEADING.

Where it is sought to have it decreed that a person's realty is subject to a use or easement in favor of another, it must be described in the pleadings with such certainty as to enable defendant to definitely know exactly what portion is so claimed.

(Ed. Note.—For other cases see Ease-

ments, Cent. Dig., Sec. 141; .Dec. Dig. Sec 61*)."

The Supreme Court of California, in discussing the sufficiency of pleadings in a suit to establish a public highway, uses this language :

" Plaintiff sought by this action not only the abatement of a particular alleged obstruction erected by defendant's testator and compensation for injury caused thereby, but also a decree establishing between the parties the fact that certain of defendant's property, consisting of a strip of land three-eighths of a mile long, was subject to plaintiff's use as a public highway or as a private right of way, and enjoining defendant from maintaining any obstruction on any part thereof. The decree grants this relief as to the whole strip of land. It goes without saying that where it is sought to have it decreed that real property of a person is subject to a use or easement in favor of another, the property affected must be *described in the pleadings* with such certainty as to enable the party against whom the claim is made to definitely know exactly what portion of his property is so claimed, and the judgment establishing the validity of the claim must be definite and certain as to the property affected." (Italics ours).

In the instant case the Findings and Decree are definite and certain, and the testimony of Heath, and plat prepared by him and admitted over our objection, is definite and certain, but the pleadings which are a *necessary and indispensable* foundation for the evidence and decree, are fatally defective.

We submit that a case cannot be found in the books where a definite, specific decree such as here,

has been permitted, by an appellate Court, to stand, where there is no attempt *in the pleadings* to define or describe the highway, roadway or easement, sought to be judicially subjected to public or private use.

A portion of the syllabus in the case of *Fox v. Pierce* (Mich.), 15 N. W., p. 880, is as follows:

, “A bill to establish a right of way, and to enjoin encroachments upon it, cannot be sustained where it does not furnish the means for declaring exactly what the right is, and the shape, dimensions, and precise locality which it occupies, and the proofs show nothing but an oral agreement for its establishment, and such occasional variations in the bounds of the locality as to make it impossible to determine where it originally existed.”

The Michigan case above cited, involved a passageway in the city of Detroit. In that case the plaintiff made a map showing the exact location and its connection to and with other property and attached to it and made a part of its complaint, but the Court held that such method failed to conform to that exactness required in the pleading that is obtained only by a survey, an exact “tie-in” of the proposed easement or driveway with definite, fixed points covered by the general city survey.

It ought not require text-books or Court opinions to satisfy the judicial mind that any complaint (in the instant case a counterclaim), upon which it is sought to establish a judgment or decree of Court, must cover the subject-matter so to be adjudicated with as much, or more, specific exactness as the judgment or decree sought. To illustrate: Could it, or would it be contended for a moment that a party, seeking to quiet title to a five-acre tract of

land, could describe his land in his pleading by saying that it was in Lot 8, Section 1, Township 2 South, Range 3 East, in White Pine Canyon, three miles northwest of Park City, and upon such complaint base a decree setting forth an exact, correct, detailed description of his five-acre tract? The answer must be negative.

Now, can a plaintiff (in the instant case counterclaimant), because such tract is long and narrow as a public highway, obtain a judgment and decree by any less definite, detailed description in his pleading than would be required if he sought to quiet title to a rectangular tract embracing five acres? Certainly not.

Pleadings have a definite, fixed place; are intended to meet a definite requirement in judicial procedure. Especially is this true in the American States, as well as under the English Common Law.

Not only was the counterclaim fatally defective in failing to set out by metes, bounds, variations, divergences, courses and distances, but all the evidence of counterclaimant, except that of the engineer Heath, which was admitted over plaintiffs' objections and exceptions, was equally defective in failing to conform to the metes, bounds, variations, divergences, courses and distances contained in the Findings and Decree herein.

Further, the testimony of Heath, and defendant's Exhibit 1, each relate *solely* to a *present* way or road — neither relate in any manner to the old way attempted to be here claimed by the defendant; neither is even an attempted description or survey of the claimed ancient highway. Both relate to a roadway, the location, metes, bounds, courses, divergences and distances of which are conclusively shown by the evidence of all witnesses herein to be

a *changed* roadway — not the original or claimed way.

The law as announced in this State, and as recognized in all the States, is so definite and certain on this essential requirement, in both the pleadings and the proof, as not to admit of argument.

The evidence, until the sur-rebuttal of the engineer Heath, was as indefinite and uncertain as were the pleadings. The evidence was in effect along the same general line of the pleadings, namely, that there had been a road, roads, cow-paths or what not, up White Pine Canyon for many years.

Time and printer's ink will not permit a re-hashing of the testimony of the witnesses in behalf of the counterclaimant touching the generality of logging roads, cow-paths, etc., up this canyon for fifty years.

The testimony of the witness William Archibald, covering many pages, is illustrative of the lack of that exactness required by law to establish a public highway. His testimony deals with roads up and down this canyon in the early days, and years before title by Government Patent passed to the plaintiffs or their predecessors, and years before title by Government Patent passed to the defendant or his predecessor.

That there have been wagon roads and cow paths up and down this canyon at various points from its earliest history, is not disputed; but cow paths or logging roads on the south side of the creek or even on the north side of the creek, many rods from the plaintiffs' present private road, which original logging roads and cow paths have long since been abandoned and grown over with underbrush, and which were established long years before patent passed to plaintiffs or their predecessors, can by no

stretch of the imagination or by no stretch of the law, furnish any foundation for declaring plaintiffs' private road, as surveyed and described in the Findings and Decree, a Public Highway.

Certain roads up and down these canyons were recognized by the Government engineers at the time the Government survey and the Government plat were made, but not the roadway described in the Decree complained of.

The Government field notes (Exhibit D) and the Government rectograph copy of official plat of Township 2 South, Range 3 East (Exhibit E), are explained, if explanation was required, by the testimony of engineer E. H. Burdick, on pages 342-350, and map prepared by him (Exhibit F). It will be noted from these Government records that the roads extending over Lot 8—the land in controversy—at the time of the Government survey, about 1902, were no where near the plaintiffs' present private roadway as specifically described by the testimony of the engineer Heath.

We submit there is absolutely no evidence to show that the private roadway described by the engineer Heath has been in existence even as a private roadway, for a period of more than five or six years, and during such time has been used by the counterclaimant and his predecessors, if at all, by means of gates and by permission of the plaintiffs and appellants.

The roads shown on the Government rectograph copy of plat, Exhibit E, and likewise shown by the Government field notes, Exhibit D, and illustrated by the testimony of Mr. Burdick and his plat, Exhibit F, show two main traveled, well defined roads, which beyond all reasonable doubt were the only

evidences of roads over Lot 8 at the time of the Government survey. One of these roads, designated on Exhibit F as road "A" approaches Lot 8 from the north, at a point more than half the distance from the east to the west line of Lot 8, and passes thru Lot 8, over the west line, and onto Lot 7. The other road, designated as road "D" approaches Lot 8 on the east boundary line thereof, and a short distance south of the northeast corner of Lot 8, and extends south on the south side of the creek, and passes out of Lot 8 and onto Lot 9 about two-fifths of the distance from the east to the west line of Lot 8.

Road "B" is the road that the witness Street described as passing between the home where his mother died, and the creek, at the time he was a small boy.

The evidence furnished by the Government records and the testimony of the witness Street, are in no way contradicted by the testimony of any witnesses in this case.

The witnesses on behalf of counterclaimant tell of a road or roads "up and down" White Pine Canyon. The Government plat and field notes show two roads up and down White Pine Canyon, namely Road "A" and Road "B", neither of which are identical with nor parallel to, nor at *any point* near the road described by metes and bounds in the testimony of the witness Heath, or in the plat furnished by the witness Heath, nor can they be construed to be in any way identified, or even connected with the easement or public highway described in the decree herein.

We might dwell at length upon the character — the indefiniteness of the roadway up and down White Pine Canyon as testified to by respondent's witnesses, but the lack of sufficient definiteness in

such testimony can be determined by this Court only upon a careful examination and perusal of the abstract and original record herein, but it is sufficient to say that even though the pleadings had have described such roadway with sufficient particularity, which they did not, the testimony of the witnesses fell far short of making even a *prima facie* case for counterclaimant and respondent.

In Volume 9, R. C. L., p. 35, Sec. 35, the rule is laid down that in order to obtain an easement by prescription, the claimant must use the right of way continuously and without variation as to the line or roadway of the easement. The right cannot be acquired to pass over a tract of land generally. It must be confined to a specific or definite line. Citing many cases, among which is the case of S. H. Croshier v. John M. Brown, 25 L. R. A., N. S., p. 174.

In *Schulenbarger v. A. H. Johnstone* (Wash.), 116 Pac., 843; 35 L. R. A., N. S., p. 41, the first part of the syllabus is as follows:

“A private right of way cannot be secured by a prescription over uninclosed land.”

Also see note at bottom of page 941.

The rule seems to be well fixed that the mere permissive use by the owner to his neighbor to pass over land and after the owner fenced, by making gates for the convenience of the neighbor, no sufficient facts in such act is found to warrant the conclusion that the neighbor's use was hostile or adverse to the owner, and hence could not set in motion the law of adverse possession or be invoked in aid of the claim of having obtained a right by prescription.

In general, a private easement for a right of

way cannot be acquired over uninclosed land unless the use is such as to convey to the owner reasonable notice that a claim is made hostile to him.

Where the owner of uninclosed lands, over which his neighbors had been in the habit of passing, left gates and bars in a fence which he erected, that act, instead of indicating a surrender or acquiescence in the right of persons to pass, evidences a different intention.

In case of *Funk v. Anderson*, 22 Utah, 238; 61 Pac., 1006, the rule seems to require twenty years to obtain a right by prescription, and the same rule prevails in case of *Rio Grande Western Railroad v. Salt Lake Investment Company*, 35 Utah, 528; 101 Pac., 586.

“A prescriptive right to an easement can only arise after use and enjoyment for a period of twenty years.” (From syllabus).

Funk v. Anderson, supra.

Adverse possession can be acquired in no other manner than that prescribed by Comp. Laws 1907, Sec. 2866, so the title to land cannot be acquired by prescription as at common law.” (From syllabus).

Rio Grande Western Railroad v. Salt Lake Investment Co., supra.

“An easement in land may be acquired by a continuous use for 20 years.” (From syllabus).

Rio Grande Western Railroad v. Salt Lake Investment Co., supra.

In case of *Jones v. Van Bochove* (Mass.), 61 N. W., 342, it is held that where there was an express grant by an individual to a railroad for a right of way, the Courts will presume the abandonment of the right of way when the railroad company took up its track, its ties, and removed the bridge that was essential to the operation of its railroad over this easement. No definite length of time was required to create an abandonment.

In Volume 6, Fed. Statutes Ann., p. 498, Sec. 2477, under subdivision 18, entitled "RIGHT OF WAY OVER PUBLIC LANDS," a very brief enactment made July 26, 1866, seeks to give a right of way for construction of highways over public lands. The foot-notes to this section are very elaborate, and it seems that the Supreme Court of Oregon, in the case of *Wallowa County v. Wade*, 43 Ore., 253, attempt to construe what the U. S. Congress meant by the above section.

There seem to be a great many citations on page 499 of said Vol. 6, Fed. Statutes, where various northwestern States have sought to get some meaning to the section above referred to.

"Under Comp. Laws 1907, Sec. 1115, providing that a highway shall be deemed to have been dedicated to the use of the public when continuously used as a public thoroughfare for ten years, use under private right is insufficient to show dedication, and such use, however long, does not make the way public, and the mere fact that the public also use it without objection from the owner will not make the way public." (From syllabus).

Morris v. Blunt, et al., 49 Utah, 243;
161 Pac., 1127.

“A prescriptive easement does not arise in seven years by analogy to the statute barring action to recover realty when a plaintiff was not seized of the property within seven years, such statutes not applying to rights of way or easements, but prescriptive right can arise only by adverse use and enjoyment under claim of right uninterrupted and continuous for 20 years.” (From syllabus).

Morris v. Blunt, *supra*.

“Evidence held insufficient to show acquisition of highway easement by prescription; the use having been interrupted at various times during the alleged prescriptive period.” (From syllabus).

Morris v. Blunt, *supra*.

“A claim to a right of way by prescription cannot be supported where the way has been allowed as a matter of accommodation, and claimant’s use of it has not been such as to give the landowner notice of an adverse user.” (From syllabus).

Lapique v. Morrison (Cal.) 154 P., 881.

“Where defendant and his tenants had been in the habit of passing over an uninclosed strip of plaintiff’s land for eight years, but had never claimed that they had the right to use the land to plaintiff or his grantor, a finding that defendant had not a prescriptive right to the use of a way over the land should not be disturbed.” (From syllabus).

Clarke v. Clarke (Cal.) 66 Pac., 10.

“The allegations of a complaint in a suit to enjoin interference with the use of land did

not show a right based on dedication, where it alleged merely that for 30 years plaintiffs, their predecessors, and the public had openly used the land as a highway." (From syllabus).

Farr et al. v. Wheelwright Const. Co.,
49 Utah, 274; 163 Pac., 256.

"The complaint in an action to enjoin interference with the use of land as a highway did not show a right based on adverse user, where it did not allege that the use of the land was adverse and under a claim of right." (From syllabus).

Farr et al v. Wheelwright Const., Co.,
. *supra*.

Easement by prescription must be acquired by twenty years' user after patent issues, as no prescriptive rights can be acquired against the United States.

Lund v. Wilcox, 34 Utah, 205; 97 P., 33.

A prescriptive easement arises only by an adverse use and enjoyment thereof, continuous and uninterrupted for twenty years under a claim of right.

Harkness v. Woodmansee, 7 Utah, 227;
26 P., 291.

Yeager v. Woodruff, 17 Utah, 361; 53
P., 1045.

Coleman v. Hines, 24 Utah, 360; 67 P.,
1122.

"In order to acquire a private easement in the nature of a right of way over the lands

of another, the claimant must have used the same openly, continuously, and adversely for 20 years, during all of which time the title to the land over which the easement is claimed must have been out of the United States.” (From syllabus).

Bolton v. Murphy, 41 Utah, 591;
127 P., 335.

“ The use, for more than 100 years, of a well-known and well-defined roadway from a public road to a great pond, by hunters, fishermen, picnic parties, celebrators on public occasions, and by whomsoever chose, without objection and without obstruction, does not establish a way by prescription or dedication, where it does not appear that such use was not with the express or implied permission of the owners of the land.

Acceptance by public authorities is necessary to create a public way by dedication.” (From syllabus).

Slater v. Gunn (Mass.) 41 L. R. A., 268.

“ Mere user of a right of way over another’s land, who had knowledge thereof for a period of 33 years, but without claim of right or title, is insufficient to establish a right of way by prescription, under Code, Sec. 3004, providing that the use of an easement is not evidence of a claim of right, but the fact of adverse possession must be established by evidence independent of use, etc.” (From syllabus).

McBride v. Bair (Iowa) 112 N.W., 168.

“ A vested right to a right of way may be acquired by use for a sufficient length of time.

It must be occupied and used as a right, and not merely as a favor or privilege granted by the owner of the servient lands."

Johnson v. Lewis, 14 S. W., 466;
47 Ark., 66.

"An easement by prescription cannot arise out of an agreement, license or mere neighborly accommodation, but must be acquired adversely." (From syllabus).

Pinheiro v. Bettencourt (Cal)
118 P., 941.

"Where defendant, before acquiring a right of way over plaintiff's land, by prescription, made a material deviation from the previously traveled way to avoid a washout in the old way, such deviation broke the continuity of the use required by law to establish the prescriptive right." (From syllabus).

Lund v. Wilcox, 64 Utah, 205; 97 Pac., 33.

Justice Frick, speaking for this Court in Lund v. Wilcox, *supra*, very aptly, clearly and concisely stated the rule that has come down to us from the statutes and adjudicated cases in the various States for the last half century, in the following language:

"There is another reason why respondent cannot be decreed a right of way over appellant's land. As we have pointed out, the road-way was changed in 1900. This change broke the continuity of the use by respondent. Jones, in his excellent work on Easements, in section 295, states the law upon this point as follows: 'A prescriptive right of way cannot be acquired by tacking together two distinct periods of use of two separate ways, though one was abandoned for the other with the consent of the

landowner, and the two periods together would amount to the prescriptive time requisite to give a prescriptive right of way. It is essential that the use should relate strictly to the identical way over which the right is claimed. A way imports a right of passing in a particular line, and not everywhere, over the land upon which the right may be claimed.' This does not mean that a person using the right of way may not deviate at all from the traveled rut or track, to the extent, at least, that this may become necessary in a reasonable use of the right of way; but it does mean that the claimant may not abandon one track or right of way and adopt another. In *Kurtz v. Hoke*, 172 Pa., 165; 33 Atl., 549, it is held that a variation of 20 feet from the traveled road is fatal to continuity of use. It is generally held by the Courts that a deviation such as occurred in the case at bar destroys the continuity of use required by law. The rule is illustrated and applied in the following cases: *Owens v. Crossett*, 105 Ill., 354; *Bryan v. East St. Louis*, 12 Ill. App., 390; *Peters v. Little*, 95 Ga., 151, 22 S. E., 44; *Hollendore v. Thomas*, 93 Ga., 300, 20 S. E., 329."

"A use under a mere license will not ripen into an easement by prescription." (From syllabus).

Phoenix Ins. Co. v. Haskett (Kan)
67 P., 446.

See: *Marazzani v. United States Fuel Co.*, 65 Utah, 123; 234 Pac., 531.

Barboglio v. Gibson, 61 Utah, 314; 213 Pac., 385.

Schettler et al. v. Lynch, 23 Utah, 305;
64 P., 955. ..

In case of *Wild v. Deig et al.*, 43 Ind., 455, the Court quotes *Cooley Const. Lim.*, p. 530, as follows:

"It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. * * * It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established."

"A roadway used by the public over government land does not become a public highway for mere user for 20 years, or by prescription, under Rev. St. Sec. 2477 (U. S. Comp. St. 1901, p. 1567), granting a right of way for construction of highways over public lands not reserved for public uses."

Cross v. State, 41 So., 875; 147 Ala., 125;

10 Am. Dig., p. 63, Sec. 4.

"A road leading from a river to a highway was used by those owning adjoining lands to haul wood and stone, but this limited use was not under claim of right, and the road did not lead to anywhere in particular; there being no bridge at the place where it approached the river. The road was never used by the public to any extent, and a part of it was always rough and unsafe for general use. Held: insufficient to establish a highway by prescription."

Fairchild v. Stewart, 89 N. W., 1075; 117

Iowa. 734; 10 Am. Dig., p. 64.

Proof of public travel over wild and unoccupied land on different tracks, as suited the conven-

ience of travelers, whose course was shaped with reference to high and low water, the land bordering on a river, is insufficient to establish a highway by user.

Lyle v. Lesia, 31 N. W., 23; 64 Mich., 16;
10 Am. Dig., p. 64.

“ We do not think the testimony as to the land used for travel up to the time of Pettibone’s survey is definite enough to establish a highway by user. The land was wild, unoccupied, and uncultivated. The testimony shows there were several tracks, and people traveled all over the bottom, as suited their convenience; shaping their course also in reference to high and low water times.”

Lyle v. Lesia, *supra*.

See case San Bernardino National Bank, et al. v. Jones, et al. (Cal.) 271 Pac., 1103, to the effect that a purchaser who obtains title to patented property is required only to examine the title record and to make such observations on the land for easements or other claims as the ordinary prudent person would make, and when he has done this, his title cannot be impeached for some roadway, easement, or other claimed right not disclosed by the record and not clearly and plainly open to view upon inspection.

The trial Court apparently overlooked the rule of law so clearly and fully outlined and defined by this Court in the case of Morris v. Blunt, *supra*, when it made its Findings and Decree herein, as well as when it made the so-called enlarged and extended restraining order herein during the course of the trial and on the 14th day of September, 1928. (Abst. 32-33).

This so-called enlarged and extended restraining order, which appears on pages 44 and 45 of the transcript (Abst. 32-33), was by its language and verbiage so sweeping, as we construe it, as to prevent appellants, owners of the real property, from interfering with respondent in the driving and grazing of his sheep and other livestock upon the whole of said Lot 8; for said White Pine Canyon Road had not at that time been in any way, shape or form identified by metes, bounds, variations, courses, divergences and distances, and in fact the said so-called "White Pine Canyon Road," as it crossed Lot 8, as shown by the old trails, consisted of many roads and trails in many directions, and by said so-called extended and enlarged restraining order there was no width fixed or prescribed of said road, no metes, bounds, variations or divergences provided for in said order, and said order amounted in legal effect to a restraining upon plaintiffs from interfering with the defendant in trespassing his sheep and other livestock, without limit of time, upon plaintiffs' garden, polluting and destroying plaintiffs' culinary water, tramping and eating their meadow lands, the garden, and entering the very door-yard.

In fact, if under such restraining order defendant's sheep and other livestock entered the home, the milk-house or other out-buildings of the plaintiffs, they would have been violating the Court's order to have interfered.

We mention the foregoing to illustrate what to our mind was a complete lack of legal knowledge on the part of the trial Court and respondent's counsel

touching the rights of a land-owner — home-owner — to protect such land and home against trespassers under the so-called guise that such trespasser was trailing his livestock over a so-called White Pine Canyon Road.

Up to the time of issuing such restraining order it had not occurred to respondent's counsel the necessity of describing the proposed road claimed to be a Public Highway, with any more particularity than "the White Pine Canyon Road over Lot 8."

The language of the order referred to and complained of at the time same was entered was just as indefinite and uncertain as defendant's pleadings, and as defendant's evidence up to the time that the witness Heath was called to the stand.

If the defendant's idea of the location of the so-called "White Pine Canyon Road" took it thru plaintiffs' garden, thru their meadow lands, past their front door, or into their house, and defendant sought to drive his sheep thereon, plaintiffs would be in danger of violating such order by resisting.

The right of a home-owner to protect his home against trespass and destruction was, we always thought, not only a sacred right but a natural duty.

We also call the attention of this Court to the fact that although this restraining order was sought to be vacated by motions and requests on the part of these appellants in the lower Court, such restraining order still stands, unless it be deemed that the same was superceded by the final decree in this case.

The restraining order referred to is mentioned here only to illustrate the apparent lack of appreciation and apparent lack of knowledge of the law of Public Highways and Easements in this State by

some of the parties concerned in the trial of this case.

In conclusion permit us to say that there is no sufficient pleadings and no sufficient evidence upon which the final decree in this case can stand, and we respectfully submit that the same should be reversed.

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