

1952

Pherrel Draper and Nell Fairbanks Draper et al v. J. B. and R. E. Walker, Inc. : Brief of Plaintiffs and Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Draper v. Walker*, No. 7685 (Utah Supreme Court, 1952).
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IN THE SUPREME COURT OF THE STATE OF UTAH

PHERREL DRAPER and NELL FAIRBANKS
DRAPER, his wife, J. B. DUNN and JULIET
CRISMAN DUNN, his wife, JACK C. DUNN
and GLADYS WILEY DUNN, his wife, GLEN
DRAPER and LORNA F. DRAPER, his wife,
R. L. REINSIMAR and MARGARET
DRAPER REINSIMAR, his wife, ERNEST
J. PEDLER and VIRGINIA A. PEDLER,
his wife, HENRY L. BUTLER and VIVIENNE
DRAPER BUTLER, his wife, and CHARLES
P. RUDD and GLADYS M. RUDD, his wife,
Plaintiffs and Respondents,

Case No.
7685

— vs. —

J. B. and R. E. WALKER, INC., a corporation,
Defendant and Appellant.

BRIEF OF PLAINTIFFS AND RESPONDENTS

FEB 26 1952

MULLINER, PRINCE AND MULLINER
Clerk, Supreme *Attorneys for all Plaintiffs and Respondents*

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I.

STATEMENT OF FACTS

This action was commenced in October, 1949, by the plaintiffs, all of whom except Charles P. Rudd and Gladys M. Rudd, the last named plaintiffs in the caption, were represented at the trial by Mulliner, Prince, and Mulliner, Mr. and Mrs. Rudd were represented by Irwin Clawson. The case went to trial in the fall of 1950.

As the trial developed it appeared that two distinct features of this nuisance were involved. The first was the matter of dust, noise and light as a nuisance. The second was a matter of the obliteration of a right of way. The factual situations as to each of these two problems were quite distinct, and for that reason they have been on this appeal briefed separately. This brief will only be concerned with the nuisance factor inasmuch as the problems of easements did not concern the clients represented by the writer hereof.

The nuisance issue concerns questions and errors argued on this point by respondent as point II and point III of its brief. After consideration, counsel for respondents were of the opinion that their respective positions could be put more distinctly if the factual situation on these two law points was stated and argued separately.

Prior to making this statement, the attention of this court is directed to the fact that *no exception is made, nor has error been assigned, on the ground that the evidence is not sufficient to sustain the findings of the court to the effect that a nuisance was committed and existed as alleged in the complaint.* Therefore, the character and the sufficiency of the evidence as presented will not be discussed except incidentally.

Plaintiffs take exception to a number of assertions made in appellant's statement of facts as contained in its brief. These will be alluded to at the conclusion of this Statement of Facts.

The site of this controversy is at the mouth of Cottonwood Canyon, a few hundred yards east of the Old Mill property. Plaintiffs, their parents and families settled in this particular district in the early 1920's. The homes were originally summer homes, but over the years were converted to comfortable, permanent houses with all modern conveniences. Their particular district was heavily wooded, with the advantage of the coolness incident to their proximity to the canyon in the summer. The area was also especially desirable because of the peace, quiet and isolation which these people sought and desire, and which motivated them to choose this particular place to live.

In the summer of 1946, without any notice to plaintiffs or without any preliminary negotiations with them, defendant commenced work in establishing a very extensive sand and gravel crushing and processing plant.

J. B. Walker was the only person regularly employed by defendant who testified at the trial. He is and was the general manager of defendant and the guiding factor in developing this operation. In his direct examination he testified that the beginning of construction commenced in June of 1946 and that in June and July of that year the pit floor was prepared by removing the underbrush, grading and changing the course of cottonwood creek. Mr. Walker referred extensively to notes which purported to convey accurate data. His purpose was obvious in that he tried to make it appear that his activities in this particular area had been going on for some time

prior to this suit. The fact of the matter is that in the latter part of August, 1946, no such activities had commenced. The only thing at that late date in the year 1946 which had been accomplished was that some work had commenced in driving the tunnel under Wasatch Boulevard; in fact, a trench half way across this thoroughfare had been dug.

The court is referred to Exhibits YYY and ZZZ. These exhibits are aerial photographs which were taken August 16, 1946. These pictures show that no work whatsoever had been started on what is now the pit floor, nor any work been done to the east of Wasatch Boulevard. Plaintiffs testified that this mountainside was defaced in 1947, and in view of these particular pictures plaintiffs' version as to this fact would seem to be the more reliable.

The operation of this gravel plant is quite extensive, both as to area and construction. The panorama photographs, (Ex. B and Ex. H) together with a number of other photographs, show this accurately. The evidence shows, and there is little dispute that during the years 1947 and early part of 1948 this plant was constructed. It began to operate in a somewhat tentative manner in July of 1948. Considerable mechanical difficulty appeared, as could naturally be expected, which resulted in the operation being quite sporadic. During the operational part of 1948 the gravel was bulldozed from the mountain east of Wasatch Boulevard onto a grizzly, from which it dropped to a conveyor which carried the material beneath the Wasatch Boulevard by means of a tunnel to

the crushing plant where it was crushed, graded, and otherwise classified, and from which it was removed by means of long conveyor belts to six storage piles.

In the spring of 1949 another method of removal of this material from the mountain was devised. This was necessary as the result of a lawsuit by Salt Lake City against this defendant, with which this court is familiar. This action by Salt Lake City required the defendant to remove material from ground east of the city water conduit. Thereafter the material was mined a considerable distance east of the boulevard and was conveyed to the same grizzly by a conveyor belt and the material was dropped from the end of this conveyor onto the grizzly some 25 or 30 feet, as appears in the first two photographs of Exhibit W, and also in numerous other photographs.

By handling this material that way, the "fines," which were the undesirable ingredient in this product as sand and gravel, were removed and blown away by the wind, which at this particular point in the mouth of the canyon blew almost constantly.

By August of 1949 all the "bugs" were out of the plant and it started to produce sand and gravel steadily, and huge amounts of this product were amassed on defendant's premises.

One of the aggravating features of this operation was the noise produced by the crushing plant, the machinery used in conveying the material, and the heavy equipment used in and around these stock piles.

The most annoying result to these plaintiffs was the daily deposit of dust on their premises. This dust is practically powder, as testified to by Dr. Jones, the engineer from the University of Utah, who analyzed it at the pit, crusher, storage piles, outside the homes of plaintiffs and inside the homes of plaintiffs. The doctor's analysis is contained in Exhibits DDDD, EEEE and FFFF. He and Dr. Hawks testified this material was powder. It is interesting to note in this respect, however, that courser material was carried to these homes. This material was gathered inside and outside houses and was preserved, presented at the trial, and is contained in boxes as a part of the record. The fact that this courser material traveled the distance from this plant to the homes conclusively demonstrates the direction and intensity of the winds in this vicinity.

Photographs were taken during the year 1949 and during the summer immediately preceding the trial of this case at regular intervals. These exhibits were consolidated, dated and range from exhibit C to exhibit UU. These pictures, the dust and dirt actually collected, and the analysis of the scientists called by plaintiffs, also the direct testimony by plaintiffs and others, conclusively show the injustice, inconvenience and discomfort they underwent as a result of this plant being located and operated where it was and as it was.

Defendant produced experts to refute this. These people purported to be advised in matters of sound and dust problems.

Mr. Netzeband conducted certain dust collecting tests in and around these premises for a number of weeks. The instrument with which he collected dust was a device which had an orifice of ten microns and the dust count was made only on particles of five microns or less. Particles of this small size are classified as industrial dust. The inhalation of this type of matter results in definite physiological detriments.

Referring to the analysis made by Dr. Jones on the size of dust particles, Exhibits DDDD, EEEE, FFFF, it will be seen that very little of the dust emitted from this plant was of this size and so the conclusion of Mr. Netzeband would have no probative value in this case. It should also be known that no method whereby dust fall could be measured was undertaken by defendant, nor was any procedure availed of by him to measure the type of dust that was being transmitted and which could be seen visually as coming from the premises of defendant.

Mr. Irvine conducted tests with sound equipment which purported to indicate the intensity of the sound caused by this plant compared to the intensity of the normal sounds in this vicinity when the plant was not operating and compared to various noise factors in different districts in Salt Lake City. Among his findings were readings taken at the crusher while it was in operation and these were extremely high. He made tests on October 17, and October 18, 1950, while the plant was operating. The ones taken on October 17, were at the crusher. On

October 18, he took two readings. One of which was at the Old Mill, the other was 800 feet from the crusher in Draper's front yard. Both of these were made while the plant was in operation. The only other readings he took while the plant was in operation were on October 30, when he took four readings at the Pedler and Draper homes. On October 30, the wind in Salt Lake Valley at the time these readings were made was toward the Northwest, i.e., from the direction of these properties toward the crushing plant at from 19 to 37 miles per hour. Plaintiffs called Mr. Franklin Gates, a sound expert, to testify in their behalf. He presented charts which showed that sound intensity as measured in decibels was a very different thing as compared to loudness as felt by the human ear. Mr. Irvine concurred with this principle. These charts and the testimony of these experts indicate that a slight change in intensity as measured by decibels results in a substantial increase or decrease in loudness as heard by the human ear. It will also be noted that Mr. Irvine's findings indicate substantial differences in intensity between the times when tests were taken while the plant was being operated and while it was shut down.

The matter of the testimony of these experts is mentioned merely to show that the type and method of their tests was not effective in controverting positive testimony of plaintiffs supported by their expert testimony, photographs, and movies.

J. B. Walker carried the burden of defendant as to practically all the matters appearing in the Statement of Fact in defendant's brief. No employee of the crush-

ing plant was called to deny the fact testified to by plaintiffs that the dust from this plant was visually observable over the premises of plaintiffs.

Considerable evidence was presented by defendant through Mr. Walker that dust was produced from Wasatch Boulevard, Cottonwood Boulevard and by the construction of the Deer Creek aqueduct. As opposed to this testimony, plaintiffs testified that they were not bothered by dust from these sources and that these same sources did not produce dust. The record also shows that the roads above mentioned were blacktopped in 1950 and that the aqueduct was completed in 1949. This testimony produced by defendant could not be effectual in view of the fact that the most offensive period of operation of this plant was in 1950.

Exception is taken to the statements appearing on pages 2 and 3 of defendant's brief. There it is implied that this crushing plant was a major factor in the economy of Salt Lake County. Mr. Walker testified to the fact that of the \$320,000.00 in sales in 1949, only \$40,000.-00 arose from revenue produced by the crushing plant. Mr. Walker's testimony as to the production of his operation also appears to be somewhat exaggerated. He testified on cross examination (record 1104) that in 1949 his gross income was \$320,000.00. His income tax report (Ex. SSSS) shows gross receipts of \$272,000.00, of which only \$222,000.00 was from concrete products. No receipts are shown for unprocessed sand and gravel on this exhibit.

On direct examination, Mr. Walker tried to make it appear that this crushing plant represented a very substantial investment. On direct and cross examination (record 1107 and 1110) he testified positively that the crushing plant represented an investment of \$308,000.00 and that the total investment in his overall operation was \$500,000.00 (record 1110). He was asked to produce his income tax returns for 1948 and 1949, which were presented (Exhibits RRRR and SSSS). They show that in 1948 this plant had a depreciated value of \$116,000.00, based on a cost price of \$128,000.00. The 1949 income tax statement shows an investment in this plant of \$145,000.00, depreciated to \$119,000.00.

Relative values of investments may have some bearing in a nuisance case, but in this case it is fair to say that the investment in this gravel plant is far less than the investment plaintiffs and their neighbors had made in the surrounding area at the time this plant was built.

Some evidence was received with regard to the existence of other sand and gravel operations in the Southeast section of Salt Lake County. There is no evidence that dust, if any, produced by such operations affected these plaintiffs in any manner.

Mr. Walker's testimony varied considerably from the obvious facts. This was illustrated in his testimony as to the production and amount of dust and noise, the existence of right of ways, and as to his investment. His evidence on the material matters involved in this action

was not received favorably by the trial court, and it is submitted that the trial court's action in failing to give credence to this testimony was proper.

II

NO ERROR WAS MADE BY THE COURT IN ALLOWING PLAINTIFFS TO AMEND OR IN RECEIVING EVIDENCE ON THE ISSUE OF ATTRACTIVE NUISANCE.

Appellant's second point commencing at Page 74 in their brief argues to the effect that the Court erred in allowing an amendment and in hearing evidence on the issue of attractive nuisance.

The theory of plaintiffs on this point was that the presence of these conveyors and machinery at a place where they were easily accessible to children interfered with the comfortable enjoyment of their life and property. Any activity which does this is under our statute (R.S.U. 104-56-1) declared to be a nuisance.

The evidence submitted in support of this allegation consisted of testimony to the effect that children of this neighborhood were in the habit of playing around this heavy equipment and climbing on to the ends of these conveyor belts which were a considerable distance from the ground. Also that the storage piles presented a dangerous condition due to the fact that the sand might slide, thereby burying a child or that a child might fall in the cone and drop into the center of such pile and thereby become suffocated or injured by the equipment located

under the pile. The evidence is undisputed that this plant was left unguarded and unattended at the times the children were found playing there.

It would seem to require no argument that such a dangerous condition being made immediately available to children of tender years would interfere with the comfort and enjoyment of their parents.

The maintenance or operation of devices inherently dangerous to occupants of adjacent lands is subject to injunction. This principle was decided in a recent California case of *Alonso v. Hills*, 214 P. 2d 50 Cal. (1950). In this case blasting on the premises of the defendant was enjoined by those living in the immediate vicinity. This case and the cases collected there hold that negligence need not be proved as is contended by appellant.

Appellant cites a case and a treatise which expounds the general principals of attractive nuisance. No cases are cited which support its contention in this case.

The only objection made to this amendment and the evidence admitted thereunder was that this evidence "must have influenced the Court" in making its finding and that there was a sharp or close question of fact presented by the evidence.

The proposition of this evidence influencing the trial court cannot be sustained because the trial court made no findings to the effect that the business conducted by defendant amounted to an attractive nuisance. The trial court confined its findings upon which it based a nuisance

to the presence of dust, noise, and flashing lights. The evidence was sufficient to support a finding of nuisance on these grounds and the appellant herein makes no objection to this finding on these grounds.

The other argument made by appellant to the effect that there was a close question of fact and a sharp conflict in the evidence is also without merit. A reading of this record and an examination of the exhibits submitted shows conclusively that the overwhelming weight of the evidence is in favor and upholds the findings of the trial court as made.

Appellant could have insisted that findings be made on this particular fact. In all likelihood such a finding would have been to the effect that the existence of this crushing plant did not constitute an attractive nuisance so far as the children of plaintiffs were concerned and that its presence did not affect their comfortable enjoyment of property. The failure of the trial court to find that this fact existed implies a negative finding and shows conclusively that the trial court did not consider this factor in arriving at its decision which was based on grounds it enumerated.

Briefly, defendant's contention on this point stands unsupported by authority and is to the effect that the introduction of this issue and evidence prejudiced the Judge's decision in respondents' favor. It is submitted that such a contention is without merit and wholly over-

looks the finding of the Court and over-whelming weight of plaintiff's evidence supporting such finding to which objection is not made.

III.

THE JUDGMENT AND DECREE IS IN PROPER FORM AND THE TRIAL COURT WAS UNDER NO OBLIGATION TO IMPOSE RESTRICTIONS UPON DEFENDANT'S USE OF ITS PROPERTY IN THE ABSENCE OF EVIDENCE ON THIS ISSUE.

Upon the trial of this case, the court was presented with the problem of whether a nuisance existed or whether it did not. The pleadings were so framed. The only defenses presented were (1) laches and (2) denial of the fact that a nuisance condition was present.

The contention of defendant that the court should have limited its injunctive order would have some merit if defendant in its pleading had admitted the fact of nuisance and presented a scheme or method whereby such a nuisance could be eliminated, if possible, by certain mechanical or scientific processes. In such case the court could then determine whether such changes would produce the desired result and rule on that matter. This procedure was followed in the Utah case of *Ludlow v. Colorado Animal By-Products Company*, 137 P. 2d 347, Utah (1943).

There are numerous cases where this type of defense has been made. The courts under such evidence have permitted a continuance of the activity which had there-

tofore resulted in a nuisance under new or anticipated procedures which were pleaded and proved at the trial. That is the situation in the cases cited in defendant's brief.

There might be numerous ways and different procedures whereby defendant's plant in this case could be operated so as not to create this abundant dust and loud noise, such as housing the crusher and the application of liberal supplies of water. The trial court cannot, and should not be required to make an independent investigation of the methods involved in the processing of sand and gravel and from such investigation determine if there is any manner under which the nuisance feature of such an activity can be controlled. Then, after such investigation, restrict the operation of a given plant until the conditions that have been discovered by the court are complied with. This, obviously, is not the duty of the court. The trial court is only required to find facts which have been properly pleaded and presented by way of evidence to it. That is just exactly what the court did in this case. It is too late in this case for this defendant to raise this particular problem.

Respondents do not deny that the operation of a gravel processing plant is a legal business. There have been numerous cases decided, both in this jurisdiction and others, which declare that an activity which produces loud noise and which results in dust and other foreign substances being deposited on other people's property is a nuisance. In these cases such activity was ad-

mittedly a lawful occupation. These cases are collected in an annotation at 11 A.L.R. 1401. This annotation is entitled "Dust as Nuisance." Our Supreme Court has held that noise is a nuisance in *Brough v. Ute Stampede Association* 142 P. 2d 670. Also dust is a nuisance in *Thackery v. Union Portland Cement Company*, 231 P. 813.

At this point it is proper to note that the trial court did not enjoin this defendant's operation of a gravel plant at this particular place. A proposed decree to this effect was not executed by the court. The decree as signed enjoins the defendant from operating its gravel pit and process plant including the storing of different products and the operation of heavy equipment upon these premises *so as* to create a nuisance affecting plaintiffs.

The language of this decree leaves the door open to defendant to continue the operation of this establishment in the event it can be operated without creating noises and excessive amounts of dust. No objection to this form of decree was made by defendant at or after the time it was entered by the Court nor was any scheme or device for the control of this dust and noise propounded when the matter of the form of this decree was being argued by respective counsel.

Appellant cites the case of *Vowinckel v. N. Clark and Son*, 216 Cal. 156, 136 Pac. (2nd) 733. In this case plaintiff brought a nuisance action against a manufacturer of pipe and tile. The factory had been adjacent to plain-

tiff's premises for a number of years. The objectionable feature of this operation was the addition of four furnaces on the side of the plant next to plaintiff. The court viewed the premises and held that these particular furnaces were objectionable and forbade their use. The defendant in this case, after the trial and on the motion for a new trial, offered to build a sound and fireproof wall, but the court refused to accept this solution. This case can by no means be cited as authority for the proposition that the court on its own initiative should investigate factors which would abate a nuisance.

Appellant cites the case of *Williams v. Bluebird Laundry Company*, 259 Pac. 484. The language of the decree in this case appears to be the same as the language in the case at bar. The same objection to it was made as is being made in this case, and the court held that such an objection is without merit. The court in the *Bluebird Laundry Company* case cites the case of *Judson v. Los Angeles Suburban Gas Company*, 157 Cal. 168, 106 Pac. 581. The language of the decree in the *Suburban Gas Company* case was the same as in the case at bar. The defendant there made the same objection as is being made here, yet the court held the language proper. The California court said:

"It is these objectionable emanations, the same sort of nuisance which had caused the annoyance to plaintiffs, that are enjoined. Even if true, it is no objection to the validity of an order that there is room for difference of opinion as to what noises are loud, what odors are offensive, and what smoke is black."

The court then goes on to say that under this form of a decree, both the defendant and the plaintiffs are sufficiently protected.

The court continued:

“If the operation of the defendant’s plant should be deemed by the plaintiffs to create such noises or pollution of the atmosphere as to be deleterious to their health or offensive to their senses, and should they produce competent and satisfactory evidence that any or all of these objectionable features were injuring or destroying their health, we think they would be entitled to relief under the terms of the judgment, otherwise not.”

These two California cases hold squarely that a decree in the language of this case is sufficiently definite and can be enforced under existing legal procedures. The only distinction that appellant makes between this case and the two California cases, which appear to be exactly in point, is that the operation of a gravel plant is a more complicated process than the operation of a steam laundry and a factory which produces gas. It is submitted that a process which merely grades and reduces the size of rock is in no way as complicated nor are there as many processes used in such activity as there is in a business which reduces coal or some other combustible to gas, or to the laundering of various types of clothing.

The court’s directive states clearly that the processing and storage of this material created dust, and that

the operation of equipment created noise, and the decree of the court is that this activity be conducted so as not to produce dust or noise.

The next objection to the form of this decree is that it refers to the Findings of Fact in the event more particularity is desired and for reference as to the manner of operation. Such a reference does not render the decree inoperative. It is submitted that such practice is the better procedure, as indicated in *Barron and Holtzoff*, Section 1436, page 314-15, Vol. III, where it is stated that the order should furnish the defendant with a direct and succinct statement of his wrongful acts and should not incorporate lengthy and verbose findings.

It is also true that under our practice the Findings of Fact, Conclusions of Law, Judgment and Decree are considered more or less as a whole, and represent the court's final determination of a given lawsuit. Rule 52A, *Utah Rules of Civil Procedure*, provide that,

“The court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.”

This was done in this case. The findings of fact represent the grounds for relief and the decree granted the appropriate relief.

Appellant maintains that this reference to the findings violates Rule 65A (D) Utah Civil Procedure, which provides that every order granting an injunction shall be specific at all times and shall describe in detail and not by reference to the complaint or other document the

act or acts sought to be restrained. This is a codification of the common law rule. And the *Bluebird Laundry* and *Suburban Gas Company* cases above quoted hold squarely that the order and decree in this case is sufficiently specific and does sufficiently describe the acts to be restrained.

Commencing at page 105 of appellant's brief the argument is presented that there exist other sand and gravel operations in the general area and that the evidence showed there were other dust producing agencies. This is in direct conflict to the weight of the evidence. As to this argument, the undisputed evidence is that these people had lived in this neighborhood for many years and were never disturbed by dust or noise previous to the operation of defendant's plant. In fact, the testimony of plaintiffs was that the area was unusually quiet and dust free. It is also undisputed that these other gravel plants mentioned were in existence before defendant's plant was built, yet these plaintiffs had no cause of complaint.

Even if it had been shown that other purported sources indicated by appellant annoyed these plaintiffs, such would not be a defense. The rule in this respect is clearly stated in the *Vowinckel* case, *supra*, 13 Pac. 2d at page 737, where the defendant contended that the plaintiff in addition to itself had as neighbors an airport on the North and a railroad on the South. Citing a long line of California cases the court declares the rule to be:

“The fact that other sources of possible discomfort to plaintiff existed in the neighborhood of his property is no defense to an action of this kind. * * * Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which in spite of them remains a nuisance.”

The whole problem of the form of this decree and its failure to specify or permit the operation of this gravel plant under some kind of a scheme which the judge should have independently discovered has been rendered moot. The file in this case has been continued and will be offered upon the oral argument hereof. Subsequent to the entry of this decree and in the summer of 1951, while this appeal was being perfected, an order to show cause was issued by the trial court, upon which a contempt order against this defendant and J. B. Walker was entered. After further hearing defendant finally advanced a proposal which in its estimation would reduce the dust and noise factor incident to the operation of this crushing plant. The trial court heard this evidence and is allowing defendant to operate after these features are constructed and installed.

CONCLUSIONS

1. So far as the nuisance question is concerned, Article 8 Section 9 of the Utah Constitution may not be invoked in this case as requested by appellant. This particular rule of law is to the effect that in equity cases the appellate court can investigate the findings and as-

certain whether or not the proof justifies the findings. In this case no objection is made to the sufficiency of the evidence to support the findings of a nuisance, and therefore the appellate court is under no duty or obligation to investigate or go into the evidence.

2. Finally, appellant in their conclusions request that this court reform this judgment by defining methods, instruments and agencies, and to define a maximum tolerance of dust fall in this case. For this court to do this it would have to make an independent investigation as to permissible limits of dust fall with no aid from appellant by way of evidence having been presented on this subject at the trial of the case and without the aid of having anything submitted to this court. Such a proposal appears upon its face to be beyond the scope of review.

3. As indicated by the extensiveness of this record, both by way of oral testimony and exhibits, it is readily apparent that considerable time, effort and money was contributed by the parties hereto in presenting the matter fully to the trial court. It is submitted that such evidence preponderates heavily in favor of respondents and that the trial court's findings and decision were in all respects correct and proper.

Respectfully submitted,

MULLINER, PRINCE AND MULLINER

Attorneys for all Plaintiffs and Respondents