

1929

## Patrick Sullivan, et ux. v. John G. Condas : Abstract of Record

Utah Supreme Court

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Patrick Sullivan; plaintiff and appellant.

John G. Condas; defendant and respondent.

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4922

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In the  
**Supreme Court of the State of Utah**

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PATRICK SULLIVAN AND  
ELIZABETH SULLIVAN,  
his wife,  
*Plaintiffs and Appellants,*

vs.

JOHN G. CONDAS,  
*Defendant and Respondent.*

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**Respondent's Brief**

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D. B. HEMPSTEAD,  
STEWART, ALEXANDER & BUDGE,  
*Attorneys for Respondent.*

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ARROW PRESS, SALT LAKE

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STATEMENT OF FACTS.

Appellants are the owners of ninety-seven acres of land located about three miles from Park City, in Summit County, in what is known as White Pine Canyon, and which was patented to the heirs of Hyrum P. Workman, February 5th, 1906. (Ex. A.) The respondent is the owner of approximately thirteen hundred acres of land located in the same canyon and above the lands of the appellants. The means of ingress and egress to and from the lands of the respondent has been by a road

leading from the main traveled highway, near Park City, up White Pine Canyon, and over a portion of the appellants' land. This suit was commenced in the year 1927 and by the complaint the appellants claim damages for alleged trespass by the respondent during the years 1925, 1926 and 1927, in taking his sheep over the premises of the appellants. Appellants also seek an injunction to restrain the respondent from going upon said premises in the future.

Respondent denied the trespass and alleged damage and alleged by way of an amended counter-claim that his only means of ingress and egress to and from his lands is and has been the roadway up White Pine Canyon, which extends over appellants' lands which roadway the respondent alleged is a public highway and has been used continuously by the general public for more than sixty years. Respondent also claims that by reason of the continuous and uninterrupted use of said highway, for more than twenty years, the respondent and his predecessors in interest had and have a right in said roadway by prescription.

At the commencement of the trial the appellants dismissed their claim for damages, and so the sole and only issue which was presented for determination was whether or not a public highway was established over the appellants' premises, which respondent has a right to use in going to and from the lands owned by him. The court found that such a highway has existed for more than fifty years and decreed that the respondent, his agents,

servants and employees have a right to use said roadway for driving sheep, cattle and other livestock, and for all kinds of traffic, in the use, occupancy and enjoyment of the said lands of the respondent. The roadway established by the decree is specified as three rods wide, that is to say, one and one-half rods on each side of a center line, the courses and distances of which are particularly described in the decree.

### ARGUMENT.

In their brief appellants contend (1) That the amended counter-claim is insufficient to support the judgment, in that it fails to particularly describe by "metes, bounds, variations, dimensions, courses and distances" the particular highway which respondent claims the right to use; (2) that the evidence is insufficient to establish any public highway in White Pine Canyon and particularly the highway described in the findings and decree, as extending over appellants' property.

In his amended counter-claim the respondent, after alleging the ownership of his lands and describing them, and that they are located in White Pine Canyon and are chiefly valuable for grazing purposes, sets forth that other persons own lands in said canyon above and below the lands of the respondent and—

"5. That there is now and has been for more than sixty years last 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 last past. That 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 plaintiffs' complaint herein, to wit: Lot 8, Section 1, Township 2 South, Range 3 East, Salt Lake Meridian.

"6. The defendant alleges that said road referred to in paragraph five of this counter-claim 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." (Tr. 33.)

Respondent further alleges that he has constructed upon his said premises valuable improvements, at an investment of more than \$6500.00, and that he made these expenditures with the knowledge on the part of the appellants of the necessity for the use of said road by respondent, and that appellants acquiesced in such use of said highway at all times while respondent was making said expenditures and improvements, and respondent there-

fore claims that appellants are estopped from asserting that there is no highway over their said lands.

Considering appellants' first objection we call attention to the fact that it is alleged in paragraphs 9 and 10 of the counter-claim that the attempt by the respondent to make use of this highway was interfered with in this: that the appellants have forbidden the defendant to in any manner use said road. It also appears (Tr. 438) that the trial court's attention was called to the fact that when the respondent was attempting to make a survey of the roadway over the appellants' property that the surveyor was ordered off the premises and that the appellants would not permit the survey to be completed; that it was therefore necessary for respondent to apply to the court for an order permitting the survey to be made. This, of course, occurred during the trial. At pages 479 to 486 of the transcript the hostile attitude of the appellants is further evidenced by the fact that counsel in open court stated that his clients declined to permit the survey to be made and the colloquy between court and counsel resulted in the court's order requiring the appellants to permit the survey to be completed. We call attention to these portions of the record as indicating that the attitude of appellants has been such as to make it extremely difficult for the respondent to acquire specific data as to the particular route of the highway over appellants' premises, until after the court had ordered the appellants to permit the survey to be made. However, we do not regard the objection to the cross-complaint as

well taken for the reason that although it may be the better practice that a road or highway or other easement, in which a right is claimed, should be particularly described, that rule is for the information of the person over whose land the right of way is claimed, and he may waive the objection that the description is too general by failing to file timely objection to the complaint by way of special demurrer. In this case the appellants filed no special demurrer to the counter-claim of the respondent and therefore they waived any objection to the counter-claim for lack of particularity in the description of the roadway.

In the fifth cause of action, paragraph two, of appellants' complaint, it is alleged:

“That on or across the lands of plaintiffs herein described and on and across the lands of the defendant herein mentioned there is an old, worn-out, un-used, except by the defendant for the three years last past, roadway or wagon track, but that said 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 said 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.” (Abs. 10.)

The defendant denied that this roadway was not a public highway and put in, without objection, evidence



to show that this road was a public highway. The appellants knew the course of this roadway through their premises and they could not have been better advised had the definite and specific description, as shown by the survey, been set forth in the cross-complaint and counter-claim. The description as given by the surveyor and included in the findings and decree follows specifically along the course of this old roadway referred to in the complaint and the cross-complaint. Cases cited by counsel, which seem to indicate that a specific description of any easement claimed should be set forth in the complaint, refer to easements or private rights of way. It would seem that the public, and particularly a property owner over whose property the highway passes, is charged with knowledge of the course and extent of such highway, and therefore the necessity of alleging specifically the description of a highway is not as important and necessary as would be a description of an easement or roadway which one might claim over the lands of another.

In *Poole vs. Greer* (Del.) 65 Atl. 767, the court uses this language:

“The defendant contends that the first count of the declaration is fatally defective because it describes the right of way as ‘toward the Holcomb Road’ and does not otherwise designate the terminus. We think this is a matter of greater particularity and description and should have been raised on special demurrer, if at all, and may not now be considered under the issues made by the pleadings.”

See also:

Anteurieth vs. St. Louis, etc., R. R. Co., 30  
Mo. App. 254.

Coming now to the sufficiency of the evidence to sustain the findings and judgment establishing the highway over appellants' property. The court permitted to be introduced in evidence a survey made by witness Heath, who particularly describes the highway and it is this description that is set out in the findings and decree. Counsel insist repeatedly that there is no evidence that the road up White Pine Canyon extended along the course as given in Heath's survey, but that the evidence shows that whatever roadway did exist up that canyon varied entirely from the route fixed by Heath.

We shall call attention to the testimony of numerous witnesses, not only as to the existence of this road, but as to its location, so as to show that the findings and decree are amply supported by the proof.

WILLIAM ARCHIBALD, a resident of Snyderville, testified:

Q. How long have you known White Pine and Red Pine Canyons and the canyons adjacent to Snyderville?

A. Since 1870.

Q. Do you know that particular ranch referred to here as the Sullivan Ranch, that Sullivan claims?

A. Yes.

Q. Do you know the Condas Ranch?

A. Yes, sir.

Q. Do you know the ranches in the vicinity of White Pine and Red Pine Canyons?

A. Yes, sir.

Q. Where is White Pine Canyon with reference to the Condas and Sullivan Ranches?

A. They are both situated in the mouth of White Pine Canyon.

Q. Each ranch with reference to the lower and upper portion of the canyon—how are they located, these two ranches?

A. The Sullivan ranch is down north of the Condas ranch.

Q. How much land do you own in that locality?

A. In that township I own 99.3 acres.

Q. State whether or not there is a roadway leading from the Park City main highway up to the plaintiffs'; that is up to the Sullivan ranch and up to the Condas ranch?

A. Yes, sir, there is. (Tr. 149-150.)

The witness then gives a general description of the route of the road and then further testifies:

Q. What is the course of this roadway with reference to White Pine Canyon?

A. It goes right up into White Pine Canyon, up into the basin.

Q. How long have you known this road?

A. Well, that road has been changed maybe a rod or two rods in a place there.

Q. Now, just describe the road you are referring to, and the course of the road and that has

been changed a rod or two rods, you may tell us that?

A. Mr. Lake and Mr. Redden, I believe, had this ranch as co-partners before Mr. Sullivan, and there is a flat there that we had a sawmill on there; I think that was about 1876; I worked for Gibson at the sawmill and I was shipping clerk and foreman, and this was placed upon the ground after the brush was cleaned off, and they changed the course of that road up a little farther towards the bench.

Q. Farther to the west?

A. Farther to the west; but there, oh, maybe fifteen rods inside the line between Mr. Sullivan and I, our sleeping cabin used to be up that road that turns in from the west, you will see a road going off this bench on to the hollow there, brought logs down to the mill. This was changed for convenience to make a piece of hay land there, changed for their convenience.

Q. That is for the convenience of Lake and Redden?

A. Yes, Lake and Redden.

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

A. Since 1873.

Q. And to what extent, of your own knowledge, since 1873, and in what manner has this roadway been used?

A. For hauling lumber, for driving stock, up in the hills, and for hauling wood and general building material for the settlement in the shape of timber.

Q. Has this roadway been used generally by the public for these purposes?

A. Yes, sir.

Q. During that entire period?

A. Yes, sir.

Q. Now, do you know, and has the course of this present road which you have referred to been generally along the course of the present road which we saw up there yesterday, with the exception, which you say, it was moved a little westerly in order to leave the meadow clear for grazing and raising crops?

A. It has run in that direction.

Q. Do you know the circumstances or why it was that this road was moved to the west some short distance?

A. Well, only I would take it that it was done to benefit this ranch.

Q. Do you know who moved the road from the meadow that is the center of that little meadow over to the west side of that meadow?

A. Yes, sir, Frank Lake and Mr. Redden.

Q. Do you know about when that was?

A. No, I cannot exactly say, I know approximately. It must have been about twelve years ago.

Q. Now state during the time you have known this road; state whether or not it has been a well defined and well traveled road?

A. Yes, sir, well defined and well traveled road.

Q. Is there any means, Mr. Archibald, of ingress and egress to White Pine Canyon, other than along the course of this road?

A. No, sir.

Q. And in order that Mr. Condas may go to his ranch, is there any way possible of his getting to his ranch from any other roadway than this?

A. No, sir. There is no other way. The other is all fenced up. (Tr. 151-155.)

Mr. Archibald further testified that at an early date the road up White Pine Canyon was used by loggers up until 1903 (Tr. 167) for hauling lumber from two saw-mills (one located on the flat by the Sullivan house, and the other about a mile and a quarter above the Condas house) which operated prior to 1878. (Tr. 169-170.) That it was the main traveled road from the Sullivan ranch and the Condas ranch and used by the public generally (Tr. 190-191); that wood was hauled out of this White Pine Canyon for the purpose of roasting ores at the mines up to about 1900 and that the road was never obstructed until the Sullivans went into possession of the property now owned by them. (Tr. 191.) He further states that the road was also used since the saw-mills ceased operations for the trailing of livestock which were taken to graze in that section of the country. (Tr. 192-193.)

THOMAS L. POWERS testified that he owns a ranch north of White Pine Canyon and a quarter of a mile distant; that he has known that canyon for thirty-five years; that he drove cattle up there thirty-three years

ago and that the road in that canyon has been used by the public. He further testified:

Q. You know where the White Pine Canyon road now runs as it passes up there through the Sullivan and Condas ranches, do you not?

A. Yes, sir, I know where it runs now.

Q. Yes. *Is that road as it is or now passes through those places substantially in the same place as it has always been, when it passed thru those places as you have known them?*

A. *Except for a slight change.*

Q. What slight change has been made?

A. It has been moved closer to the north side of the canyon, closer to Mr. Sullivan's or Lake's house.

Q. That is it has been moved from the meadow a short distance from the west side towards the house?

A. Yes.

Q. *That is, the road as now constituted is the same road that passed through the Sullivan and Condas ranches, the same road as has been there since you have known it?*

A. *Yes, since I have known it.*

Q. During the time that you have known this road has there ever been any interference or obstruction in the road until the plaintiff in this case fenced it?

A. No, I have not known of any obstruction. When they went in there Mr. Redden took up the Condas place and Mr. Lake, I cannot say for sure whether Mr. Lake put a gate there or not, but it always was so it could be opened. I don't know whether Mr. Lake put a gate there. I cannot say for sure, but after it was there it was so it could be opened.

Q. So the public could go through just the same?

A. Yes.

Q. There was never any attempt to stop the public going through to your knowledge?

A. I don't think Mr. Lake or Mr. Redden ever tried to stop anyone. (Tr. 198-199.)

On cross-examination Mr. Powers testified:

Q. I understand you to say the road as it approaches the Sullivan land has been moved from where it was nearer to the foot hills?

A. Yes, a slight change.

Q. Do you remember the time that mill stood there?

A. No, that was before my time.

Q. When you say a slight change you mean what—three or four rods?

A. Not that much.

Q. Two rods?

A. Oh, probably one rod.

Q. And that change has been made along the entire line of the road?

A. Not the entire distance. Some part of it might be changed about a rod, some a half a rod.

Q. Some about two rods?

A. That is what I say. Some of it is on the same ground it always was.

Q. But there has been a complete change in the road over the hay land?

A. I would not call it complete.

Q. What I mean is the entire road has been moved farther up the hillside, so as to make more room for the hay land below?

A. Yes, I guess it has. (Tr. 205-206.)



The real intent of the witness was to testify to the same change in the road mentioned by witness Archibald.

DAVE SNYDER, sixty-one years of age, testified that the road had been up White Pine Canyon as long as he could remember and that it had been used by the public for hauling wood, driving stock, hauling logs and mining timbers. (Tr. 209.)

\* \* \* \*

Q. *Was this road as it passes over the Sullivan ranch in the same place in the early days as it is now?*

A. *Yes, sir.*

Q. Has there been some minor changes?

A. Very small ones, if any, to my knowledge.

Q. What is the nature of the minor changes?

A. Well, to the benefit of the Sullivan people and Lake people.

Q. Just state how it was changed to their benefit?

A. A little to the west nearer the hill.

Q. Nearer the hill to admit or afford more meadow for owners of the land?

A. Yes.

Now, in the days of logging, when there was a good deal of timber work along this highway, was the road wide enough so teams could pass?

A. Yes, sir; in fact it was always wide as you would need it for any purpose, I believe. It was never closed up.

Q. Was it wide enough for teams to pass and for livestock to be trailed along it?

A. Yes, sir.

Q. And did these teams going up and down pass each other?

A. Yes, sir.

Q. And did livestock trail in a general way along the roadway?

A. Right along the roadway where we used to take ours.

Q. And that is true along the roadway as it passes through the Sullivan ranch?

A. Yes.

Q. Did you ever know of this roadway being obstructed by anyone up to the time Sullivan got on this ranch?

A. No, sir.

Q. Did the public generally use and treat it as a public highway?

A. Open as far as I know, but never closed in any way.

Q. And is this the only road that is useable in order to get up White Pine Canyon?

A. Yes, sir.

Q. And White Pine Canyon in these early days was used for the purpose of getting out logs, cordwood, for the purpose you mentioned, and in later years was used extensively for what purpose?

A. Stock and sheep later years.

Q. And since used for sheep. Have sheep trailed up this road in order to get into White Pine Canyon?

A. Yes, sir, I think so. (Tr. 210-211.)

On cross-examination he testified that there has been no change in the road, except there was a change for

a very short distance just below the Condas house, and another change whereby the road was put up nearer the hill for the benefit of the Sullivan meadow, this latter change being made for the benefit of the then owners of the Sullivan land.

RUFUS J. BAILEY, age sixty-four years, testified:

That he has known White Pine Canyon for twenty-six or twenty-seven years; that there was a roadway up the canyon, a fair road for a wagon; that he started trailing sheep up White Pine Canyon twenty-four years ago; that he took his supplies for his camp up the canyon in a cart, the front wheels of a wagon; that the road in places was two or three rods wide. (Tr. 227-229.)

TRACY WRIGHT testified that he has been familiar with White Pine Canyon since 1919, and has used the road since 1919, and has used the road since that year for the trailing of livestock and for the hauling of provisions in wagons; that the road has been up that canyon ever since he has known the canyon; that it was a good canyon road; that he has met lots of people going up and down this road; that he has seen people on horseback and up to the Condas ranch in automobiles; that he knew of sheep being trailed and of vehicular traffic up the road since 1919; that the sheep were trailed over a width of about four rods; and in some places not over a rod or rod and a half. (Tr. 236-238.) He further testified:

Q. Who was with you at the time you took your sheep up, Mr. Wright?

A. I had some horses with me.

Q. What years did you first take them up there?

A. My father has taken them up that trail since 1892.

Q. When did you, first years, accompany and take the sheep up that canyon?

A. That is pretty hard to tell. I have helped father all my life since I was large enough.

Q. Well, as near as you can tell me now?

A. Well, I will say I am positive since 1913.

Q. Since 1913?

A. Yes, sir.

Q. The trail that you had been using over the Sullivan land was the upper trail that goes over the brush?

A. For the sheep, but the other I have used for automobile, horses and pack outfits, that went up by his house and to Condas.

Q. Has there ever been any objection by Mr. Sullivan?

A. No, sir. (Tr. 240-241.)

On cross-examination he testified:

That there has been no objection to the use of the road; that there were some gates there since about 1921, which could be opened and closed. (Tr. 241-242.)

DELBERT REDDEN testified:

That he has known White Pine Canyon since 1900; that the highway has been used since that time for haul-

ing timbers, logs and poles, by stockmen and sheepmen, including himself, and also by the farmers. That he was interested in the Sullivan ranch with Frank Lake in 1906 to 1908.

Q. While you *and* he were interested, or at *the time you* were interested in *the Sullivan ranch*, where *did this White Pine Canyon road* go as it *passed along through the Sullivan ranch*?

A. Well, *practically in the same place it is today, except a few feet lower down.*

Q. And state what, if any, change was made in those few feet on the lower end you spoke about?

A. Well, they grubbed off the brush and moved the road maybe five or eight feet on the lower end.

Q. What was the purpose of that?

A. To get more meadow land.

Q. Who moved that road farther west and along the foot of the hill to get more meadow land?

A. At the lower end you mean?

Q. Yes.

A. Mr. Lake.

Q. And after the road was moved by Mr. Lake, state whether or not the public generally did use that road, as it had been changed to the foot of the hill?

A. Just the same. (Tr. 258-261.)

Q. What were your observations as to how the road was used and who used it and the frequency with which it was used during the time you lived there from 1912 to 1923?

A. During the summer season sheepmen up and down all the time; cattlemen up and down

all the time; lots of strangers. I saw lots, a few traveling over towards Ogden, and during the chicken law, when the chicken law was open, ten or fifteen years, seen at my house pretty nearly every year. I saw a couple of men in a car that had traveled up that trail. Wright has traveled up and down that canyon all the time I lived there.

Q. During that entire period did you ever see the road obstructed?

A. No, sir. (Tr. 266-267.)

Q. Were you on the road from time to time and were you in a position to see whether the road was obstructed?

A. Yes, sir.

Q. During the time that you traveled back and forth over this highway leading to and from your place up there, did anyone who was on the Sullivan ranch, or Mr. Lake, or anyone else, question or make any obstruction—question your right or make any objection to your using that road?

A. No, sir. (Tr. 268.)

He further testified that where the road passed through the Sullivan ranch and up to the Condas house it was two rods wide in some places and others three rods wide. (Tr. 276.)

On cross-examination he testified that the highway over the Trottnan Lane to the Condas house was two or three rods wide. (Tr. 290.)

On redirect examination he testified that from 1898 to 1923 the road was used by numerous persons,

whose names he gives, for trailing sheep, and that he made the change in the road where it crosses over the meadow land. That he never stopped anybody from using the road. (Tr. 297-298.)

JOHN CONDAS, the respondent, testified:

That he has been familiar with White Pine Canyon since 1924 and that he purchased his ranch from Mr. Redden; that there was a road leading up to his place in 1924 and 1925, when he became interested in the property; and that the road was traveled by the general public. That in 1926 Sullivan put a gate across the road to keep the stock from getting into his hay land. That in 1926 Sullivan told him he wanted to put a lock on the gate for a few days, because he didn't have any man to watch his cattle; that he gave Condas a key so that he could travel the road; said he didn't care for other people. (Tr. 307.) He further testified that he had used the road to travel up and down with his sheep since 1925 (Tr. 308), and that two or three or four rods was necessary for this purpose. (Tr. 311.)

JOHN R. LAKE, witness for the plaintiffs, testified:

That he lived on the Sullivan ranch from 1911 to 1917; that his father changed the road where it used to run through the Sullivan meadows and built it farther to the west, near the hill, so he could save meadow. (Tr. 526-527.)

WILLIAM ARCHIBALD testified on rebuttal:

That he hauled wood over this road as late as 1890 or 1891 (Tr. 548); that the road was used for hauling cord wood from 1878 down to 1893; that he hauled cord wood down to the mines and that when the price of silver went down the mines closed (Tr. 548-549), and he named a number of people who made use of this road to show that it was used by the general public. He states that the road was used as a public road continuously from 1873 (Tr. 550); that the road from Snyderville up to Dragtown went clear up the canyon; that the road marked "A" on appellants' exhibit "C" (which is the road claimed by the respondent) was a public traveled road. (Tr. 556.)

DELBERT REDDEN testified on rebuttal:

That except for the change made at the gate between the Condas and Sullivan ranches, to make more meadow land, the road has never been changed since 1914. (Tr. 629-631.)

Q. Mr. Redden you heard Mr. Sullivan testify that he moved the road above his house leading toward the Condas ranch ten or fifteen feet to the west towards the hillside?

Q. Is that a fact?

A. No, sir, the road has never been changed by Mr. Sullivan himself up to the gate; this piece of road you are speaking of.

Q. Yes?



A. Up until the time I changed it from the swamp to the hill.

Q. That was in 1914?

A. 1914.

Q. But the location of the road has never been changed from the Sullivan place to the Condas ranch?

A. Just the same. (Tr. 631.)

He testified that he helped construct the gate at the northeast corner of the Sullivan ranch in 1915 (Tr. 632), and he further testified as to a conversation he had with Mr. Lake, at the time the gate was constructed. He testified after they got the fence built from Sullivan's fence, north end of his land up to Redden's gate, to keep the cattle from coming from Snyderderville to come in on both of them, he said, "Have you any objection to putting up a fence?" Redden said, "No, not in the least." He had a few potatoes and had them fenced in. He said, "It will keep your horses in and strays from coming in from Snyderderville." He said, "After we get the fence up we will open the gate and leave it open." That is what happened.

Q. That is the gate was left open after that time?

A. Yes.

Q. Was there ever a lock on that gate?

A. No time that I ever knew of.

Q. Did you have a lock on the gate between Lake's place and your place?

A. Never. (Tr. 633.)

The court will bear in mind that the respondent is claiming the road "A," as shown on appellants' Exhibit "C," which runs on the north and right hand side of the canyon going up and that road is shown as the road surveyed by Heath. (See Heath map introduced in evidence.) Heath testified that his survey shows the road just as it is located through the Sullivan tract (Tr. 647), and this is the road that the court establishes as a public highway by his findings and decree.

Having shown that there has been a used road or highway up White Pine Canyon since 1873 and that it has been used for all purposes by the general public, and that said road has always been substantially along the route of its present location, we are now to show that under the facts the court was justified, as a matter of law, in entering a decree herein, establishing said road as a public highway.

This road existed prior to the time that the Sullivan land was patented on February 5th, 1906, and therefore the owners of the Sullivan land acquired it from the government subject to the highway easement. Section 4919, United States Compiled Statutes (Revised Stat., Sec. 2477), provides:

**"RIGHT OF WAY FOR HIGHWAYS OVER PUBLIC LANDS.** The right of way for the construction of highways over public lands not reserved for public use is hereby granted."

In the case of Verdier vs. Port Royal Rd. Co., 15 S. E. 476, it is held that under the section above quoted a

grant of right of way is valid as against a subsequent conveyance by the government of the land, by metes and bounds, to a private person.

See also *Flint & P. M. Ry. Co. vs. Gardo* (Mich.) 2 N. W. 648.

In *Montgomery vs. Sommers* (Ore.) 90 Pac. 674, it is said:

“The Act of Congress referred to by the court is an express dedication of a right of way, and an acceptance of the grant while the land is a part of the public domain may be effected by public user alone, without any action on the part of the public highway authorities. When an acceptance thereof has once been made the highway is legally established and thereafter a public easement upon the land and entrymen and claimants take subject to such easement.”

A settler on public lands on which there is a road in common use as a highway takes subject to the public easement in such way, though it was never established by the public authorities under the general road laws.

*Van Wanning vs. Deeter* (Neb.) 110 N. W. 703; 112 N. W. 902.

The foregoing section of the statute constitutes a grant in *praesenti* and when accepted by the public takes effect as of the date of the grant. That is to say the

grant remains in abeyance until the highway is established and takes effect from that date.

McAllister vs. Okonogan Co. (Wash.) 100  
Pac. 146.

Stofferan vs. Okonogan Co. (Wash.) 136 Pac.  
484.

Butte vs. Mikosowitz (Mont.) 102 Pac. 593.

The fact that bars or gates were constructed across the public highway does not affect one's rights to the use of the highway and is not an assertion of any right inconsistent with the use of the road as a highway.

In Eldredge vs. Collins (Neb.) 105 N. W. 1085, the court declares:

“It is true the evidence shows that during the winter season from 1891 to 1895 the owners of lands adjoining the road sometimes stretched wire across it to connect fences on either side, but from the entire evidence we are satisfied that such obstructions never amounted to an assertion of any right inconsistent with the easement of the public, because the public used the road, notwithstanding such obstructions, and submitted to the inconvenience, not in recognition of any right inconsistent with their use of the road as a highway, but as an act of grace and out of regard for the interests of the land owners during that period.”

In Sprague vs. Steed (Colo.) 139 Pac. 544, gates were constructed across the public highway, but the pub-

lic continued to use the road. The fact that the gates were so constructed in no way affected the public's right to the use of the road. Sprague brought an action for damages and trespass, complaining that Steed had broken the locks on the gates. It appeared that the road which was fenced off by the gate extended through the land belonging to Sprague, long before patent had been issued to such land. The court held that the defendant had a right to the use of the highway.

The rights granted by the United States Statutes cover and include, not only highways used as wagon roads, but also livestock trails, used by the general public for driving their flocks and herds from one range to another.

**Hatch Bros. vs. Block (Wyo.) 165 Pac. 518.**

**Bishop vs. Hawley (Wash.) 238 Pac. 284.**

**Montgomery vs. Sommers (Ore.) 90 Pac. 674.**

Respondent also claims that he has a right to use said highway because it has become established as such pursuant to the laws of this state.

When this road was established the Statutes of Utah Territory then in effect, Chapter 29, Laws of 1880, provided:

“Section 2. Highways are roads, streets or alleys and bridges laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the use of the public.

Section 3. Roads laid out and regarded as highways by the county court and all roads used as such for a period of five years are highways.”

Chapter 12, Laws of 1886, Section 2, provided:

“All roads, streets, alleys and bridges laid out or erected by others than the public and dedicated or abandoned to the use of the public are highways. A highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has been continuously and uninterruptedly used as a public thoroughfare for a period of ten years.”

This last quoted statute was carried into the Compiled Laws of Utah, 1888, Section 2066.

The Revised Statutes of Utah, 1898, Section 1114, provide:

“In all counties of this state all roads, streets, alleys, lanes, cross places, trails and bridges laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in actions for partition of real property are public highways.”

In construing this statute this court, in the case of *Wilson vs. Hull*, 7 Utah 90, 24 Pac. 799, declared:

“There being in Utah Territory no statute covering any formal acceptance by officers or agents in charge of public roads of land dedicated by owners for highways, the court is not prepared to say that an acceptance may not be inferred, under some circumstances, from the action and use of the public generally, without any action by the body charged with the repair of public roads.”

The following are additional sections of Revised Statutes 1898:

"Sec. 1115. A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

"Sec. 1116. All highways once established must continue to be highways until abandoned by order of the Board of County Commissioners of the county in which they are situated, by operation of law, or by judgment of a court of competent jurisdiction; provided that a road not used or worked for a period of five years ceases to be a highway."

"Sec. 1117. The width of all public highways, except alleys, lanes and trails, shall be at least sixty-six feet. The width of all private highways and byways, except bridges, shall be at least twenty feet. Provided that nothing in this title shall be construed so as to increase or diminish either kind of highway established or used as such."

The law now in effect is set forth in Secs. 2802 and 2803, Compiled Laws of 1917, which read:

"Highways once established must continue to be highways until abandoned by order of the Board of County Commissioners of the county in which they are situated, or by a judgment of a court of competent jurisdiction."

"Sec. 2803. The width of rights of way for such roads shall be such as will meet the approval of the State Road Commission and the width of all rights of way to be used for county roads, alleys, lanes, trails, private highways and by-roads,

shall be such as shall be deemed necessary by the Board of County Commissioners; *provided that nothing in this section shall be construed as to increase or diminish the width of either kind of highways already established and used as such.*"

By repeated decisions of this court the law as declared in the statutes just quoted has been recognized and confirmed, not only when the court had before it the question of the existence of a public highway, but also as to the width thereof.

In Whitesides vs. Green (Utah) 44 Pac. 1032, the court held:

"Where the public have acquired the right to a public highway by user they are not limited in width to the actual beaten path; the right carries with it such width as is reasonably necessary for the public easement by travel and the width must be determined from the facts and circumstances peculiar to such cases."

In Schettler vs. Lynch, 23 Utah 305, 64 Pac. 955, it is held:

"The dedication of land for a public highway may be either expressed, as when the owner manifests his purpose by a grant evidenced by writing, or implied when the acts and conduct of the owner clearly manifest intention on his part to devote the land to the public use."

The last adjudication is Lindsay Land & Livestock Co. vs. Nick Churnos, decided in October, 1929, wherein this court holds that a highway used prior to the patenting



of the lands over which the same extends, conferred a right upon the public to continue to use such highway. The facts in that case are quite similar to the facts in the case at bar. The court recognizes that under the Federal Statute the use of the highway constitutes an acceptance of the grant made by the Federal Statute, and further declares that in determining whether the use has been sufficient to establish a highway that it is sufficient that it be shown that the road was used for a variety of purposes and that the use made of it "was as general and extensive as the situation and surroundings would permit had the road been formally laid out as a public highway by public authority."

As to the exact location of the road the court, speaking through Chief Justice Cherry, uses this language:

"With respect to the certainty of the line or course of the road the evidence was also sufficient to support the decree. While the public cannot acquire a right of way to pass over a tract of land generally, but only in a certain line or way, it is not indispensable to the acquisition of the right that there should be no deviation in the use from a direct line of travel. If the travel has remained sufficiently unchanged and the practical identity of the road preserved it is sufficient, although there may have been slight deviations from the common way to avoid encroachments, obstacles or obstructions upon the road."

In the case at bar it clearly appears that the only change made in the road was by Redden and Lake, when

they were in possession of the Sullivan land, in order that they might have the use of a little more meadow land, and as that change was made for the benefit of the owners of the land, the appellants cannot now assert that such change broke the continuity of use of the highway.

This question came before this court in the case of Bolton vs. Murphy, 127 Pac. 335, and the court, referring to certain changes in the road, uses this language:

“This was in the early 80’s, along about 1883, when one J. W. Young was the owner of the lands, and the deflection in question was made at his request, in order to avoid a railroad grade, which it seems he was constructing in front of the premises in question. The deflection was, however, slight and under the circumstances under which it was made cannot be considered as having in any way broken the continuity of the use.

“Any slight change in the traveled track was made about the year 1903. If it were conceded, however, that the latter change was such as under ordinary circumstances would be sufficient to break the continuity of travel or use, such is not the case here for the reason that the latter change was, in effect, made at a time when the right to an easement by prescription was complete. Under the undisputed evidence this change comes clearly within the rule laid down by this court in Thompson vs. Madsen, 29 Utah, where at page 382 (81 Pac. 161), Mr. Justice Straup, speaking for the court, said: ‘If then the predecessors of the defendants in consideration of the closing of said portion of the north and south alley granted to plaintiffs and to their predecessors a right of

way over the east and west alley in lieu thereof, which was accepted by the plaintiffs and their predecessors, the defendants will not now be allowed to close the new or substituted alley, without first reconstructing the old one; and the fact that such grant was oral matters not, if on the faith of it rights have been acquired or relinquished and acted upon.' ”

This court, in the case of Lindsay Land & Livestock Co. vs. Churnos, *supra*, affirmed the trial court in decreeing the road to be one hundred feet in width. In this case the evidence is ample to show the use of a roadway three or four rods in width, and the court fixes the width as one and one-half rods on either side of the center line as surveyed by Heath.

In addition to the fact that respondent is entitled to use this roadway as a public highway established over public domain, and therefore granted by the Federal Statute, and as one continuously used for a period of more than ten years, and therefore a road established under the State Statute, there is the equitable consideration, as shown by the evidence, that Redden, when he took up the Condas place in 1907 (Tr. 260-261-262) used this highway over which to haul his materials for his house and other improvements, and the use that was made of this road was with the knowledge of the Sullivans and their predecessors in interest. Redden expended considerable money in establishing himself on this property, and Condas purchased the property with such improvements and with

the knowledge and understanding that the road had been used as a means of ingress and egress to and from the premises, and without any question ever having been raised by any occupant of the Sullivan property, until Sullivan began to object in 1927.

Appellants complain that the court erred in admitting the testimony of Engineer Heath, who made a survey of the highway over the Sullivan property. We have already called attention to the fact that it appears from the record that appellants would not permit Heath to make a survey when he first went upon the premises for that purpose, and that it was necessary for respondent to get an order of the court in order that the survey might be made. The refusal to permit the survey, of course, made it impossible for respondent to put Heath on the stand along with other witnesses for respondent, and it was not until appellants' witnesses had testified that Heath had the survey completed. As shown by the record (Tr. 647-649), appellants' objection to the testimony of Heath was that it was not proper surrebuttal and was introduced out of order. To quote:

“MR. SULLIVAN: While he is marking that we interpose the objection on the ground that the testimony is not proper surrebuttal.

THE COURT: I take it that it is not surrebuttal.

MR. STEWART: It is simply introduced for the purpose, your Honor, of specifically showing the course of the roadway in question, so that the metes—so that the roadway may be specifically and definitely fixed.

**THE COURT:** I take it that your request now is to introduce this evidence out of order.

**MR. SULLIVAN:** We object to it being introduced out of order. Let me say, just a moment, that a very great deal could be said and properly said about this kind of procedure. In view of the length of time this case has been for trial and in view of the way the plaintiffs were pushed into the trial, we could talk for an hour as to the impropriety, unjustness and unfairness of this kind of proceeding. We won't take time to say all that could be said, but we want our objection and exception to be made if it is allowed.

**MR. STEWART:** I want to make a record. Your Honor appreciates the difficulty we have had in getting on the premises at all because of the plaintiffs' attitude in this case. We went up several days ago to have this survey and the plaintiffs, while in the course of the survey, ordered us off the place, and we called attention to the fact when we rested that there would be another witness that we would have to call, and this proceeding, while it is a little out of order, we feel it is justified and ask the court to permit us to introduce this as a part of our main case.

**THE COURT:** The objection may be overruled and the plaintiffs may have an exception."

In *Musgrave vs. Studebaker Bros. of Utah*, 48 Utah 410, 160 Pac. 117, the court uses this language:

"Whether the court will or will not permit a party to reopen his case upon a certain question or subject is largely a matter of discretion. No doubt the court might abuse its discretion in that

regard and if such were the case relief could be had on appeal."

It is not apparent how plaintiffs were in any wise prejudiced by the court permitting the witness Heath to testify. He was simply giving evidence as to a physical fact, to wit: the route and course of the highway through the Sullivan property. This evidence was material and as a matter of fact indispensable, in order that the court might have before it the particular description of the highway which respondent claims has long been established and which he claims the right to use in going to and from his premises. There certainly was no error in the ruling of the court in permitting such evidence to be introduced, even though it was out of order.

We respectfully submit that both under the facts and the law a public highway exists through the Sullivan tract, along the route established by the finding and decree, and that the judgment should be affirmed.

Respectfully submitted,

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