

1979

# John P. Condas et al v. George J. Condas et al : Brief of Respondents opposing Appellants' Petition for Rehearing

Utah Supreme Court

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## Recommended Citation

Response to Petition for Rehearing, *Condas v. Condas*, No. 15669 (Utah Supreme Court, 1979).

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs and )  
respondents, )

vs. )

GEORGE J. CONDAS, MARY CONDAS )  
LEHMER, CHRIS J. CONDAS, NICK )  
J. CONDAS, ELLEN CONDAS BAYAS, )  
ALEXANDRA CONDAS OCKEY, and )  
J. CONDAS CORPORATION, )

Defendants and )  
appellants. )

Case No. 15669

--oo0oo--

RESPONDENTS' BRIEF OPPOSING APPELLANTS'  
PETITION FOR REHEARING

--oo0oo--

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Wigmore on Evidence §1267 (Chadbourn Rev.) . . . .  
§2107 . . . . .

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RESPONDENTS' BRIEF OPPOSING APPELLANTS'  
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POINT I

THE TRIAL COURT DID NOT IMPROPERLY RELY ON MATTERS  
OUTSIDE THE EVIDENCE

In Salt Lake City v. United Park City Mines Co., 28

Utah 2d 409, 503 P.2d 850 (1972), this Court reversed a judgment because the trial court had considered as part of the case a book which was not in evidence as a basis of some calculations he made in appraising the merit of certain exhibits. The court said,--

[N]either a judge nor a jury is permitted to go  
outside the evidence to make a finding.

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Defendants claim that the trial judge below went outside the record in considering the Sullivan v. Condas decision. The short answer to this argument is that all of the materials from Sullivan v. Condas which were considered by the trial judge were in evidence. Simply because the defendants disagree with the decision to admit them does not present a situation like that in Park City Mines, where no one offered the book in evidence.

#### POINT II

THERE IS AN ADEQUATE BASIS TO BELIEVE THAT THE  
ABSTRACTED TESTIMONY OF WITNESSES IN SULLIVAN v.  
CONDAS IS COMPLETE

The Rules of Practice in the Supreme Court of the State of Utah, set out at 32 Utah vi (1908), are apparently the rules which were in effect at the time the Sullivan v. Condas abstract was filed. These rules provide, in part, as follows:

The appellant shall . . . file . . . a printed abstract of the record in each case. . . . Said abstract shall contain an index and set forth the title of the cause with the date of filing of all papers in the court below embodied in the transcript, and a brief statement of the contents of each pleading and paper, and shall set forth fully the substance of the pleadings and of the evidence, if any, and of the points relied on for the reversal of the judgment or decree, . . . (Rules of Practice in the Supreme Court 6, 32 Utah vii (1908) (emphasis supplied))

It appears therefore that the attorney preparing the abstract was required to set forth all the substance of the material testimony. This overcomes the objection of defendants that there is some unspecified gap in the completeness of the abstract.

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Defendants claim ~~that the abstract is incomplete and does not support~~ their argument that

the abstract is unacceptable because it does not contain all the evidence. Wigmore states,--

When a public record is lost or destroyed, the same situation exists as for private records lost or destroyed; hence as already noticed . . . verbal precision of proof cannot be required, but entirety of material parts must be insisted upon. The substance of the missing document suffices . . . (Wigmore on Evidence §2107 at 644 (Chadbourn Rev.) (emphasis in original deleted, emphasis supplied))

What defendants seem to be saying is that the abstract lacks verbal precision, a requirement that would make almost all secondary evidence of lost papers inadmissible.

### POINT III

THE ANSWER AND COUNTERCLAIM OF JOHN CONDAS IN SULLIVAN v. CONDAS ARE ADMISSIBLE AS A JUDICIAL ADMISSION OF DEFENDANTS' GRANTOR

Defendants object to the admission of the Answer and Counterclaim of John Condas, arguing that under current pleading rules, the use of inconsistent, alternative, and hypothetical forms of allegations are permitted. Therefore, the argument goes, the allegations in the answer and counterclaim should not be viewed as binding the pleader.

This is not an accurate view of the law at the time the Sullivan v. Condas pleadings were written, however. As recently as 1948 in Powell v. Powell, 112 Utah 418, 188 P.2d 736 (1948) an administrator for an estate alleged in a complaint to recover some stock both that the stock had been owned by the deceased at the time of death and that the stock had been held in trust by another at the time of death. The trial court sustained a demurrer and the Supreme Court affirmed, saying

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that the allegations of the complaint were inconsistent and therefore the complaint failed to state a cause of action. The Court cited an earlier case, Combined Metals, Inc., v. Bastian, 71 Utah 535, 267 P. 1020 (1928), decided very near the date on which the Sullivan v. Condas opinion was written, in which the Court said, speaking of inconsistent allegations in the complaint and reply,--

It, of course, is familiar doctrine that where allegations of a declaration are repugnant to and inconsistent with each other they thereby neutralize each other and render the declaration bad on general demurrer . . .  
(Combined Metals, supra, at 1026)

Furthermore, the law at the time of Sullivan v. Condas was quite clearly in favor of the admissibility of pleadings of a party's predecessor in title as admissions binding the party.

A pleading is properly held to be admissible against parties claiming under the pleader or basing other rights or title upon the rights or title held by him. It is a general rule of evidence that admissions against interest made by one in possession of rights or title to property are admissible against one claiming such rights or title through him.  
(Annot., 14 ALR 22, 62 (1921))

The foregoing annotation, published just before Sullivan v. Condas, is unqualifiedly in support of the above rule. Thus we see that whatever the force of the rule regarding pleadings drafted under present day notice pleading standards, there should be no valid objection to the admissibility of pleadings from the prior era, where inconsistent factual allegations were a ground for dismissal of the complaint or counterclaim.

POINT IV

THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE  
OF THE FINDINGS IN THE SULLIVAN v. CONDAS CASE

Defendants complain that the trial court took judicial notice of the findings of fact in Sullivan, and therefore fell into error. Defendants refer to State ex rel. Hales, 538 P.2d 1034 (Utah, 1975), which states,--

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.

The issue in the case below, however, was not whether the trial court had, sua sponte, noticed the Sullivan case, without placing evidence of the proceedings there in the record, but whether the court should admit secondary evidence proving the proceedings in the prior case. No objection to the authenticity of the abstract was raised by defendants at the trial (R. 408) and in framing his objection to the abstract counsel for defendants indicated that the decree set forth in the abstract was binding and militated against the admission of other parts of the abstract. (R. 406 at lines 7-15)

Utah Rules of Evidence 10, in regard to judicial notice, provides that the court may have access to any source of pertinent information. Here the court resorted to matters in evidence and seems to be well within the rules.

There is some question whether the doctrine of judicial notice is a complete description of what the court did in considering the findings of fact in Sullivan. The court had before it several sources of information about the

earlier case, the pleadings of John Condas, the abstracted testimony of witnesses, the brief of John Condas in which he reproduced testimony of witnesses, and the findings of fact. All these sources agree that an issue in the Sullivan case was whether there was a public road in White Pine canyon, and thus each of these sources corroborate one another, and support the decision to admit the abstract into evidence. Inconsistencies among these sources would have been a basis for doubt about the accuracy or completeness of the abstract on this material point.

#### POINT V

ADDITIONAL EVIDENCE, BESIDES THE SULLIVAN ABSTRACT, SUPPORTS AND CORROBORATES THE ABSTRACT AND JUSTIFIES THE AWARD OF THE COURT BELOW

Point IV of the Plaintiffs-Respondents Brief discusses the non-Sullivan evidence introduced below. In regard to this evidence the trial court found as a matter of fact that respondent:

produced additional credible evidence during the trial to corroborate the evidence contained in the transcripts of Sullivan and further substantiate the findings of the trial judge in Sullivan. (R. 189, 191)

The twelve pages of argument referred to by defendants which they claim this Court did not respond in its opinion and which defendants claim as a basis for a holding that there was no public road, did not go to the question of whether a public road had been established during the time that the land was public domain. Instead the testimony they refer to went to whether the public was actively using the road during some later period of time. This evidence, and defendants' argument, is

irrelevant; the law is clear that the road remains public until vacated by act of the appropriate public authority. Utah Code Ann. §27-12-90.

POINT VI

THE COURT'S OPINION IS CORRECT AND SHOULD NOT  
BE DISTURBED

Defendants have not brought forward anything at this point deserving a rehearing.

Rehearings are not granted as a matter of right and are not allowed merely for the purpose of reargument unless there is a reasonable probability that the court may have arrived at an erroneous conclusion or overlooked some important question or matter necessary to a correct decision.  
(5 Am. Jur. 2d Appeal and Error §988)

Notwithstanding the foregoing principle the petition for rehearing contains more than one reference to the defendants' opening brief as the standard by which this case should be judged, in spite of the thorough discussion set out in the court's opinion. This is merely reargument.

Defendants also contend that the trial court should not be permitted to consider the proceedings in Sullivan, despite the relevance of the testimony therein to the issues of this case and despite the unavailability of these witnesses today due to the passage of time. Nothing more than the entire record in the prior case, now not in existence, will apparently satisfy defendants, notwithstanding the clear relevance of the parts of the record which have been preserved and notwithstanding that the abstract is required to set out all the material testimony. In Davis v. The State of Utah, 57-38 (1950) cited

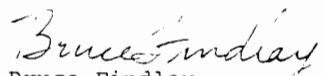
by Wigmore in his treatise on evidence, we find the following:

But it is supposed that a disastrous blow would be stricken against the sanctity of public records and this that public policy would be greatly outraged. If records, while they existed, were allowed to be contradicted or established by parol, this would not fail to be the result. But how this is to result from the establishment of their tenor and effect when destroyed is not altogether clear. Surely judicial records are not so sacred that their very ashes must not be disturbed, and that to minister to their quiet, the most important rights of men must be sacrificed, with pagan superstition to their names. (Wigmore on Evidence §1267 (Chadbourn Rev.))

#### CONCLUSION

Plaintiffs respectfully submit that the petition for rehearing merely reviews and reargues the material already set forth in the defendants brief and that the decision of this Court already on file sufficiently answers the arguments raised therein.

Respectfully submitted,

  
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SERVED two copies of the foregoing brief by mail this 26 Nov. 1980 upon Joseph Novak, defendants' attorney, 520 Continental Bank Bldg., Salt Lake City, Utah 84101.

