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Basil Thurman, Ron Kester, Vaughn Kester and Joseph Page v. Verl D. Byram, William K. Byram, John D. Byram, Val M. Byram, Donald E. Byra.M, Kenneth Byram, Harry J. Wilkinson, Dorothy Wilkinson, His Wife, Browning Industries, John Doe I and John Doe Ii : Brief of Appellants

Utah Supreme Court

RODNEY S. PAGE; Attorney for Plaintiffs-Respondents ROBERT A. ECHARD; Attorney for Defendants-Appellants

IN THE SUPREME COURT OF THE

STATE OF UTAH

BASIL THURMAN, RON KESTER VAUGHN KESTER and JOSEPH PAGE, Plaintiffs-Respondents vs. VERL D. BYRAM, WILLIAM K. BYRAM, JOHN D. BYRAM, VAL M. BYRAM, DONALD E. BYRAM, KENNETH BYRAM, HARRY J. WILKINSON, DOROTHY WILKINSON, his wife, BROWNING INDUSTRIES, JOHN DOE I and JOHN DOE II, Defendants-Appellants.	)	Case No. ~~16703~~ 16873

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, HONORABLE J. DUFFY PALMER, PRESIDING

ROBERT A. ECHARD
Attorney for Defendants
-Appellants
427 - 27th Street
Ogden, Utah 84401

RODNEY PAGE
Attorney for Plaintiffs-
Respondents
40 South 125 East
Clearfield, UT 84015

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vs.	)
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STATEMENT OF THE KIND OF CASE

This is an appeal from the judgment of Duffy Palmer sitting as the District Court Judge in Morgan County wherein a judgment was granted against the defendants on the 20th day of November, 1979.

DISPOSITION IN LOWER COURT

The lower court granted the plaintiff's a judgment on their complaint declaring the road in question to be a public road and that the plaintiffs had a right-of-way by easement over said road.

RELIEF SOUGHT ON APPEAL

The appellants seek to have the Court reverse the decision of the District Court and declare that the road in question is a private road.

STATEMENT OF FACTS

The appellants own property located in Cottonwood Canyon in Morgan County, State of Utah. There is a dirt road which traverses the Cottonwood Canyon and services the various property owners in that canyon. A road has existed in the canyon since before 1925. Prior to 1929, there were at least three gates located on the road as it proceeded up the canyon. (T.114) In approximately 1929, the road was modified and straightened and has remained in that condition to the present time. The road in question crosses the Cottonwood Creek. In about 1929, the State of Utah gave the property owners a bridge that had been previously used on U.S. Highway 30. That bridge was used to span the creek and is now part of the road which is the subject matter of this lawsuit. (T.115 and T.116) The appellants own all of the property in the canyon including the property over which the road passes with the exception of approximately two sections of land which were purchased by the United States Forest Service in 1965. (T.159, 160 & 167, lines 3 through 7) The Forest Service property is

approximately nine miles up the canyon. The Forest Service does not have a legal right-of-way across the property belonging to the appellants. However, the appellants allow the Forest Service personnel, as well as all other persons owning property in Cottonwood Canyon to use the road for access to their property. (T.25, lines 13 through 22)

In 1978, the property owners, the appellants herein caused a gate to be installed at the mouth of the canyon in order to limit the access to the road and the property located in the canyon. There is an additional section of the road which has been paved in the vicinity of the Browning Arms Industry. This section of the road is also privately owned by the appellants. However, the appellants, over the years, have allowed this road to be paved and to be used by the public. The gate that was installed did not, in any way, restrict access to the paved portion of the road and the paved portion of the road is not part of the subject matter of this lawsuit. (T.124, line 29 through T.25 line 21) Shortly after the gate was installed on the dirt portion of the road which the appellants claim is a private road, this lawsuit was instigated by the appellants for the purpose of having the Court grant them an

easement over the road and/or to declare the road from the gate up Cottonwood Canyon to be a public road.

At the time the road in question was put in its present condition, which was in approximately 1929, the property owners caused no trespassing signs to be placed along the road and upon their private property which adjoins the road. Exhibits 1 and 2 show part of the road and a sign which is located beside the road notifying people that they are not to trespass. The sign in question is approximately four-foot by four-foot and has been in existence continually since 1947 or 1950. (T.203) The sign was relocated in about 1965 so that it was moved closer to the location of the present gate. (T.122, line 15 through T.123, line 9) The sign which is shown in Exhibits 1 and 2 reads as follows: "No trespassing on private property in this canyon. Law says no shooting, only in hunting seasons. It is up to you to know the law and where you are. Violators will be prosecuted".

In addition to the sign which is shown in Exhibits 1 and 2, other signs indicating no trespassing have always existed along the road since 1947. (T.203, lines 1 through 25) The appellants have also attempted to notify people by causing various objects along the road to be painted with an orange paint. The bridge in

question, as well as rocks and fenceposts along the road, have been painted orange ever since the Utah Wildlife Resources issued a proclamation stating that orange paint indicated private property. This proclamation was first issued in approximately 1973. (T.187, line 25 through T.189, line 9)

Each year one of the property owners fences off the road in question in the vicinity of the bridge for the purpose of using the roadway to handle his sheep. This occurs about three times a year and amounts to a total period of about two weeks. During this period of time no traffic is allowed through the fenced area. T.209, line 28 through T.211, line 4)

The parties owning property in the canyon have attempted over the years to limit the access of people along the Cottonwood Road. For a long period of time the road was only used by property owners and people who had business in the canyon. However, this began to change as vehicles were developed which allowed people to get into more rugged terrain. Consequently, for the past twelve to fifteen years the property owners have had to exert more effort to limit the people that were attempting to use the road. (T.120 and 142) The problem became severe enough that in 1964 the Byram family, appellants herein, caused a notice to be published in the Ogden Standard Examiner which has general

circulation throughout Morgan County. That notice read as follows:

> Notice, all hunters! Due to the disrespect of three hunters Sunday for private property and their refusal to comply with the request of our employees we are forced to close permanently all lands in Davis, Morgan and Weber, Cache and Rich Counties to any and all forms of use by the public as of this date. Robert Byram Sons. (Exhibit 3)

At about this same time many of the property owners in Cottonwood Canyon began to require written permits for people to travel in the Cottonwood Canyon and to hunt on their private lands. Prior to this time people had been required to obtain verbal permission and on occasion the property owners would permit their neighbors and friends to use the road and property in the canyon even though they did not obtain specific permission. (T.176, lines 14 through 16)

The property located in the Cottonwood Canyon covers an extensive area and the road in question is approximately ten miles long. Consequently, the owners were not able to continuously patrol the road or their property. (T.128 and 184)

The respondents and the witnesses testifying on behalf of the respondents stated that they had used the

road for hunting over the years and during that period of time had observed the signs along the road indicating that the property was private and indicating no trespassing. Inspite of these signs, these individuals used the road and property in the canyon without obtaining permission. (T.57, 58 and 73) These individuals did not know who owned the property on which the road was located. (T.42 and 81) Many of them admitted that they had intentionally and knowingly trespassed upon the property of the appellants. A few of the respondents claimed that for a period of twenty years they had been travelling the road for the purpose of getting to the Forest Service land and that they had hunted and camped on the Forest land not on private property. (T.64 and 178) However, the evidence was clear that the Forest land had only been acquired in 1965 and consequently, the respondents could not have been hunting and camping on Forest land. (T.159, 160 and 167)

A R G U M E N T

POINT I

THE TRIAL COURT JUDGE COMMITTED PREJUDICIAL ERROR IN MAKING FINDINGS OF FACT WHICH WERE CONTRARY TO THE EVIDENCE PRESENTED AND IN MANY CASES TOTALLY UNSUPPORTED BY ANY TESTIMONY WHATSOEVER.

This matter was tried before the Honorable J. Duffy Palmer on September 11, 1979. Judge Palmer took the matter under advisement and issued a Memorandum Decision on the 17th day of October, 1979. That Memorandum Decision was eight pages long and proported to outline the testimony given by each one of the witnesses called at the trial. A review of the Memorandum Decision will demonstrate that Judge Palmer did not give a fair and impartial hearing to all of the evidence presented. A casual observation of the Memorandum Decision will demonstrate that Judge Palmer has attempted to phrase the testimony of the various witnesses in a manner that will support the Judge's ultimate conclusion. The Memorandum is one that you might expect to be presented by an advocate rather than one prepared by a Judge who is charged by law to be fair and impartial. The summary of the testimony given by the witnesses is inaccurate and in some cases even diametrically opposed to the actual testimony which was given at the trial.

One of the best examples of this concerns the testimony of a Clem Morris, one of the witnesses called by the respondents. One page 3 of the Memorandum Decision, Judge Palmer finds that Mr. Morris knew about the road in question for 58 years and that from 1920 on

Mr. Morris knew it was a public road and felt that from that time to the present the road had always been and used extensively by the public. In fact, Mr. Morris did not make any such statements. Mr. Morris testified that he was not familiar with the Cottonwood Canyon Road at the present time but had been familiar with it in the 1920's for a period of 8 years. (T.65, line 20 through T.66, line 20) He testified that he owned land in the vicinity of the road and that the road was in a somewhat different position at the time he lived there than it was at the time of the trial. (T.66, line 29 through T.68, line 1) He was asked by the respondents' attorney if he had ever had an occasion to be in the Cottonwood Canyon since the time he lived there. His response was "No". (T. 66, lines 18 through 20) Mr. Morris did testify that he felt the road was open during the time he lived there; however, he did not give any testimony about the road being used extensively by the public. It is evident from comparing the Judge's Memorandum with the actual testimony that the conclusions of the Judge must have been a figment of his imagination since they are not supported by the testimony of Mr. Morris.

The respondents called a Clinton Gruel, an employee of the United States Forest Service, as a

witness. Judge Palmer found Mr. Gruel testified that the federal goverment paid Morgan County for law enforcement "of the roadway". This again was totally unsubstantiated by the evidence. Mr. Gruel testified that money was given to Morgan County because Forest Service land was located within the County. He specifically testified that the money was not for the purpose of patrolling the private road leading to the forest land. He indicated that the money could not be expended for use on private land. (P.28, lines 15 through 29) Mr. Gruel also testified that the forest service did not have any legal rights to the road and used it only by permission of the property owners and that when anyone called and inquired of his office concerning the use of the road, they were informed that it was a private road. (T.25, line 18 through T. 26, line 5)

Judge Palmer found that the former sheriff, Porter Carter, who had patrolled the road for 16 years believed the road was open to the public and in fact a public road. Porter Carter in fact testified that he patrolled the road to keep people from stealing and destroying private property and that he did not know that the road was private property. He further testified that when he referred to the public using the road

he did not distinguish between private property owners and other people who did not own property in the canyon. (T.42, lines 3 through 27)

Judge Palmer found that a Delbert Kester, a relative of one of the respondents, testified that he had used the road since 1937 and that it was always open and that he was never required to get a permit from anyone and did not observe any restrictions on the use of the road. In fact, Mr. Kester testified that he had known about the no trespass signs, Exhibits 1 and 2, for many years and that he knew the private land was posted but still hunted on that land. (T.58, lines 2 through 30) At one time Mr. Kester had lived on private property that was located in the vicinity of the road and consequently, was allowed to use the property. (T.59, lines 11 through T.60 line 6) He also testified that he did not know if the people travelling on the road were doing so pursuant to permission and that he did not worry about that fact. (T.60 lines 7 through 15) Mr. Kester and his son had purchased permits from the Byrams for a period of 2 years and were aware that the Byrams required individuals to have permits to go on the property because the permits were sold at Mr. Kester's place of business, a cafe known as Trout Springs Cafe, which Mr. Kester owned between 1952 and

1955. (T.54, lines 19 through 22, T.56, lines 3 through 6, T.63, lines 19 through 26) Even though Mr. Kester claims to have been acquainted with the property since 1937, he testified that he was not acquainted with the Byrams and had never spoken with Mr. Wilkinson concerning the use of the property in the Cottonwood Canyon. (T.55, lines 19 through 30) He also claimed to have camped on federal land for 20 years when in fact the property had only belonged to the forest service for approximately 14 years. (T.63, line 27 through T.64, line 13)

Judge Palmer found that Basil Thurman had been using the property for 29 years without any restrictions or limitations on the use of the road and that he had seen other people and vehicles using the road. In fact, Mr. Thurman testified that in over 29 years of using the road and property that he had never seen any of the owners of the property in the canyon and had never talked to anyone except Cecil Byram and that was by telephone concerning why Mr. Byram had closed his property. (T.80, line 22 through T.81, line 10) He also testified that he had been hunting on federal property for 29 years when in fact the land had only been owned by the federal government for 14 years. (T.78, line 13 through T. 79, line 11) Mr. Thurman admitted under oath

that he had known that permits were required to go on the property since 1959 and had known about the no trespassing sign for 29 years. (T.79, lines 21 through 26, T.73, lines 10 through 25)

Judge Palmer found that Joseph Page, one of the appellants' witnesses, used the road for 11 years and was never restricted or stopped while using the road. Joseph Page testified that during the time he used the road the did not know any of the property owners with the exception of Val Byram, and that he had never spoken to any of them concerning the use of the road. (T.85, lines 15 through 20) Mr. Page observed the signs in the area for as long as he had been going up the road, but he had never at any time inquired to find out if the road was private or who owned the property. (T.86, line 3 through T.88, line 1)

The seventh witness called for the respondents was Ronald Kester. The Court found that he had been using the property for 28 years and that there had never been any limitation on the use of the road. However, Mr. Kester testified that he had also known about the signs the along the road including Exhibits 1 and 2 and had not checked to see if the road was private. (T.96, line 27 through T.97, line 16) He also testified thathe had not been on the property since the Byrams began

selling permits in approximately 1965 except by permission from Mr. Richins. (T.94, lines 7 through 25)

Judge Palmer found that Vaughn Kester and Elton LaVar Wood had used the road over a period of time and had never been restricted in their use. These witnesses, however, testified that they had known about the signs along the road and had used the property inspite of the signs. Mr. Kester testified that his attitude was that he would do what he wanted to on the land unless someone physically kicked him off. (T.103, line 29 through T.104, line 4) Mr. Wood testified that he was a personal friend of Mr. Wilkinson and that he had Mr. Wilkinson's permission to use the property in the canyon. (T.107, lines 5 through 30)

As can be seen from the comparisons between Judge Palmer's findings and the actual testimony given at the trial, Judge Palmer made many findings that were not supported by the evidence and in fact were directly contrary to the evidence presented at the time of the trial. Judge Palmer, at the end of the trial, took time to compliment Mr. Harry Wilkinson on his testimony. He indicated that he thought Mr. Wilkinson was very honest and candid in his testimony and that it was refreshing to see that type of testimony presented before the Court. (T.241) However, the Judge did not accept Mr.

Wilkinson's testimony, and in fact, found that Mr. Wilkinson said many things to which he did not testify.

The Judge claims that Mr. Wilkinson said that the road in question was at one time a state road. He also attributes to Mr. Wilkinson a statement to the effect that the road had been open and that there had been no restrictions on the road for the last 10 to 12 years. In fact, Mr. Wilkinson was very emphatic in testifying to the contrary. Mr. Wilkinson did not at any time indicate in his testimony that the road had ever been owned by the state. He did indicate that a bridge had been removed from state highway #30 and given to the property owners to be installed across the Cottonwood Creek in the Cottonwood Canyon. (T.116) He also testified that the county did use some of their equipment to grade their road on occasion. However, Mr. Wilkinson pointed out that the county equipment was used in many occasions for private purposes when requested by county citizens even including the plowing of the peach orchards. This practice was stopped during the time when Mr. Wilkinson was chairman of the Morgan County Commission. (T.116 through T.118) Mr. Wilkinson testified that there was never a time when the property owners consented that the public could have free and unlimited access to the road and the property in the

canyon. He testified that they had done everything within their power to restrict the road even though they had allowed the use by friends and neighbors and people that they knew and could trust. (T.128 lines 11 through 30, T.142, lines 1 through 30) Apparently, the testimony of Mr. Wilkinson relied upon by the Judge to reach his conclusion that the road had been open was the testimony given by Mr. Wilkinson on Page 119. That testimony was as follows:

> Q Give us a little history on your recollection of the use of that road, whether it's been open ever generally to the public or whether it's been by permission.
>
> A Well, it hasn't been what I should say restricted because most, like Mr. Wood, he's a friend, or some boy scouts or somebody that wanted to go camping. We haven't restricted it to that. Until recently it's been fairly well open. There's no question about that. But, only because we knew who was going and we weren't going to get any damage.
>
> Q Was this pretty much by your permission then and consent?
>
> A Yes, mostly, generally do.
>
> Q All right, do I understand then for a period of time the people that would use it were people that you would be personally acquainted up until a certain period of time.
>
> A Yes, until the automobile started to come, you know, and stuff like that, there was no question about it. (T.119, lines 15 through 30)

It is very important to view this testimony in light of the overall testimony of Mr. Wilkinson and not to pull it out of context. The other testimony of Mr. Wilkinson made it clear that he allowed friends and neighbors and people known to him to use the road but did not otherwise feel that the road had been opened to the public. Mr. Wilkinson testified specifically that the property owners tried to limit the traffic on the road to people who had written or verbal permission. (T.126, lines 17 through 30) On at least one occasion approximately 14 to 15 years ago Mr. Wilkinson had Sheriff Porter Carter remove an individual from the private road because he was doing damage to it. (T.129 lines 18 through 28) He also testified that he had requested Sheriff Max Robinson to remove individuals that were on the private road. (T.135, lines 2 through 12) Mr. Wilkinson pointed out that there were six property owners along the road who had the right to give permission for use of the road. Consequently, it was not possible for him to always know which people had permission to use the road and which people were using the road without permission. (T.143, line 18 through T.144, line 3)

Judge Palmer acknowledged that three of the defense witnesses, Dee Hancock, Kenneth Hancock, the Weber County Fire Chief, and Al Conklin, all testified

that they had used the road from between 20 and thirty years and had always felt that it was private property and road and obtained permission before going on the property. In fact, these witnesses did so testify and testified that they felt that the road was private and that they should not use it unless they had permission from the owners. (T.148, 162 and 215) These witnesses also testified that they were aware of the signs along the road and felt that the signs indicated that the road was private. (T.141, 154, 164) All of these witnesses indicated that they had not seen anything to indicate to them that the road was an open or a public road. (T.148, 154, 162)

One of the witnesses for the defense, Frank Bowman, is no longer a property owner in Cottonwood Canyon. He was the individual that sold his land to the Forest Service in approximately 1965. Mr. Bowman had been very involved in the county affairs, served on the county commission and has been on the county planning commission since 1963. (T.166, lines 4 through 12) Mr. Bowman testified that Morgan County has not accepted the Cottonwood Canyon as a public road and has not received any PMC road money for that road. (T.169, lines 25 through 30)

Judge Palmer did not give much emphasis to the testimony of the other appellants in this case. Val Byram testified that he had caused an article to be published in the Standard Examiner in 1964 notifying people that the Byrams property was private. A copy of that advertisement was introduced into evidence as Exhibit 3. Mr. Byram also explained that written permits were required in order for people to come onto their property. A copy of one of those permits was entered into evidence as Exhibit 4. Approximately 180 permits were issued by the Byrams alone each year for people to travel in the canyon upon the road. In addition, other individuals were allowed into the canyon who had permission from the other property owners that lived on the road. (T.180) Val Byram was the individual who caused the bridge, fence posts and other objects in the canyon to be painted orange thereby notifying any parties coming into the canyon that the property involved was private. (T.188) Val Byram was very emphatic that the use of the road had always been by permission and that the road have never been open to the public. (T.183)

The comments made by Judge Palmer concerning the testimony of Kenneth Byram are accurate. However, the Judge ignored or did not refer to much of the

important information testified to by Kenneth Byram. Mr. Byram testified that the intent of the property owners in causing the no trespassing signs, Exhibits 1 and 2, to be installed was to indicate that the road was private and closed. (T.204) This witness also testified that their business suffered greatly because of the trespass of individuals on their property. He noted one occasion on which one of the cows in the area was shot fifteen times. (T.205) Mr. Byram did request the Forest Service to help keep trespassers off the road, but the Forest Service refused to do it saying that it was impossible. (T.206, lines 1 through 4)

Leland Kippen, one of the appellants, testified that the no trespassing signs had been on the road since he became acquainted with the area in 1950 and that the road had never been open to the public. (T.214, 215) Mr. Bill Byram testified that he actually patrolled the road for the purpose of keeping trespassers off the road and property and had filed criminal actions against individuals who had used the road. (T.221, lines 12 through 30) This witness also testified that the purpose of the no trespassing sign was to close the canyon and the road. (T.222, lines 18 through 23) This witness had personal knowledge of the fact that the road was closed off each year to keep the traffic off the road and to allow the

property owners to use it for their sheep herding business. (T.224, line 25 through T.25, line 9)

It is the position of the appellants that a Judge must fairly and impartially consider all of the evidence presented to him. The Judge issued the Memorandum Decision over one month after having heard the testimony. This could account for the great variance between the Judge's findings and the actual testimony presented at the trial. Regardless of the reason for the variance, it is clear that the Judge committed prejudicial error in making findings which were not supported by the evidence.

POINT II

THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH THAT THE RESPONDENTS HAD A PRESCRIPTIVE EASEMENT OVER THE ROAD IN QUESTION.

In order to establish an easement by use, the respondents must show by clear and convincing evidence that a prescriptive easement has been established by open, adverse, notorious and uninterrupted use for a period of in excess of twenty years. Cassitty vs. Castagno, 247 P.2d 837 (Utah, 1959) It is the position of the appellants that the use must be of such a nature that the owner is placed upon notice that the respondents intend to claim a right that is adverse to that of the appellants. With that

knowledge, the appellants must acquiesce in that use or at least allow that use to continue uninterrupted for a period of twenty years. The party may not claim a prescriptive easement by reason of use that did not become known to the owners of the property. Such a use obviously would not comply with the requirements that the use be adverse and notorious.

There have been a number of Utah cases that have discussed this principle. In the case of Zollinger vs. Frank, 110 U. 514, 175 P.2d 714, the Utah Supreme Court stated that in order to create a prescriptive right-of-way, the adverse use must be against the owner as distinguished from under the owner. The Court went on to say that this was true regardless of whether the use was described as being adverse, hostile, peaceful or with the consent of the owner. The Court, in Savage vs. Nielsen, 114 U. 22, 197 P.2nd 117, stated that when a person has the right to use an easement by reason of the owner's consent, the use cannot become adverse until the owner has received notice of the claimant's hostile use of the land. The Court went on to state that a prescriptive title to an easement cannot be obtained when the use is allowed as a mere neighborly accommodation. In the case of Lunt vs. Kitchens, 123 U. 488, 660 P.2nd 535, the Utah Supreme Court stated that when a landowner consents to the use of his land, such

use is by license and a prescriptive easement cannot be created unless the license is renounced. The Court went on to say that the issue is whether the use was against or under the owner.

It is the position of the appellants that the four respondents in this matter all testified that they had used the road on a limited basis over the years for hunting and for occasional picnicing. During that time they testified that they had seldom, if ever, seen the property owners or had any contact with them. These same individuals admitted having seen signs telling them to stay off the private property but with that knowledge had still used the road and had used the property of Frank Bowman and others in the canyon without their permission. These parties did not even know who owned the land and obviously made no contact with the owners to notify them that they were going to use the property. They claimed that they were using forest land but the evidence is clear that the land they used has only been owned by the forest service for a period of approximately fourteen years. It is the position of the appellants that this cannot be an open, notorious and adverse use in light of the fact that the appellants did not even know the respondents were using their land.

It should be noted that Byram and Sons, one of the property owners in Cottonwood Canyon issued up to 180

hunting permits each year. (T.180, lines 8 through 15) The other property owners also gave permission to friends, neighbors and other individuals to hunt the land, and a property owner would honor the permits given by another property owner in the canyon. Consequently, there were numerous people who would use the land and the property with permission of the property owners. The respondents used the road on a limited basis and most of the use was during the hunting season when hundreds of people who had permission would be in the canyon. Consequently, it would be impossible for the property owners to know that four individuals were using the property without authority. Without this knowledge, the property owners could not acquiesce in that use.

POINT III

THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH THAT THE ROAD IN QUESTION WAS DEDICATED AND ABANDONED TO PUBLIC USE.

Section 27-12-89 of the Utah Code Annotated states as follows:

> Public Use Constituting Dedication. A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used for a public thoroughfare for a period of ten years.

Dedication is defined in Ballentine's law Dictionary, on page 318 as follows:

> The setting aside of land for public use, in other words the intentional appropriation or donation of land, or of an easement or interest therein by its owner for some proper public use.

Counsel for the respondents, in a Memorandum submitted to Judge Palmer, made the following statement concerning dedication: "Dedication requires the elements of offer or consent by the owner and an acceptance of this offer by the public. (26 C.J.S. 399)" The appellants agree with this statement of law.

The appellants contend that the respondents have the burden of demonstrating by clear and convincing evidence that the road was offered to the public by the property owners or the property owners consented to the road becoming public and that this offer was accepted by the public.

In the case of Petersen vs. Combe, 20 U. 2d 376, 438 P.2d 545 (1968), the Utah Supreme Court stated that the burden of proving a public use continuously for ten (10) years must be demonstrated by clear and convincing evidence. That case involved a claim that a road known as Combe Road in Weber County had been dedicated as a public street. The court stated that the

owners of the property abutting or strattling the road cannot be considered members of the public in order to establish the public use required by statute. The Court made a special point of the fact that the evidence established that the landowners had posted a warning sign on the road claiming the property to be private. The sign was introduced at the trial by photograph and none of the parties seriously contested the fact that the sign had been in place. There was also testimony presented that some parties had been aware of the no trespassing sign and had entered the road with the consent of the property owners. This case also involved testimony that certain public agencies such as the Weber Basin Water Conservatory District, the telephone company and the Fish and Game Department used the road with the permission of the property owners to service their own interests. In view of this evidence, the Supreme Court reversed the lower Court's decision and found that public use of the road had not been established. In doing so the Supreme Court stated that the burden must be borne by the party claiming public use by "clear and convincing evidence that constitutionally must be justified. . ." In a dissenting opinion issued by Judge Crockett, he stated as follows:

> The ownership of property as evidenced by duly recorded written documents should be granted a high degree of sanctity and respect. Such ownership should neither be taken nor eroded away by stealth or inadvertence in the use or encroachment thereon by others.
>
> In order for others to acquire rights therein, the adverse use must be done in such a way that the owner knows or should know the right to use his property is being asserted against him. The proof of these facts must be clear and convincing evidence.

Judge Crockett's dissenting opinion was based primarily on the fact that he felt that the Court should honor the determination of the trial Judge in this regard.

A similar decision concerning the burden of proof was rendered in Thomas vs. Condas, 27 U.2d 129, 493 P.2d 639 (1972), the Utah Supreme Court stated that occasional use by the public of unoccupied land with the knowledge and without objection of the owner will not create an inference that the owners intended to dedicate the land as a public road. In the case Culner vs. Salt Lake City, 27 U. 252, 75 P. 620, the Utah Supreme Court stated that an alleyway was not a public road even though it had been used by the public for a number of years when the property owners had always maintained control over the alleyway and had closed it from time to time.

In the case of Gillmor vs. Carter, 15 U.2d 280, 391 P.2d 426 (1964), the Utah Supreme Court held that a road was not dedicated to the public under the state law. In reaching that decision, the court pointed out that the owners of the land had installed gates and signs at strategic points indicating that the land was not open to the use of the public. The party claiming the road public acknowledged that he had seen said gates and signs. The Court also found that it was important that the landowners had entered into an agreement to allow certain duck clubs and others to use the road with their permission and over the years had instigated lawsuits in defense of their claim that the property was private. The Supreme Court then stated:

> Such actions by owners who have established a road over their own lands, even though a portion of the road traverses land not owned by them is inconsistent with a 10-year use of this road as a public thoroughfare.

The Court also cited a law which stated in part as follows:

> Use under private right is not sufficient. If the thoroughfare is laid out or use as a private way, its use, however, long, as a private way does not make it a public way. . .

The Court ruled that there must be evidence of intent by the owner or owners to dedicate the road to the

public and proof of acceptance by the public before the requirements of state statutes can be met.

In the case of Morris vs. Blunt, 49 U. 243, 161 P. 1127, the Utah Supreme Court stated that a use of the road under a private right is insufficient to show a dedication regardless of how long it has been used and the fact that the public also uses the road without objections from the owners will not make it a public way. In the case of Bonner vs. Fudbury, 18 U. 2d 140, 417 P.2d 646 (1966), the Utah Supreme Court reached a similar decision. The Court in that case upheld a lower court ruling that a dead-end road was in fact dedicated to the public. In its decision, however, it stated clearly the principle that must be applied in making that decision. The court stated:

> In connection with this review we deem it appropriate to note our agreement that the dedication of one's property to a public use should not be regarded lightly and that certain principles should be adhered to. The presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is upon those claiming it. The mere fact that members of the public may use a private driveway or alley without interference will not necessarily establish it as a public way; nor will the fact that it was shown on the public records to be a public street; nor even that it had been paved and sign-posted as a public street by the City. . .

An extensive dissenting opinion was issued in this case by Justice Callister in which he reviewed a number of a cases pertaining to the dedication of a public right-of-way.

It is the position of the appellants that the road in question has always been private property and has been posted as private. The appellants have never consented to public use of the road and have done everything in their power to observe the road as a private road. It is in the contention of the appellants that the respondents failed to carry their burden in demonstrating that the road was dedicated to the public by the property owners and accepted by the public as a public road.

CONCLUSION

It is the position of the appellants that the respondents failed to carry their burden in proving by clear and convincing evidence that the Cottonwood Road, which is the subject matter of this lawsuit, was a public road or that the respondents had established a right-of-way by prescription. The appellants contend that the road has always been private, continually posted as private and that the appellants used every means reasonably available to them to prohibit use of the road to all parties except those having permission from the property owners.

WHEREFORE, the appellants petition the Court to dismiss the respondents' claim and declare the road in fact a private road and that the respondents have no prescriptive easement over it.

DATED this ____ day of March, 1980.

Respectfully submitted,

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ROBERT A. ECHARD
Attorney for Appellants