

1978

John P. Condas et al v. George J. Condas et al : Brief of Defendants-Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Condas v. Condas*, No. 15669 (Utah Supreme Court, 1978).

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. CONDAS, GEORGE P.
CONDAS, HARRY P. CONDAS,
MARGARITA CREGLOW ELLIS
and TESSIE MADSEN,

Plaintiffs and Respondents,

vs.

CASE NO. 15669

GEORGE J. CONDAS, MARY
CONDAS LEHMER, CHRIS J.
CONDAS, NICK J. CONDAS,
ELLEN CONDAS BAYAS,
ALEXANDRA CONDAS OCKEY and
J. CONDAS CORPORATION, a
Utah corporation,

Defendants and Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

AN APPEAL FROM THE DECREE OF THE FOURTH
DISTRICT COURT IN AND FOR SUMMIT COUNTY,
HONORABLE GEORGE E. BALLIF, JUDGE

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Appellants George J. Condas,
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FILED

JUN 21 1978

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Defendants and Appellants.

Case No. 15669

BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF THE KIND OF CASE

Action to establish a public roadway and/or a prescriptive easement for a roadway across defendants-appellants lands in White Pine Canyon in Summit County, Utah, and for injunctive relief to order removal of gates across the roadway and to enjoin defendants-appellants from obstructing or interfering with vehicle or foot travel along the roadway to or from plaintiffs-respondents lands.

DISPOSITION IN THE LOWER COURT

The trial court held that plaintiffs-respondents failed to establish a prescriptive easement across defendants-appellants lands, but a public roadway had been established. Accordingly, it entered its Decree

(1) adjudging that the existing roadway up White Pine Canyon is a public road as it passes through and beyond the lands of defendants-appellants;

(2) ordering defendants-appellants to remove the gates which they erected across said roadway; and

(3) enjoining defendants-appellants from interfering with or in any manner obstructing the use of the roadway by plaintiffs-respondents and by the public generally through the lands of defendants-appellants.

RELIEF SOUGHT ON APPEAL

Defendants-appellants seek to reverse the whole of the Decree and to remand the case to the lower court with instructions to enter an Amended Decree dismissing plaintiffs' Complaint and adjudging that the roadway across defendants-appellants lands in White Pine Canyon is their private roadway and plaintiffs-respondents own no interest or right therein, or that failing, a new trial.

STATEMENT OF FACTS

To simplify matters, defendants-appellants collectively will be referred to hereinafter as defendants and plaintiffs-respondents collectively will be referred to hereinafter as plaintiffs and individual defendants or plaintiffs will be designated by name.

Defendants are the owners of approximately 2,600 acres of land and plaintiffs are the owners of approximately 640 acres of land, both in the area of White Pine Canyon. (Edgs. 1, 2, R.211, Exhs. 1-P, 14-P). The north line of defendants' lands

begins near the mouth of White Pine Canyon and extends up White Pine Canyon and over into the area of Iron Mountain (Exhs. 1-P, 14-D). Plaintiffs' lands are situate up-canyon and for the most part are bounded on the North and South by defendants' lands (Exhs. 1-P, 14-D).

Defendants are the children and successors of John G. Condas who acquired the lands in part patented by Delbert Redden, in part under his own homestead patents and in part patented by his brother, Gust Condas (Exhs. 33-D, 34-D, 35-D, 11-D). Plaintiffs are the children and successors of Peter G. Condas who acquired his lands under his own homestead patent (Exh. 12-D). John G. Condas and Peter G. Condas were brothers, making defendants and plaintiffs first cousins.

The first homestead entry was made by Delbert Redden in 1912 covering the northernmost lands of defendants in the mouth of White Pine Canyon on which the buildings and improvements were located (Ex. 33-D). Delbert H. Redden filed an additional homestead entry in 1922 covering the adjoining land up White Pine Canyon and to the East (Exh. 34-D). John G. Condas filed homestead entries in 1912 and 1916 covering lands adjoining the Redden property (Exh. 35-D). Gust Condas filed an adjoining homestead entry in 1924 covering lands up-canyon and to the South and East (Exh. 11-D). Patents to the above lands were thereafter issued. John G. Condas acquired the Redden property in 1925, and thereafter received his own patents and acquired the lands of Gust Condas, making up the lands now owned by defendants. In

1926, Peter G. Condas filed his homestead entry and in 1929 acquired a patent to the lands now owned by plaintiffs (Exh. 12-D).

Defendants' predecessor John G. Condas was the defendant in an action entitled Patrick Sullivan, et ux, plaintiffs v. John G. Condas, defendant, being Salt Lake County Civil No. 42140, concerning the White Pine Canyon Road as it crossed the Sullivan property immediately to the North of the lands then owned by John G. Condas. Plaintiffs' predecessor, Peter G. Condas, was not a party to the foregoing action. A final Decree was entered therein on December 4, 1928 (Exh. 36-D) which adjudicated that a public highway existed from the Park City Highway along Trotteman's Lane and over and across Sullivan's property to the gate (on the North line of the then John G. Condas property). An appeal was taken by plaintiffs Sullivan to the Utah Supreme Court and its opinion is reported in 76 Utah 585, 290 Pac. 954 (1930) wherein the decree of the trial court was affirmed.

One of the pivotal issues in this case was whether any portion of the Abstract of the Record (Exh. 2-P) or the Briefs (Exhs. 3-P, 4-P) filed in Sullivan v. Condas, supra (Supreme Court Case No. 4922) was admissible in evidence in this case. Plaintiffs offered in evidence the foregoing Abstract of Record (R. 405) to which defendants objected (R.405-409) and the Court initially would not receive it (R.408-410). Thereafter, plaintiffs attempted to offer portions of the foregoing Abstract of Record

piecemeal by reading excerpts thereof into the record comprising paragraph 14 of the Answer and Counterclaim of defendant therein, John Condas (R.411,412) to which defendants objected (R.412,413) and moved to strike (R.416) which Motion was taken under advisement by the trial court (R.416).

Thereafter, plaintiffs were permitted to read into the record from Exhibit 3-P (Respondents' Brief) over defendants' objection and subject to their Motion to Strike (R.422), portions of the abstracted testimony of several witnesses and/or summaries thereof, including the summarized testimony of John G. Condas, as summarized by his lawyer (R.423-435, incl.). Defendants then moved to strike all of the foregoing testimony and summaries (R.435) which the trial court took under advisement (R.436).

At the conclusion of plaintiffs' evidence, plaintiffs reoffered into evidence designated parts of the Abstract of the Record in the Sullivan case, included in Exhibit 2-P; to-wit, the Answer and Counterclaim of John G. Condas, the Decree, all of the testimony offered by Mr. John Condas, including the findings of the District Court of which a part of Finding No. 8 was read into the record (R.619-622, incl.). Defendants renewed their Objection and Motion to Strike (R.624). The trial court overruled defendants' Objection and received the evidence subject to defendants' Motion to Strike (R.624).

Defendants were to be afforded the opportunity to proffer other portions of the Abstract of Record in the Sullivan v. Condas case after the lower court ruled on defendants' Motion to Strike

(R.622,623,624). At the conclusion of defendants' evidence, it was again made clear that in the event the trial court ruled the above proffer admissible, defendants would be afforded the opportunity to present any additional documentation out of the Sullivan v. Condas case which they determine necessary (R.965).

Some three and one-half months after final arguments, the lower court ruled that the abstracts of testimony in the Sullivan v. Condas case and the pleadings of John Condas, and the Findings and Decree were admissible in this case and on that basis decided this case on its merits (R.190,191) without affording defendants an opportunity to proffer rebuttal portions of the above abstracts as defendants had been repeatedly assured they would be permitted to do (Tr. 622, 623, 624, 965).

Defendants are mindful of the time-honored rules of appellant review which require stating the facts in the light most favorable to the Findings of Fact and Decree below. However in view of the difficulties above enumerated and defendants' firm position as to the inadmissibility of such evidence, defendants' further Statement of Facts herein is developed to the exclusion of such evidence.

In 1903, only a trail about four or five feet wide existed up White Pine Canyon to the flats (Supplemental Record - James Archibald Deposition, p. 8) which remained the same in 1905 or 1906 (ibid p. 10) and 1907 (ibid p. 11). The Trottman Lane used to connect with the road to Red Pine Canyon as it came out of McDonald's Basin (ibid p. 15). From 1903 to 1917 a very poor trail existed up the bottom of White Pine Canyon, but no road

for a wagon (Supplemental Record - Earl Johnson Deposition, pp. 7, 8, 9, 10). The Trotman Lane was passable by a wagon to the Del Redden cabin but not beyond (ibid p. 11).

From 1915 to 1920 only a horse trail existed which was steep and rough with a lot of rocks (R.438,442,443,445). In 1908 or 1910 and in 1915 there wasn't any trail to amount to anything (R.471,475). In 1922 there was no road up White Pine Canyon (R.644).

From 1920 to 1950 only a single trail existed up White Pine Canyon beyond the first stream crossing above the John Condas buildings (R.652,655,659,666,667,672,675,676,680,681,689,691, 729,734,735,736,737,749,750,760,762,763,771,775,784,790,791,855, 856,885,904,905,912,915,916,925,931,943). The only exceptions were described as a trail where you could drive a car through (R.533), or sometime between 1925 and 1929, prints of two tracks showing that four-wheeled vehicles had been on the road (R.498) or in 1942 a road or trail not manmade with tracks (R.969), or an unimproved road or jeep trail in 1940 based on opinion (R.1036).

From 1903 until 1925 no one but the Condas and an occasional horseback rider was seen traveling in White Pine Canyon (Supplemental Record - James Archibald Deposition, pp. 12,22; Supplemental Record - Earl Johnson Deposition, pp. 9,10; (R.441, 475,675).

During the years 1925 to 1928, John G. Condas, predecessor in interest of defendants, constructed a series of fences and gates within the northerly portion of his property dividing the

same into several pastures and corral areas which included a wooden gate across the roadway entering his property on the North line thereof and a series of division fences and wire gates along the roadway through his pasture and corral areas and a wooden gate of only sufficient width to permit passage of a person riding horseback across the roadway near the southern end of his pasture area (Fdg.9, R.213; Exh.15-D).

The wooden gate and its replacements constructed across the roadway on the North line of the John G. Condas property was usually maintained in a closed and locked condition, whenever John G. Condas and his successors were away from the property, generally since the construction thereof until the present time, and was generally maintained in a closed but unlocked condition when they were present on the property and said gates were generally posted with "keep out" or "no trespassing" signs since the construction thereof until the present time (Fdg.10, R.213).

During the period from 1926 to 1932, inclusive, entry upon and use of the roadway up White Pine Canyon across defendants' property by plaintiffs' predecessor in interest was with the permission and consent of defendants' predecessor in interest who provided a key to the locked gate to plaintiffs' predecessor in interest (Fdg.11, R.213).

During the period from 1933 to 1970, inclusive, plaintiffs and/or their predecessors in interest, leased their lands to defendants' predecessor in interest and/or defendants or the

lands of both parties were jointly leased to third persons and all during said period the entry upon and use of the roadway up White Pine Canyon across defendants' property by plaintiffs and their predecessors in interest was with the consent and permission of defendants and/or their predecessor in interest (Fdg.12, R.213, 214).

During the period from 1926 to 1970, inclusive, the use of the roadway by plaintiff and their predecessors in interest was under a claim of right and not in recognition of defendants' claimed right to grant or deny permission to use same (Fdg.13, R.214).

In 1972, defendants petitioned the Board of County Commissioners of Summit County to vacate a portion of the roadway across the northerly portion of their lands if such public road existed (Fdg.17, R.214), and that portion of the roadway was vacated by Ordinance 63 dated September 6, 1972 (Exh. 39-D) as amended on February 7, 1973 (Exh. 38-D). The Board of Commissioners did not give notice of the vacation to the plaintiffs nor did they (it) publish notice of the vacation prior to enacting the vacating ordinance (Fdg.18, R.214). Notice of the enactment of Ordinance 63 was published in the Park Record on September 14, 1972 (Exh. 40-D).

ARGUMENT

Introduction

We are mindful that under traditional rules of appellant review the Findings of the trial court are indulged with a

presumption of correctness and the burden is upon the attackee to demonstrate that they are in error and should be overturned. Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972); First Security Bank of Utah, N.A., v. Wright, (Utah) 521 P.2d 563 (1974). Here the Findings of the trial court are not only unsupported by competent evidence, but are against the overwhelming weight of the evidence. To establish a public thoroughfare, plaintiffs have the burden of proving public user for 10 years by clear and convincing evidence. Petersen v. Combe, 20 Utah 2d 376, 438 P.2d 545 (1968); Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639 (1972). And for a matter to be clear and convincing it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. Greener v. Greener, 116 Utah 571, 212 P.2d 194 (1949); Jardine v. Archibald, 3 Utah 2d 88, 279 P.2d 454 (1955).

We are also mindful that different rules of appellant review apply depending upon whether the case is one of law rather than equity. The instant action seeks injunctive relief against interference with an alleged easement and the trial court invoked collateral estoppel, an equitable remedy, in granting the injunctive relief. And where doubt exists as to whether a cause should be one in equity or one in law, the trial court should have some latitude of discretion. Sweeney v. Happy Valley, Inc., 18 Utah 2d 113, 417 P.2d 126 (1966). This being an equity case, and having been so treated by the trial court,

this Court will review the evidence and will reverse if it concludes that the evidence clearly preponderates against the Decision. Constitution of Utah, Art. VIII, Sec. 9; Rule 72(a), U.R.C.P.; Stanley v. Stanley, 97 Utah 520, 94 P.2d 465 (1939); Foster v. Blake Heights Corp., (Utah) 530 P.2d 815 (1974); Provo City v. Lambert, (Utah) 574 P.2d 727 (1978).

The key issue on this appeal is whether the Abstract of Record in Sullivan v. Condas (Supreme Court Case No. 4492), and Appellants' Brief and Respondents' Brief filed therein are admissible as evidence in this case. Inherent in that issue are

(1) whether the pleadings and abstracted testimony of defendants' predecessor, John G. Condas, are declarations against interest which can be invoked against defendants in this case, and

(2) whether the Findings in this case can rest on abstracted testimony of witnesses who testified in the Sullivan case, and

(3) whether the Doctrine of Collateral Estoppel applies or can be invoked against defendants in this case.

Absent the Abstract of Record in Sullivan v. Condas, there is no substantial evidence to support the findings of the trial court that a public road had been established in White Pine Canyon. In fact the overwhelming weight of the evidence in this case establishes that from at least 1903 until 1950 only a trail existed up White Pine Canyon beyond the first stream

crossing just above defendants' buildings. Likewise the evidence overwhelmingly establishes that during the whole of such period the only means of travel up White Pine Canyon was by foot or by horseback and it was not until 1950 and 1951 when a bulldozer cut a makeshift roadway up White Pine Canyon which made it passable for even 4-wheel drive vehicles.

The sum and substance of it all is that the trial court disregarded the evidence in this case and found against defendants because it regarded the position taken by defendants in this case as being opposite to the position taken by their predecessor in Sullivan v. Condas. In so doing the trial court erroneously admitted into evidence the Abstract of the Record in Sullivan v. Condas and the briefs filed therein, misconstrued the Findings of Fact therein and misapplied the Doctrine of Collateral Estoppel herein. The trial court then decided the case against the defendants without affording them the reassured opportunity to proffer rebuttal portions of the abstract. The end result of it all is that the trial court opened defendants' lands to the public by subjecting the same to a public roadway which never existed across their lands in fact or in law and in so doing committed reversible error.

POINT I

THE TRIAL COURT ERRED IN ADMITTING THE ABSTRACT OF RECORD IN SULLIVAN V. CONDAS (SUPREME COURT CASE NO. 4922) AND THE BRIEFS FILED THEREIN AS EVIDENCE IN THIS CASE.

Defendants' predecessor John G. Condas was defendant in Sullivan v. Condas (Salt Lake County Civil No. 42140) and neither plaintiffs nor their predecessor in interest was a party therein. Sullivans owned the land immediately North and adjoining the land of John G. Condas. A roadway known as Trotman Lane extended from the main highway across the lands of Sullivans and onto the land of John G. Condas. There Sullivans sued Condas for trespass and by way of Answer and Counterclaim Condas asserted a public roadway over the Sullivans' land claiming that a public roadway existed from the main highway all the way up White Pine Canyon. The trial court held that a public roadway existed across Sullivans' land up to the gate on the North line of defendant Condas' land. The trial court did not hold that a public roadway existed up White Pine Canyon across defendant Condas' lands.

(1) Neither the Pleadings, Testimony or Brief of Respondent John G. Condas in Sullivan v. Condas Constitutes Vicarious Admissions Against Defendants in this Action.

Vicarious admissions are controlled by Rule 63(9), Utah Rules of Evidence (U.R.E.), and are limited to agency, employment, conspirator or third-person contractual liability relationships, none of which are present in this case. The foregoing rule was taken from Rule 63(9), Uniform Rules of Evidence, approved by the National Conference of Commissioners on Uniform State Laws in 1953 which notes that this exception adopts the policy of Model Code (American Law Institute), Rule 508.

Declarations of predecessors in interest, while usually treated as vicarious admissions, are excluded from Model Code Rule 508 (Rule 63(9), U.R.E.) but may be included in the Model Code Rule 509 (Rule 63(10), U.R.E.). American Law Institute, Model Code of Evidence, Rule 509, p. 251. The Model Code omits any provision for admitting declarations of predecessors in interest except under the Code's liberal rules admitting declarations against interest. McCormick on Evidence, Section 245, p. 523.

Wigmore acknowledges that the Morgan Theory of Vicarious Admissions (adopted by the Model Code and Uniform Rules of Evidence), has sought to overthrow the whole theory of vicarious admissions as set forth in Wigmore's Treatise. Wigmore on Evidence, Section 1080(a), p. 195. The rationale for the Morgan theory is that the reception of so-called admissions made by persons related to the now opponent only by a "privity of interest", is a transfer into evidence law of numerous tests of substantive law which have nothing to do with evidential values and that in result, the rules of evidence admit copiously, as "vicarious admissions", many sorts of extra judicial statements of third persons which have all the testimonial weaknesses struck at by the hearsay rule, and which thus form an anomalous and undesirable sort of evidence. Wigmore on Evidence, supra.

In ruling on defendants' Objection and Motion to Strike, the trial court held that the allegations or assertions of fact contained in the pleadings (Answer and Counterclaim of

John G. Condas) as they pertain to White Pine Canyon, are admissible as "admissions" against interest (as to this proceeding), made by an authorized agent of defendants' predecessor in title, John Condas (R.190). The problem with that is the trial court overlooked the distinction between a declaration and an admission. A "declaration" is the assertion or a statement of fact and an "admission" is a voluntary acknowledgement made by a party of the existence or truth of certain facts. 29 Am. Jur. 2d, Evidence, §597, p. 651. Thus, an admission is a position taken by an adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention now being made by him in the litigation. Ibid. p. 652.

The pleadings of John G. Condas made by his attorney in Sullivan v. Condas might well be admissions which could be used against him in subsequent litigation under Rule 63(9), U.R.E., since he authorized the same. However, such would not be admissible as against these defendants in this case under Rule 63(9), U.R.E., since declarations of predecessors in interest are excluded from that rule under the authorities cited above.

The prior testimony of John G. Condas would be admissible against him in subsequent litigation under Rule 63(10), U.R.E., if it constitutes a declaration against interest. Likewise, his prior declarations, if against his interest at the time made, would be admissible against defendants in this proceeding under

the general rule cited by this Court in Lyman Grazing Assoc. v. Smith, 24 Utah 2d 443, 473 P.2d 905 (1970). However, to be admissible here under Rule 63(10), U.R.E., such declarations must be statements of fact made by John G. Condas himself against his interest at the time made.

(2) Neither the Pleadings, Testimony or Brief of Respondent, John G. Condas, in Sullivan v. Condas are Admissible as Declarations Against Interest.

The exception to the hearsay rule of declarations against interest are covered by Rule 63(10), U.R.E., which requires that such statement be made by the declarant and be against the interest of the declarant when made. Rule 63(10), U.R.E., was taken from Rule 63(10), Uniform Rules of Evidence, approved by the National Conference of Commissioners on Uniform State Laws in 1953, which notes that this exception, as does Model Code Rule 509, changes the prevailing rules by making declarations against interest admissible even though the declarant is available as a witness, and by recognizing the value of declarations against a social, as well as his pecuniary or proprietary interest.

Under Model Code Rule 509, the facts stated must be contrary to the interest of the declarant at the time of the statement, and evidence of the declaration is admissible wherever relevant, no matter against whom it is offered. American Law Institute, Model Code of Evidence, Rule 509, p. 256. However, as noted above, such declarations must be an assertion of

a statement of fact made by the declarant himself. Thus, neither the pleadings or brief of respondent John G. Condas in Sullivan v. Condas are admissible as declarations against interest in this case under Rule 63(10), U.R.E.

The only declarations which might qualify under Rule 63(10), U.R.E., are the statements of John G. Condas in his testimony in Sullivan v. Condas. A careful reading of the abstracted portion of his testimony (Exh. 2-P, pp. 104-111, incl., 194, 195) reveals no statement or declaration by him of a public roadway up White Pine Canyon through his property. The most that can be said about it is his abstracted statement on page 111 thereof that

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

Nothing contained therein constitutes a declaration against interest within the meaning and definition of Rule 63(10), U.R.E. Accordingly, even the abstracted testimony of John G. Condas in Sullivan v. Condas is inadmissible as evidence in this case.

(3) The Abstract of Record in Sullivan v. Condas Does Not Come Within the Hearsay Exception of Content of Official Record Under Rule 63(17), U.R.E.

"Official Record" is defined in Rule 63(4), U.R.E., and means all public writings, including laws, judicial records, all official documents and public records of private writings.

Rule 63(17), U.R.E., is an exception to the hearsay rule only to prove the content of an official record. In Bridges v. Union Pacific Railroad Co., 26 Utah 2d 281, 488 P.2d 738 (1971), this Court noted that the explanatory note under Rule 63(15), U.R.E., states:

" . . . It is not designed to permit the admission of a judgment or finding of fact of a court or administrative body for the purpose of proving the matters upon which such judgment or finding of fact were based."

The foregoing is equally applicable here and the Abstract of Record in Sullivan v. Condas is not admissible under Rule 63(17) U.R.E.

(4) Abstracted Portions of Selected Testimony From the Abstract of Record in Sullivan v. Condas Do Not Come Within the Hearsay Exception of Depositions and Prior Testimony Under Rule 63(3), U.R.E.

Testimony given at a former trial or proceeding between the parties to an action or proceeding is hearsay, and unless a proper foundation is laid to bring such testimony within the exception to the hearsay rule, it is not admissible in evidence. 29 Am. Jur. 2d, Evidence, §738, pp. 807, 808. The trial court held that the abstracts of testimony in the Sullivan v. Condas case is material and relevant and meets the requirements of Rule 63(3)(b)(i) and (ii), U.R.E., (R.190).

Rule 63(3), U.R.E., requires that prior testimony admissible as an exception to the hearsay rule is subject to the same limitations and objections as though the declarant

were testifying in person. It requires a finding that the declarant is unavailable as a witness and no evidence was offered by plaintiffs to establish such fact as to any declarant except defendants' predecessor John G. Condas.

In order to prove testimony given at a former trial, it must also appear that there is substantial identity of parties and issues. 29 Am. Jur. 2d, Evidence, §743, p. 812; Annotation: 70 A.L.R. 2d 494. John G. Condas was the defendant in the former case of Sullivan v. Condas, but neither plaintiffs nor their predecessor in interest was a party thereto. Nor are plaintiffs successors in interest to the Sullivans. The issue in the former trial was whether a public roadway existed across the Sullivan property and not whether a public roadway existed across the John G. Condas property. Thus, there is no substantial identity of parties and issues to satisfy the requisites for admissibility of such hearsay evidence.

The form of the former testimony may be by oral testimony of other witnesses who heard and remember the former testimony or by a verified copy of the transcript, stenographic notes or by notes made by a witness which correctly and accurately and fully reproduce the former testimony. 29 Am. Jur 2d, Evidence, §760, 761, 764, 765; Annotation: 11 A.L.R. 2d 30. The whole substance of the whole of the former witness' testimony, or at least the substance of the whole testimony on the particular point or issue involved in the previous trial, must be proved, including both testimony given on the direct exami-

ation and testimony given on the cross-examination, although the identical words need not be reproduced. Annotation: 11 A.L.R. 2d 30, §32, p. 112; 29 Am. Jur. 2d Evidence, §762, p. 832.

Here the prior testimony is not in the form of an official transcript nor the testimony of a witness who was present at the Sullivan v. Condas trial. Rather, it is in the form of an abstract of selected portions and/or summarized statements of prior testimony. Accordingly, the abstracted testimony in the form offered is inadmissible in this case against these defendants. Furthermore, a litigant is not at all bound by the testimony given by his witnesses on a former trial of the same case; that is to say, the former testimony does not, on the latter trial, constitute evidence of the true facts in regard to which the inquiries were made. Annotation: 74 A.L.R. 2d 521, 522. For the trial court to base its findings in this case on selected extracts and/or summarized statements of testimony given in Sullivan v. Condas is reversible error.

(5) The Trial Court Erred in Taking Judicial Notice of the Findings of Fact and Decree in Sullivan v. Condas and in Admitting the Same in Evidence from the Abstract of Record Therein.

The trial court concluded that the Findings of Fact and Decree in the Sullivan case constitute a public record of judicial proceedings of which the court may take judicial notice or receive under other rules qualifying same for introduction into the evidence in this case (R.191). The Findings of Fact

Sullivan v. Condas were offered by plaintiffs as a part of the Abstract of Record (Exh. 2-P, pp. 36-43, incl.; R.405,619-622, incl.). The Decree was offered by plaintiffs as a part of the same Abstract of Record (Exh. 2-P, pp. 45-49, incl.; R.405,619-622, incl.). Plaintiffs did not offer certified copies from the District Court files. A certified copy of the Decree was separately offered by defendants and was received (Exh. 36-D; R.962,963).

The rule applicable to judicial proceedings is that, while a court may take judicial notice of the proceedings and records in the case before it, the court cannot in one case take judicial notice of its own records in another and different case. Robison v. Kelly, 69 Utah 376, 255 Pac. 430 (1927); Spencer v. Industrial Commission, 81 Utah 511, 20 P.2d 618 (1933). More recently this Court stated the rule in State, in the Interest of Hales, (Utah) 538 P.2d 1034 (1975), as follows:

"In any case the court should not take notice sua sponte of the proceedings in another case unless the files of the other case are placed in evidence in the matter before the court."

To the same effect is Carter v. Carter, (Utah) 563 P.2d 177 (1977). Nor can this court judicially notice proceedings and records of a case previously determined. Johanson v. Cudahy Packing Co., 107 Utah 114, 152 P.2d 98 (1944).

Only the Decree in Sullivan v. Condas decided any of the issues therein. All that Decree decides relevant here is

that a public highway exists from the main State highway and running along Trotman's Lane, Southerly toward White Pine Canyon and over Sullivans' land to the gate on the South boundary of the Sullivan property. The Decree is clear and unambiguous.

An ambiguous Judgment (or Decree) is subject to the same construction according to the rules that apply to all written instruments. Moon Lake Water Users Association v. Hanson, (Utah 535 P.2d 1262 (1975)). Where (as here) a judgment is clear and unambiguous, neither pleadings, findings of fact nor a verdict may be resorted to change its meaning. Chronister v. State Farm Mut. Auto Ins. Co., (N.M.) 381 P.2d 673 (1963); Callan v. Callan, (Wash.) 468 P.2d 456 (1970). If a judgment is not ambiguous and leaves nothing for interpretation, there is no need to refer to the pleadings or other parts of the Record. 46 Am. Jur. 2d, Judgments, §76, p. 365.

The trial court committed error in taking judicial notice of the Findings of Fact in Sullivan v. Condas and in admitting the same in evidence in the form of the Abstract of Record. The trial court committed reversible error in making and entering its Findings of Fact 6 and 7 based thereon and in founding its Decree on such findings.

POINT II.

THE TRIAL COURT ERRED IN ITS APPLICATION OF THE
DOCTRINE OF COLLATERAL ESTOPPEL TO THE FACTS OF
THIS CASE.

The whole basis for the trial court's decision in this case is summed up in its Decision dated August 2, 1977, (R.191) as follows:

"Based upon the principle of collateral estoppel, this Court concludes that the plaintiffs' (Defendants') predecessor having succeeded in prior litigation on his claim that a public road existed up White Pine Canyon, his successors in interest cannot now turn from that benefit established in a court of law to take an opposite position to gain another benefit at this time. (Richards v. Hodson, 26 U. 2d 113, Mechem v. City of Glendale, 489 P.2d 65.)"

Yet in Richards v. Hodson, 26 Utah 2d, 485 P.2d 1044 (1971), and cited by the trial court, this Court held that collateral estoppel applies only where issues are actually decided against a party in a prior action. Thus on pages 115 and 116 of the Utah Reports, this Court clearly stated the application of the Doctrine of Collateral Estoppel in Utah as follows:

"A form of res judicata applies to situations like this wherein issues which are actually decided against a party in a prior action may be relied upon by an opponent in a later case as having been judicially established. This doctrine, known as collateral estoppel, differs from res judicata not only in the fact that all parties need not be the same in the two actions, but also in the fact that the estoppel applies only to issues actually litigated and not to those which could have been determined."

Sullivan v. Condas decided that a public roadway existed from the main highway along Trotman's Lane Southerly towards White Pine Canyon across the then Sullivan lands up to the gate (Exh. 26-D). That issue was decided in favor of defendants' predecessor John G. Condas. Nowhere in the Decree was it decided that a public roadway existed up White Pine Canyon across the

then lands of John G. Condas. Nor was any issue decided against him therein unless it could be said that the refusal or failure of the District Court to hold that a public roadway existed up White Pine Canyon constituted a decision that no public road existed above his north line.

The trial court invoked collateral estoppel in this case on the authority of the Utah case of Richards v. Hodson, supra, and the Arizona case of Mecham v. City of Glendale, supra. Yet in Richards, supra, this Court held that defendants were collaterally estopped from asserting the invalidity of the sale since that issue had been decided against them in the prior litigation. However, in Mecham supra, the Arizona Intermediate Court of Appeals held that Mechams were "judicially" estopped from assuming a contrary position to that asserted by them in the prior litigation.

Here the trial court was bound to follow the application of collateral estoppel as announced by this Court in Richards, supra. There this Court emphasized that the issue had to be actually decided against a party in a prior action and would not apply to issues which could have been determined. The issue of whether a public road existed up White Pine Canyon over and beyond the lands of John G. Condas could have been decided in Sullivan v. Condas, but was not decided against him.

Even if the Findings of Fact in Sullivan v. Condas could be referred to herein, a careful reading thereof reveals that there is no finding which specifically finds a public

roadway up White Pine Canyon over and beyond the then lands of John G. Condas. All references to the public roadway therein are either over and across the lands of Sullivan or from the Park City highway and passes over and along Trottman's Lane and onto and across the lands of Sullivan with the center line specifically described to the gate on his south boundary. Likewise the Decree therein describes the public highway as running over and along Trottman's Lane southerly towards White Pine Canyon and not up White Pine Canyon.

It is interesting to note that Finding No. 4 herein (R.212), superimposes over defendants' lands herein, the identical language of Finding No. 8 in Sullivan v. Condas which was there limited to the lands of Sullivan. What is more, Finding No. 6 herein (R.212), finds that the District Court in Sullivan v. Condas found that the roadway up White Pine Canyon had been used by the general public since 1873. Nowhere in those findings did the District Court find that the general public had used the roadway up White Pine Canyon or above the south boundary of Sullivan's land. Likewise, nowhere in those findings did the District Court find a public use dating back to the year 1873.

The trial judge in Sullivan v. Condas who heard all of the testimony of all of the witnesses and knew the area made no findings that a public road existed up White Pine Canyon beyond the south boundary of the Sullivan lands. Likewise, he was very careful in his Decree to limit the public road to

Trottman's Lane from the Park City Highway southerly towards White Pine Canyon and specifically terminated it at the gate on the south boundary of the Sullivan property. To permit the lower court in this case to second guess that trial judge some 49 years later based on incomplete and inadmissible hearsay evidence would do violence to the law and would undermine the rules of evidence.

The sum and substance of it all is that the lower court misconstrued the findings in Sullivan v. Condas even if it could refer to them, misapplied the application of the Doctrine of Collateral Estoppel as announced by this Court in Richards v. Hodson, supra, and in so doing committed serious and reversible error.

POINT III.

THE FINDINGS OF THE TRIAL COURT THAT THE ROADWAY UP WHITE PINE CANYON OVER DEFENDANTS' LANDS IS A PUBLIC ROAD IS UNSUPPORTED BY THE EVIDENCE AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The most discouraging part of this whole case is that the trial court in its zeal to implement its erroneous application of the Doctrine of Collateral Estoppel superimposed on defendants' lands selected abstracted testimony from Sullivan v. Condas as it related to the roadway or trail up White Pine Canyon. The net effect thereof was to retry Sullivan v. Condas based on a cold, condensed, inadmissible Abstract of the Record without the benefit of viewing the exhibits or hearing all of

the live testimony of all of the witnesses. To bind defendants with the abstracted testimony of witnesses other than their predecessor in interest is quite a different thing from binding them with his judicial admissions or declarations against interest if any there were.

In its Finding No. 3, the trial court found that the roadway up White Pine Canyon is a public road and has been used by the plaintiffs and defendants and their predecessors in interest and by the public generally since 1873 (R.212). In its Finding No. 4, the trial court found that the public's use of the roadway for more than 50 years prior to 1918 was for general purposes of traffic and for all purposes which public highways under similar conditions were then used which continued until it was closed by defendants in 1971 (R.212). The trial court further found in its Finding No. 5 that the uses made of the roadway were on foot, by horseback, in horse-drawn wagons and in trucks and cars (R.212).

Plaintiffs had the burden of proving the public roadway across defendants' lands by clear and convincing evidence. Peterson v. Combe, supra; Thomson v. Condas, supra. As such the foregoing findings must be supported by clear and convincing evidence and the rule of appellate review applicable here should be that this Court will reverse if it is clear that such findings are not supported by clear and convincing evidence. The following summarizes the testimony and documentary evidence, exclusive of the Abstract of Record in Sullivan v. Condas,

clearly demonstrate that such findings are not only unsupported by the evidence but are contrary to the overwhelming weight of the evidence.

At the outset it should be noted that there could be no use by either plaintiffs' or defendants' predecessors in interest prior to 1924 since neither was there prior to that time (R.500). The very earliest in time testified to by any witness in this case was James Archibald whose testimony was offered by plaintiffs in the form of his deposition (R.478-481, incl.; Supplemental Record - James Archibald Deposition). The first time the witness Archibald was in White Pine Canyon was 1898 in the wintertime assisting his father in bringing out logs on a bobsled (ibid. pp. 5,6). The next time he was in White Pine Canyon was in 1903 when he "walked on, oh, kind of a road. It really wasn't a road, it was a trail about 4 or 5 feet wide." (ibid. p.8). He was there again in 1905 or 1906 on horseback (ibid. p.10), and 1907 on horseback (ibid. p.11), and never observed a wagon beyond the Sullivan property (ibid. p.9), and saw no one else on foot or horseback (ibid. pp. 12, 22), but did observe livestock in White Pine Canyon (ibid. p.22).

The next witness in point of time who testified in this case was Earl Johnson whose testimony was offered by plaintiffs in the form of his deposition (R.478-481, incl.; Supplemental Record - Earl Johnson Deposition). He was first there when he was 12 years old, ie. 1903, and traveled up White Pine Canyon several times a month by saddle horse every year until 1917

(ibid. pp. 3,7,8). In 1903 "there was a very poor trail but no sign of any wagon, no road for a wagon," which condition stayed pretty much the same every year from 1903 until 1917 (ibid. p.8). During that entire period he never saw anyone else in the canyon nor did he ever see a wagon or other vehicle up White Pine Canyon beyond the Del Redden cabin and White Pine Canyon was not passable by a wagon (ibid. pp. 9,10). At that time there was a poor road on which a wagon could travel up to the Del Redden cabin, but not beyond (ibid. p.11). He never did see any logging any time out of White Pine Canyon (ibid. p.16).

The witness, Gilbert Kimball, called by plaintiffs in this case, testified that between 1915 and 1920 he traveled up and down White Pine Canyon six or seven times on horseback (R.438, 444) during which period he never saw anyone but sheep men (Condases) traveling up the canyon (R.441). All that existed at that time was a trail (R.442,445), which was steep and rough with a lot of rocks (R.445). He rode single file because the trail was not sufficiently wide to permit two persons to ride side by side (R.443,445).

The witness, Douglas C. Archibald, called by plaintiffs in this case, testified that the first time he was in White Pine Canyon was when he was 12 or 14 (1908-1910) at which time there wasn't any trail or road to amount to anything (R.471), which he qualified by stating that "there wasn't any specific trail. You had to make your own. You just took the easiest way up there" (R.475). He went up the canyon again in 1915

and didn't see anyone else up there on either occasion (R.475).

Thus, plaintiffs' own evidence as shown by the testimony of their own witnesses in this case is wholly contrary to Findings 3, 4 and 5. Furthermore, the documentary evidence offered by defendants in this case and the testimony of practically all of the witnesses called by defendants, are contrary thereto.

Exhibit 16-D is a geologic map dated 1901 and shows the roadways to the upper White Pine Canyon area from the Thaynes Canyon side and shows only a trail (dashed-line) down White Pine Canyon (R.739,740).

Exhibit 31-D is a copy of the original U. S. Government Land Office survey map of Township 2 South, Range 3 East, S.L.B. & M., dated September 17, 1903, and includes a more legible photocopy of the area in question. It shows a roadway entering the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 1 in the upper right hand corner coursing Southeasterly and terminating just below the figure "56.35" which terminus corresponds with a point just South of the Condas cabin as shown on Exhibits 1-P and 14-D. (R.956,957,959,961).

Exhibit 32-D comprises the original survey notes of the Government surveyor in 1901 and 1902 from which Exhibit 31-D was prepared (R.959,961). The survey notes show the roadway crossing the east line of Section 1, 19.0 change North of the W $\frac{1}{4}$ corner thereof, designated as "road to Canon bears E and W." (Exh. 32-D, p.308). However, the survey notes do not show a roadway crossing the south line of Section 1 (Exh. 32-D, p.255

nor a roadway crossing the south line of Section 12 (Exh. 32-D, p.253) nor a roadway crossing the east line of Section 13 (Exh. 32-D, p.253) all of which are now crossed by the existing White Pine Canyon Road (Exh. 14-D). Yet the survey notes show other roadways which cross the section lines, viz. the north line of Section 1 (Exh. 32-D, p.308) being North of the subject properties and on the south line of Section 24 (Exh. 32-D, p.305), being South of the subject properties on the West Monitor Flats.

Exhibits 16-D, 31-D and 32-D are ancient public documents prepared by public officials. The very clear inference therefrom is that in 1901 and 1902, no roadway existed up White Pine Canyon. Otherwise the same would have been shown on the geologic map, the official Government Land Office survey map and would have been identified in the official notes of the Government land surveyor.

Equally significant are the patent documents covering the Gust Condas patent (Exh. 11-D), and the Peter G. Condas patent (Exh. 12-D), over which the present White Pine Canyon road passes (R.534,536). The second page of Exhibit 11-D contains a certificate by the Government status clerk dated July 21, 1931, of the word "none" following the word "rights of way". Likewise on the second page of the Testimony of Witness, Peter G. Condas, plaintiffs' predecessor, dated December 30, 1930, shows "1925, cut trails on Secs. 12, 13 T2S, R3E AND Sec. 13, T2S, R4E, these trails being necessary to get sheep on entry." When asked about it the witness, Peter G. Condas,

acknowledged that he probably made the foregoing statement (R.538). Likewise, the second page of Exhibit 12-D covering the Peter G. Condas patent contains a certificate by the Government status clerk dated January 27, 1930, of the word "none" following the words "rights of way". When asked about it the witness, Peter G. Condas, denied so advising the Bureau of Land Management (R.535). The same status clerk certification is contained in each of the Delbert H. Redden patents (Exh. 33-D, 34-D) and the John G. Condas patent (Exh. 35-D).

The more current documentary evidence comprising the general highway maps show that since at least 1937 only that portion of the White Pine Canyon road extending from the main state highway to a point near the center line of Section 1 (to the old Condas cabin) has been designated as part of the county road system (Exh. 19-D, R.865). The same was true in 1950 (Exh. 20-D, R.866), in 1966 (Exh. 21-D, R.868), in 1971 (Exh. 22-D, R.869), and in 1975 (Exh. 23-D, R.870). Even the more recent maps (Exh. 1-P, 14-D), show the roadway (double-dashed lines) terminating at the old Condas cabin near the center of Section 1 and beyond only as a trail (single-dashed line).

The witnesses, called defendants in this case, provide an unbroken chain of credible evidence of no public road or public user from 1922 until the present time which simply cannot be ignored. The witness, Cleo Wright, testified that he ran sheep in the area from 1922 until 1926 or 1927 (R.638), but did not go up White Pine Canyon because there was no road (R.644), and

would see someone on a horse occasionally in White Pine Canyon R.645 . There was a road to John Condas' home, but not beyond R.650,655'. After John Condas owned the property there was a gate on the north side of the John Condas property that was an obstruction to anyone traveling the roadway R.650,651).

Defendant George J. Condas testified that he first went on the property in 1925 R.659) at which time only a narrow horse trail existed beyond the first stream crossing R.666, 667 . In 1927 there was a semblance of the trail where horses had been up and down which was single track about three feet wide up a narrow, rocky canyon (R.672) which remained essentially the same every year until 1940 (R.675,676,680,681). He traveled the canyon once or twice in 1927, a half dozen times in 1928 and on many occasions thereafter R.675,676,681,688). During that period he never observed any vehicle beyond the second wooden gate since it was impossible to get a vehicle up there R.682. From 1925 to 1928 he saw no one in the canyon except members of his immediate family R.678) and very seldom thereafter a few friends came up R.682,698 . The defendant George J. Condas further testified that in 1940 the condition of the trail was overriden with vegetation R.689) which conditions remained the same from 1940 until 1950 R.691). In 1950, a D-8 caterpillar went through the property trying to get up to the upper end of the flats to build a relay station R.691 which knocked a lot of big trees to the side and moved a lot of boulders but didn't make a road R.691,692). In 1951

he hired a D-8 caterpillar which made a passable road for a 4-wheel drive vehicle (R.692). The road was repaired in 1972 and 1974 (R.696) and by "the movie people" in 1975 (R.697).

The witness, James Ivers, Jr., testified that in 1928 there was a narrow trail down White Pine Canyon (R.727) which was the same in 1929 (R.729). In 1930 the trail was narrow, rocky in places, was impassable by a wagon (R.734) and was no more than what a horse could travel which would be about 18 inches or 24 inches wide (R.735,736). From 1930 until 1941 he traveled the canyon on horseback approximately 15 times each year (R.731,735), and the trail did not change during the entire period (R.735) nor did he recall any change in the conditions from 1945 to 1950 (R.737). He would occasionally run into shearherders but never saw a sheep wagon along the trail (R.728,729,736).

The witness, Andrew Louras, who was a camp tender for John G. Condas during the year 1932 and 1933, or 1933 and 1934 (R.747,748) traveled the canyon on horseback at least once a week (R.749), testified that during those years just a trail existed up White Pine Canyon (R.749) which was only wide enough to get one horse through (R.750).

The witness, David R. Spafford, who was camp tender for John Condas from 1929, 1930 and 1931 (R.768) who traveled the canyon at least a dozen times each summer (R.770) by saddle horse (R.771), testified that it was very steep and very narrow and heavily wooded and there was only one track where you had

to go single file (R.771) and when he returned in 1945 it was just a regular horse trail as it had always been (R.775). He never saw a wagon or a vehicle along the White Pine Canyon trail above the creek crossing (R.771) but encountered a rider once in a while (R.772).

The witness, Albert L. Sorenson, who traveled White Pine Canyon every year from 1940 until 1950 on horseback (R.907) followed the main trail which was rough and rocky (R.904), did not observe any wagon tracks or roads or anyone else traveling along the trail (R.905).

Defendant Chris J. Condas went up White Pine Canyon first in 1933 or 1934 (R.782) and traveled the canyon every year until 1942 (R.788). He testified that during that period there existed only a single path, a single trail about two feet wide above the first creek crossing with trees on both sides that would preclude vehicles from going up because it was too narrow (R.784). He never saw a wagon along the trail (R.789) and never saw a vehicle up above the first creek crossing until after 1951 (R.790,791). He returned in 1946 and traveled the canyon 10 or 12 times and observed that there was basically no change since 1941 (R.790). The conditions stayed pretty much the same until 1951 when a bulldozer spent time on the road (R.791).

Defendant, Mary Condas Lehmer, first went up White Pine Canyon when she was 11 years old (1928), testified that the trail had the characteristics of a footpath or a trail (R.925,931). She visited the property in White Pine Canyon in subsequent years

(R.931), continuously except for 1942, and returned in 1955 and has been in the area and on the property every year since then except for the summer of 1956 (R.932). Up until the time that the trail was improved as a roadway which was after 1948 or 1948, the condition of the trail had not materially changed (R.943). Prior to that time she had never observed a wagon or any vehicle traveling along White Pine Canyon from the first stream crossing up to the flat (R.943,944). Beginning in about 1963 she began having trouble with people driving four-wheel drive vehicles, motorcycles and some trucks who came down White Pine Canyon from the Big Cottonwood-Park City side of the flats and would end up in front of her cabin (R.944). They were stopped by the north gate and for some she would unlock the gate and others she charged them with trespass or forced them to go back the way they came (R.945).

The witness, Don H. Peterson, who was the foreman on the State Road (R.879), testified that in 1951 an attempt was made to construct a road up White Pine Canyon with a TD-18 International cat. (R.818). They abandoned the effort when the cat. got high-centered on a boulder on a little steep hill below Moonshine cabin (R.883). Beyond the point where the cat. got stuck there was only a trail which he walked up to the flat (R.885). He then decided that there was no way to get through the road that they wanted to get to (R.885) and took the cat. back out, loaded it up and took it up to Scott's Pass and cleaned the road that way (R.893,884).

The witness, Kent Christensen, testified that in 1942 or 1943 a fairly good horsetrail existed above the first creek crossing (R.912,915) and the condition of the trail did not change from 1942 to 1950 (R.916). The witness, Frank Marcellin, testified to similar conditions in 1944 (R.855) until the early 1950's (R.856). The witness, James F. Murnin, testified to similar conditions in the late 1940's (R.760,762,763).

The only evidence to the contrary was the testimony of plaintiffs' predecessor, Peter G. Condas, Fred H. Browning, David L. Street, Francis A. Brunyer, Chung Myun Lee and the plaintiffs. Peter G. Condas testified that his brother, John, would bring him supplies up White Pine Canyon in a car (R.508), or a truck (R.509). In 1925 there were quite a few people coming up almost every day traveling with wagons, bringing firewood and logs out, some people were traveling with trucks and some people were traveling with cars, going to the other side of the divide (R.510,511). He testified that people used the roads every day (R.512). He ran sheep on his property in 1929 (R.539) and 1931 when he lost his sheep (R.540) and thereafter leased his property to Tracy Wright in 1932 (R.540) and to John Condas from 1933 to 1967 (R.541). From 1929 to 1967 he visited his property every year except for 6 or 7 years (R.547). He described it as a trail where you could drive a car through (R.553).

The witness, Fred Browning, testified that he worked for John Condas from 1925 to 1930 (R.483), at which time the

road went up White Pine Canyon above Pete Condas' property (R.487). Some people went up there with wagons and horses and some went up there with pickup trucks or cars, sometimes 2 or 3 times a week, sometimes once a week, or as far as every 2 weeks (R.489,490). He saw them bring logs on a wagon (R.491, 492). He traveled up the road sometimes on foot and sometimes on horseback (R.412). He observed prints of two tracks showing that four-wheeled vehicles had been on the road (R.498). During the years 1925, 1927, 1928 and 1929 he was only on the property occasionally (deposition of Fred Browning (R.377, 497).

The witness, David L. Street, testified that he first went up White Pine Canyon in 1950 to take a dozer up to establish a signal tower for the highway patrol (R.560). He described the road up White Pine Canyon as passable for wagons or trucks and cars if you would like to take your car in that kind of place (R.560). He did not do work on the road as he went up (R.561). It took two days getting up there (R.565). He high-centered the D-8 cat. and had to use dynamite to get it off (R.566).

The witness, Francis A. Brunyer, hiked up White Pine Canyon in 1942 on three occasions and once in 1943 (R.969,970). He described the road or trail as somewhat bushy, but it was not a man-made road. There were tracks there. It was pushed down and hardened (R.969). On none of those occasions did he see anyone traveling along the trail (R.587).

The witness, Chung Myun Lee, testified as an expert witness

that based on his inspections of 1940 and 1950 aerial photographs it was his opinion that an unimproved road or jeep trail existed up the bottom of White Pine Canyon (R.1032,1034), but he could not tell whether it was man-made or animal-made (R.1036,1044, 1045).

Plaintiff George P. Condas testified that in approximately 1945 when he was 10 years old he went up to the flats with his uncle, John Condas, in his sheepwagon or truck (R.571, 572). Thereafter sometimes he would go up the canyon on a horse or in a jeep with his cousin, George (R.573). He observed people using the White Pine Canyon road from 1945 up until 1971 (R.579), except for the years 1966 and 1967 (R.581,585). However, he never did describe the trail or road.

Plaintiff Harry P. Condas testified about the same as plaintiff George P. Condas, going back to 1945 when he was 12 years old (R.604) for almost every year thereafter (R.606). Plaintiff John P. Condas testified about the same since about the early 1950's (R.674). However, neither testified as to the condition of the trail or road.

There was no evidence to show that any maintenance work had been done by either the county or the State on the White Pine Canyon road above the John G. Condas cabin. From 1930 until 1950 the only maintenance work performed by the State was along Trotteman's Lane up to the John Condas cabin but no maintenance work was performed beyond the gate (R.464, 465). From 1937 until the present time Summit County received

no Class "B" road funds for maintenance of any roadways South of the John Condas cabin or gate but did receive funds for that segment from the highway up to the gate during that period (R.872).

Defendants respectfully submit that the foregoing are fair and accurate summaries of the evidence and testimony on the issues of public road and public user in this case. Such testimony and evidence falls far short of establishing by clear and convincing evidence a public road by public user across defendants' lands. In fact, the overwhelming weight of the above evidence proves otherwise. Where, as here, it is clear that the findings and decision of the trial court are not supported by clear and convincing evidence, it is the duty of this Court to reverse. Accordingly, Findings of Fact Nos. 3, 4 and 5 must be set aside and the Decree must be reversed.

POINT IV.

THE GENERAL FINDINGS OF FACT OF A PUBLIC ROAD ARE CONTRADICTED BY THE SPECIFIC FINDINGS OF FACT THEREON AND MUST BE SET ASIDE.

The general Findings of Fact Nos. 3, 4 and 5 make findings of a public road and continuous public user on foot, by horseback, in horsedrawn wagons and in trucks and cars across defendants' lands from 1873 until 1971 (R.212). However, the specific Finding of Fact No. 9 finds that between 1925 and 1929 a wooden gate of only sufficient width to permit passage of a person riding horseback was constructed across the roadway at

the southerly end of the pasture area (R.213). The latter finding is clearly supported by the evidence (Exh. 15-D; R.665, 667, 682, 688, 733, 751, 752, 772, 783, 903, 904, 914, 941 942). Thus, it was impossible for any vehicle to travel through that gate until it was widened in 1951 (R.1087,1089).

Likewise, specific Finding of Fact No. 9 finds that between 1925 and 1928 the wooden gate was constructed across the roadway entering the John G. Condas property on the north line thereof (R.213). Specific Finding of Fact No. 10 finds that such wooden gate and its replacements were usually maintained in a closed and locked condition, whenever John G. Condas and his successors were away from the property, generally since the construction thereof until the present time and was generally maintained in a closed but unlocked condition when they were present on the property. It further finds that said gates were generally posted with "keep out" or "no trespassing" signs since the construction thereof until the present time (R.213). Such specific finding is incompatible with the requisite intention or conduct of John G. Condas or his successors to abandon the roadway to the public use. Morris v. Blunt, 49 Utah 243, 161 Pac. 1127 (1916); Hall v. North Ogden City, 109 Utah 325, 175 P.2d 703 (1946); Thompson v. Nelson, 2 Utah 2d 340, 273 P.2d 720 (1964); Gillmor v. Carter, 15 Utah 2d 280, 391 P.2d 426 (1964); Peterson v. Combe, 20 Utah 2d 376, 438 P.2d 545 (1968); and Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639 (1972). Likewise, the foregoing specific findings

contradict the above general findings of public road and public user and as such the general findings cannot stand.

A judgment which rests on some particular finding for its validity and support may not be upheld where such finding is contradicted by another finding treating of the same essential matter. 76 Am. Jur. 2d, Trial, §1260, p. 212. If, on the same evidence the trial court should make findings of fact necessarily contrary to each other, such action would be capricious and such inconsistent findings should not be permitted to stand. Malstrom v. Consolidated Theatres, 4 Utah 2d 181, 290 P.2d 689 (1955).

The lower court was obviously concerned with the lack of public user resulting from the establishment of gates by John Condas preventing use of the roadway (R.191,192). However, it dismissed such concern since it had already concluded that on the basis of Sullivan v. Condas the public road pre-dated his acquisition of title. Yet its findings cannot be reconciled on this point. If the findings prove irreconcilable, it is the duty of the court to accept those most favorable to the appellant. 76 Am. Jur. 2d, Trial, §1260, p.212.

General Finding of Fact No. 6 is clearly erroneous as shown by the summaries of the evidence and testimony of the witnesses under Point III hereinabove. Furthermore, the district court in Sullivan v. Condas did not find that the road up White Pine Canyon through the lands now owned by defendants was a public road as is demonstrated under Point II hereinabove.

It follows that Finding of Fact Nos. 3, 4, 5 and 6 must be set aside and the Decree being based thereon must be reversed.

CONCLUSION

The key issue on this appeal is whether a public roadway can be established across the lands now owned by defendants on the basis of the Abstract of Record in Sullivan v. Condas and the Briefs filed therein. Pivotal to that issue is whether such Abstract of Record is admissible in evidence in this case for if it is not, the evidence is wholly insufficient to establish a public road over defendants' lands. In fact, absent the foregoing Abstract of Record, the evidence overwhelmingly establishes no public user and no public road. Yet plaintiffs have the burden of establishing the public road by clear and convincing evidence.

On the basis of Sullivan v. Condas, the trial court erroneously applied the Doctrine of Collateral Estoppel and decided the case against the defendants without affording them the reassured opportunity to offer rebuttal evidence of the same caliber. To implement its decision the trial court superimposed on defendants' lands selected abstracted testimony from the Abstract of Record in Sullivan v. Condas and made findings herein on defendants' lands based on findings therein on Sullivan's lands. The net effect thereof was to retry Sullivan v. Condas based on a cold, condensed, inadmissible abstract without the benefit of viewing the exhibits therein

or hearing all of the live testimony of all of the witnesses therein. In so doing, the lower court here attempted to second-guess the trial judge there who made no findings of a public road up White Pine Canyon beyond the south boundary of the Sullivan lands and who carefully limited the public road therein to Trottman's Lane and specifically terminated it at the gate on the south boundary of the Sullivan lands.

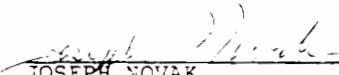
If anything came out loud and clear from the evidence in this case, it was that from at least 1903 until 1950 only a one-horse trail existed up the bottom of White Pine Canyon which was impassable by all vehicles. It was not until 1951 when the road was sufficiently improved to afford passage to even a four-wheel drive vehicle. Equally clear was that since at least 1903 until the present time there was no public user of the road which troubled even the lower court.

In face of the overwhelming credible evidence to the contrary and in spite of it, the lower court found a public road which pre-dated the acquisition of defendants' property by their father. In so doing, it completely changed the status quo of the previous 54 years and ordered defendants to remove the gates which even it found had been maintained in one form or another during the last 54 years, both locked and unlocked, and posted with "keep out" or "no trespassing" signs. This has to be a most shocking end result.

The sum and substance of it all is that the lower court has now opened up defendants' lands to the general public by establishing a public road across their lands which never

existed in fact or in law. We respectfully submit that the general findings of a public road and public user must be set aside and the Decree of the trial court must be reversed and the case remanded with instructions to enter an Amended Decree dismissing plaintiffs' Complaint and adjudging that the roadway across defendants' lands in White Pine Canyon is their private roadway and plaintiffs own no interest or right therein, or that failing, a new trial.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of June, 1978,
I mailed two (2) copies of the foregoing Brief of Defendants-
Appellants to Claron C. Spencer, attorney for Plaintiffs-
Respondents, 1200 Beneficial Life Tower, 36 South State Street,
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