

1956

Stan Naisbitt v. Parley Hodges and Theora Hodges : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STAN NAISBITT,
Plaintiff and Respondent,

Vs.

PARLEY HODGES and
THEORA HODGES,
Defendants and Appellants.

Brief of Respondent

Appeals No. 8331

FILED

APR 17 1956

Clerk, Supreme Court, Utah

Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Rich

Hon. Lewis Jones, Judge

BULLEN & OLSON

E. F. ZIEGLER

Thatcher Building, Logan, Utah
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spondent

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INTRODUCTION

The appellants urge this court to reverse the judgment made and entered by the trial court for the reason that the evidence does not support the Findings of Fact and Conclusions of Law and therefore the trial court has no basis for making its Judgment and Decree. Respondent contends there is ample evidence to support the Findings, Conclusions and Judgment.

STATEMENT OF FACTS

To avoid duplicity, the facts are not set out in detail at the outset, but respondent has set out in the argument the Findings of Fact made and entered in this case and refers to the testimony and documentary evidence which supports the findings.

For the convenience of the court and so that the court can more readily examine and study the case the respondent has prepared the following sketch, and unless otherwise mentioned the sketch will be used to identify the tract or tracts and lines being discussed: See Center of Brief.

ARGUMENT 1

This case was heard by the trial court sitting without a jury, and it is respondent's position that if the trial courts judgment is supported by the Conclusions of Law, and the Conclusions of Law are in turn supported by the Findings of Fact and the Findings of Fact are supported by the evidence, then the Supreme Court will not overturn the Judgment and Decree of the lower court.

Therefore, respondent deems it necessary to set out some of the courts findings in some detail, and refer to the page or pages in the transcript wherein evidence is presented to the court and relied upon by the court and which supports said findings.

The trial court found in its Findings of Fact numbers 2 and 3 as follows:

"2. That the plaintiff now is [and] the plaintiff and his predecessors in interest for more than 40 years last past have been the owners of, in possession of and entitled to the possession of the following described premises in Rich County, State of Utah, to-wit:

Beginning at the Northeast Corner of Lot 5, Section 33, Township 14 North, Range 5 East of the Salt Lake Meridian which is also the meander corner on shore of Bear Lake between Sections 33 and 34, which is North 1529.88 feet (23.18 chains) from the Southeast corner Section 33, Township 14 North, Range 5 West of the Salt Lake Meridian;

thence *South* 209.88 *feet* along the East boundary of said Lot 5 to the southeast corner of said lot; thence *North* 89°20' *West* 864.5 *feet*, more or less along the south boundary of said lot; to the projection of a fence bearing *South* 31°16' *West* (point 8 Birch Survey) which is *North* 89°20' *West* 864.5 *feet*; thence *North* 1320.0 *feet*; (*North* 1330.06 *feet* and *West* 864.44 *feet*) from the southeast corner of Section 33; thence *North* 31° 16' *East* and 569.3 *feet* more or less along the projection of said fence to the meander line of Bear Lake established Oct. 10, 1875 thence *South* 63°15' *East* 637.3 *feet* more or less along said meander line to the point of beginning. Containing 6.233 *acres* more or less further described as being in Lot 5, Section 33, Township 14 North, Range 5 East Salt Lake Meridian.

(Also identified on plaintiff's Exhibit "A" as and identical with that parcel of land bounded on the West by the "Road to Bear Lake." bounded on the South and East by "Ideal Beach Resort" and bounded on the North by Bear Lake;

Also, identified on plaintiff's Exhibit "A" as and identical with the parcel of land encircled in red pencil, with the further identification of "Tract I" and "Tract IA" labeled within said red boundaries)

"3. That for said forty years last past, plaintiff and his predecessors in interest have owned, claimed and occupied said premises and have held open, notorious and adverse possession of said land and have improved and used the same and

every part thereof under color of title and claim of right so to do.

[These findings are amply supported by the evidence contained in the Transcript of Record herein next referred to. In future paragraphs, the courts findings of fact will be prefaced by the number of the finding, and the reference to the transcript will then follow, without further identification. For evidence supporting the above findings, see Tr. 139, lines 14 to 30; 140: 141, lines 22 to 30; 142, lines 1 to 6; 144: 145, lines 1 to 5; 147, lines 18 to 30; 147; 148, lines 1 to 6; 197: 199; 200: 202, lines 1 to 20; 203, lines 15 to 20, and 25 to 30; 204: 205, lines 1 to 16; 207, lines 15 to 30; 208: 58: 59, lines 1 to 4; 63, lines 17 to 26; 71 lines 22 to 30; 72, lines 1 to 19; 74, lines 17 to 30; 76, lines 15 to 30; 77: 78; 79: 80: 81, lines 1 to 4.]

and during all of said time have paid all general and special taxes, which have been levied and assessed against said premises and the whole thereof and that during said time said taxes have been assessed in the name of the plaintiff and his predecessors in interest." Stipulation, paragraph 7 found at page 16 of the Judgment Roll and pages 28, 29 and 30 thereof: Tr. 26, lines 27 to 30; 27; 203, lines 21 to 24; 85, lines 27 to 30; 86, lines 25 to 30; 87; 88; 89).

The evidence referred to, covers in part the possessory acts of the predecessors in interest to the plaintiff, as well as those of the plaintiff. These possessory acts are hereinafter summarized.

Possessory acts of J. W. Neil, one of respondents predecessors in interest, as established by the evidence referred to above, were as follows:

1. That between the years 1912 and 1916, the area inclosed by 5, 4, 6 and 7 was used by J. W. Neil as a farming unit and the disputed area, C, B, 2, 3, was used by J. W. Neil for the purpose of raising approximately 1,000 chickens, 50 to 100 hogs, 5 cows, 3 horses and 200 sheep. That during this time the said J. W. Neil filled in the sloughs on the disputed area.

2. During said time he constructed a fence from number 4 to number 5, which said fence remained upon the property from the year 1916 to the time said property was conveyed to O. H. Nelson in 1939.

3. The said J. W. Neil constructed cabins on the said disputed strip and used the same as a summer resort until 1939 when he sold the property to O. H. Nelson.

While the property was in the possession of the said O. H. Nelson, he performed the following possessory acts:

1. Rebuilt the fence heretofore mentioned.
2. Used the disputed area as part of a summer resort.
3. Constructed a water main approximately 3 feet

deep on the disputed property, which was constructed with outlets approximately every 44 feet.

4. That during the year 1938 the said O. H. Nelson leased to a third party the property identified as 1, 2, 3 and 5 together with other property. And that said third party used this property for pasturing his cows during that year.

That during the year 1951 O. H. Nelson conveyed to Stan Naisbitt, the respondent, Tract 1, 2, 3, ^{E.F.Z.} 4 together with Tract 3, 4, 6, 8 and the said Stan Naisbitt, performed commencing with the year 1951 to the time of commencing this action, the following possessory acts in relation to the property:

1. Covered the disputed strip with top soil and planted same to grass.

2. Planted Lilac bushes, trees, shrubs and other plants upon disputed strip.

3. Required appellant to move a cabin which was located upon the disputed strip and which appellant had purchased from O. H. Nelson.

“4. That about one year ago defendants, Parley Hodges and Theora Hodges first asserted and claimed and now claim and assert an estate or interest in the above described premises, adverse to the plaintiffs right, title and interest, (Tr. 144, 78, 79, 204) that the claims of said defendants are invalid and without any right whatsoever. That said defendants do not have any estate, right, title

or interest whatsoever in said premises or any part thereof."

"5. That during the year 1912, plaintiffs predecessor in interest, J. W. Neil, who is one of the defendants herein, entered into a contract for the sale and purchase of land with the Hodges Land, Livestock and Milling Company, a Corporation, whereby the said J. W. Neil agreed to purchase and the said Hodges Land, Livestock and Milling Company, a Corporation, agreed to sell to the said J. W. Neil a tract of land in Rich County, Utah, containing 43 acres, more or less. (Tr. 140, 141) The West boundary line of said 43 acre tract extended Southerly from the shore of Bear Lake from a point at the Northwest Corner of the property described in paragraph 2 hereof, (herein referred to as Tract I) along the West Boundary of said Tract I to the State Road and was bounded on the North by Bear Lake and on the South by said State Road. That the East boundary of said 43 acre tract is immaterial to the issues involved herein."

"6. That it was the intention of the said J. W. Neil and the Hodges Land, Livestock and Milling Company that the said J. W. Neil was to have conveyed to him under the terms of said sale of land contract all of the land in said area East of said West Boundary of the above mentioned 43 acres between Bear Lake on the North and the State Road on the South which would completely embrace Tract I." (Tr. 47; 48; 49, lines 22 to 30; 53, lines 18 to 23; 55, line 29 and 30; 56, lines 1 and 2; 140; 141)

"7. That during the year 1916 and after the said J. W. Neil, had taken possession of said 43 acre tract, which includes Tract I, and

used said land as a farming unit the said J. W. Neil and Hodges Land, Livestock and Milling Company discovered that the Deed from the Hodges Land, Livestock and Milling Company did not cover Tract I as intended but that record title to said Tract I was vested in the defendant [,] Parley Hodges.” (Tr. 47 48; 49; 53; 55; 56; 140 and 141)

“8. That the said Hodges Land, Livestock and Milling Company in order to completely perform said contract for the sale of said 43 acres. secured the consent of Parley Hodges and wife to deed Tract I to the said Neil and paid to the said Parley Hodges the sum of \$619.00; (Tr. 48, lines 15 to 26) and in consideration of said sum the said Parley Hodges and wife, Theora Hodges, on the 14th day of August, 1916 executed and delivered to the said J. W. Neil a Warranty Deed, (Plaintiff’s Exhibit “B”, Entry 2 thereof) intending to convey all of Tract I to J. W. Neil, but by reason of mutual mistake, said warranty deed erroneously described the property as follows:

Commencing at the Northeast corner of Lot 5 Section 33, Township 14 North Range 5 East Salt Lake Meridian: thence South 1 chain and 15 links; thence West 13 chains and 15 links; thence North $32^{\circ} 15'$ East 6 chains and 85 links, thence East along Lake Shore 70° South 10 chains 98 links to the place of beginning.

That the South and East courses of the description in said deed were conterminous with the West course and the North course in the deed from Hodges Land, Livestock and Milling Company to J. W. Neil, (Tr. 165) and it was not intended that there should be any gap between the

property conveyed to Neil by Parley Hodges and his wife, Theora Hodges, and the land conveyed to J. W. Neil by said company. In other words, the 43 acres sold to Neil by Hodges Land, Livestock and Milling Company, consummated by delivery of said deed to Neil by the company and defendant Parley Hodges embraced all the land lying East of the "Road to Bear Lake" between the State Highway on the South and Bear Lake on the North, and said Neil took possession of said 43 acres, which includes Tract I, pursuant to said understanding in 1912, and said Neil and his successors in interest, including plaintiff have occupied Tract I ever since, free of any claim of the defendants Parley Hodges and his wife, Theora Hodges." (Tr. 55; 56; 141; 142; 143; 144)

"9. That at the time said J. W. Neil was negotiating with the Hodges Land, Livestock and Milling Company for the purchase of said 43 acres above referred to, the said J. W. Neil stayed at the home of the defendant, Parley Hodges. (Tr. 148) That during said negotiations and subsequent to the execution and delivery of the above mentioned warranty deed, J. W. Neil and the defendant Parley Hodges, on numerous occasions went upon the land (Tr. 148) and during said times expressly agreed that the West boundary of the land being purchased by J. W. Neil from Parley Hodges and his wife, Theora Hodges was the same as the West boundary of the land encircled in red; (Tr. 148; 149, lines 6 to 9) and that the defendant, Parley Hodges, assisted J. W. Neil in constructing a fence along the West boundary of said Tract I, which said West boundary line is also referred to and identified as and is identical with what is now the East line of the Road to Bear Lake, as shown on plaintiff's Exhibit "A". (Tr.

154, lines 24 to 28; 155, lines 18 to 20). That the defendant, Parley Hodges and J. W. Neil expressly agreed during said times that the fence constructed along the entire West boundary of Tract I and continuing on South to the State Highway was to constitute the dividing line between the land owned by defendant Parley Hodges and J. W. Neil and understood and agreed that Parley Hodges owned all land to the West and J. W. Neil owned all the land to the East of which is now the East boundary of said Road to Bear Lake. (Tr. 145, lines 3 to 9; 146, lines 1 to 15. and lines 20 to 30; 147 lines 1 to 15 and 149) and that at no time did the defendant, Parley Hodges, claim any interest adverse to J. W. Neil in and to the land to the East of the said "Road to Bear Lake" as shown on plaintiff's Exhibit "A."

"10. That during the time said J. W. Neil owned and occupied said 43 acres, there was no fence separating said Tract No. I (which is the same property as encircled in red on plaintiff's Exhibit "A") and that the land abutting on the South thereof, for the reason that the J. W. Neil owned and occupied the whole of said property to the East of what is now the Road to Bear Lake and North of the State Highway running from said state highway to the shore of Bear Lake and J. W. Neil operated the said property as one unit." (Tr. 142, lines 11 to 20; 143, lines 4 and 5.)

"11. That during the year 1916, J. W. Neil sold a portion of said 43 acres to the Ideal Amusement Company, (Tr. 143, lines 6 to 8 and lines 22 and 23) which said land is identified as "Ideal Beach Resort" on plaintiff's Exhibit "A," and which said land abuts Tract No. 1 on the South and East. That there is no intervening land between the property encircled in red on plaintiff's Exhibit

S.W. CORNER, LOTS,
SEC. 33, T. 14 N. R. 5 E

N

BEAR

LAKESIDE
N 32° 15' E
452.10 FA
(6 CHAINS - 85 LINKS)

ROAD TO

SECTION
RANGE

STATE
HIGHWAY

STO° E 126

NOTE:
HIGHWAY CONTINUES
PAST IDEAL BEACH ACCESS
ROAD IN SAME GENERAL
DIRECTION

LAKE

63° 15' E 637.3 FT. (10 CHAINS - 98 LINKS)

N.E. Corner, Lot 5
SEC. 33, TR. 14 N.,
R. 5 E., S. L. M.

Disputed Area

S.E. Corner, Lot 5

864 SF. (13 CHAINS - 15 LINKS)

BEACH RESORT

IDEAL
BEACH
RESORT

SECT TP. 14 NORTH,
RANGE, SALT LAKE MERIDIAN

EAST LINE SEC. 33

ROAD TO IDEAL BEACH
NOW 349 FT.
TO 575 FT.
HIGHER

ES
ACCESS
-RAL

30 CHAINS

“A” (Tract No. I) and the property conveyed to the said Ideal Beach Resort and the courses used to describe the East and South boundary line of the said property encircled in red and two of the courses used to describe the property conveyed to said Ideal Beach Amusement Company are conterminous.” (Tr. 162; 163; 164; 165; 231; 232)

“12. That on or about the 14th day of August, 1939, J. W. Neil sold the remaining land lying to the West and North of said Ideal Beach property and East of the Road to Bear Lake extending down to Bear Lake, (Tr. 25, lines 21 to 24; 140, lines 1 to 3; 197 and 199; Plaintiff’s Exhibit “B” Entry 3 thereof) together with other land not involved in this law suit to O. H. Nelson, that during the later part of said year 1939, the said O. H. Nelson and the defendant Parley Hodges went upon Tract No. I and mutually agreed that the South boundary of said Tract No. I and the North boundary of Ideal Beach Resort land were identical and that the West boundary of the said Tract No. I was along the East line of said Road to Bear Lake. That at the said time Parley Hodges assisted the said O. H. Nelson in constructing a water line along the South boundary of Tract I (Tr. 213; 215; 216; 217, 201, lines 20 to 30; 202, lines 1 to 9; 204) That thereafter said O. H. Nelson rented the use of said property, together with other property owned in the vicinity of O. H. Nelson to the said Parley Hodges for the purpose of grazing livestock.” (Tr. 208)

“13. That the plat of Rich County, Utah, which is used by said county for purposes of property taxation shows that there is no intervening land between the property sold to the said Ideal Beach Amusement Company and the property encircled in red on plaintiff’s Exhibit “A” and that the

courses used to describe the East and South boundary of said property encircled in red and two of the courses used to describe the property assessed to the said Ideal Beach Amusement Company are identical.” (Tr. 161; 162; 163; 164; 165; 166. lines 1 to 8; 167; 189, 190; 191; 192; 231; 232.)

“14. That during the year 1953, the said O. H. Nelson, a single man, executed and delivered a deed to the plaintiff conveying to the plaintiff all of his right, title and interest in and to Tract I.” (Tr. 202, lines 21 to 30; 203, lines 1 to 14; plaintiff’s Exhibit “B” Entries 5 and 6 thereof).

II

The trial court must have relied upon the undisputed evidence that if there was not a mutual mistake made in the Deed from the appellants to J. W. Neil and perpetuated down through the conveyances to the respondent, the respondent’s record title would overlap the property on the West of the tract now occupied by respondent and the owner of the property on the West would have an overlapping record title to the property abutting him on the West and so on around Bear Lake. (Tr. 34; 35).

The trial court must have also relied upon the fact that the only way the description of Tract I would fit into the surrounding descriptions was that if both the grantor, Parley Hodges, and the grantee, J. W. Neil, in drawing the Deed which conveyed the property from the appellants to Neil, thought the Northeast corner of Lot 5 was 1 chain 15 links (79.9 feet) North of the Southeast

corner of Lot 5 and not 209.88 feet North of the South-east corner of Lot 5 as established by the surveyors hired by the appellants and respondents. (Tr. 32 and 33)

III

There are certain issues presented in the appellants' brief which were not argued heretofore. Therefore, the respondent hereinafter will discuss each of these issues. In Argument Number 1, appellants state, in effect, that Tract I was used jointly by appellants and by Neil, one of the respondent's predecessors in interest; that the appellants, before the year 1918, constructed a garage on the South portion of Tract I, and that there was a fence dividing the disputed tract and the land abutting the disputed Tract on the North. The trial court chose to believe the evidence of the respondent that at no time did appellant claim any interest in or to tract I and that the location of the garage was not on Tract I (Tr. 133; 199) and that there was no fence line dividing the disputed area and tract 1, 5, C, B. (Tr. 142)

In appellants Argument Number 2 they contend that the property was never enclosed by substantial enclosure. It is true that from the years 1914 to 1939 Tract I was not fenced as a separate unit, but the undisputed evidence was that it was part of a 43 acre Tract and that this 43 acre tract was used as a separate unit and was enclosed by substantial enclosure. (Tr. 146, 199, 200, 201). The respondents evidence further shows that during the

year 1939 O. H. Nelson, one of the plaintiff's predecessors in interest constructed a fence around Tract I with the exception of the Lake Shore. (Tr. 206). On page 6 of appellants brief it is claimed that the respondent failed to make out that he and his predecessors in interest were in exclusive possession of the property in dispute and that appellants installed a pipeline on the disputed area and worked with the plaintiff's predecessors in interest upon the whole area. Again there is a conflict of testimony, because O. H. Nelson, one of the plaintiff's predecessors in interest, testified that he constructed said waterline. (Tr. 204) Also, the testimony of J. W. Neil was that the appellant Parley Hodges was employed by J. W. Neil at the time he, Neil, owned the said land, to work upon the land. (Tr. 145; 146)

The appellant objects to the courts finding in favor of the respondent because respondent failed to show that the taxes were levied and assessed upon the disputed area and paid by the respondent and his predecessors in interest. The record sustains the courts finding that the taxes were levied and assessed and paid by the respondents and his predecessors in interest for the required period of time. (See pages 4 and 11 hereof)

However, even if it is assumed, for the purpose of argument, that the respondent and his predecessors in interest have not paid taxes upon the property, the respondent still must prevail because taxes were not levied

and assessed. The county records do not show any intervening parcel of land between Tract 1, 2, 3, 5 and that property identified as Ideal Beach Resort, hence it must follow that there were no taxes levied and assessed upon the intervening tract and therefore the requirement of U. C. A. 1953, 78-12-12 is satisfied. *Utah Copper Company vs. Chandler*, 45 Utah 85, 142 Pac. 1119 (1914); *Farrer vs. Johnson*, 2 Utah 2nd 189, 271 P. 2d 462 (1954)

One further point needs discussing in connection with appellants argument on adverse possession. Appellants seem to assume, in their argument on pages 4, 5, 6 and 7 of their Brief, that in order to establish an adverse possession not under written instrument, that it is necessary for the claimant to prove all three of the items listed concerning substantial enclosure, cultivation or improvements, and the expenditure of money for irrigation purposes. In the first place, the respondent does not concede that it is necessary for him to prove adverse possession under the above provisions. The record is full of testimony concerning the fact that respondent claimed the property under a written instrument, which all assumed at the outset, covered the property in question. However, again assuming for purpose of argument, that respondent would have to qualify under the provision providing for adverse possession not under a written instrument, the law is clear that only one of the three items need be established in order to make out a case of adverse possession under this provision, to-wit:

Section 78-12-11, Utah Code Annotated, 1953. In the case of Central Pacific Railroad Company vs. Tarpey, 51 Utah 207, 168 Pac. 554, (1917), this court stated, referring to the above cited section, as follows:

“But where the claim of title is not founded upon a written instrument, but is based entirely upon actual possession of every part of the land, the requirement that the land be protected by a substantial inclosure, or that it has been usually cultivated or improved, or money expended upon it for irrigation, as provided in that section, is imperatively necessary . . . The law fixes these conditions, one of which, at least, must exist and be proven in order to establish title by adverse possession under this provision of the statute.”

We do not think that appellants can seriously urge that none of these items have been complied with. The evidence, which we have referred to above, certainly bears out that the land was not only substantially enclosed for many years, but that it was also usually improved during each and all of the years that it was held by respondent and his predecessors in interest. And, in the event the court would determine that all three of said items were necessary, reference is made to the Transcript of Record, page 77, 78 and 79 where the evidence bears out that much more than \$5.00 per acre was expended by respondent for the purpose of irrigating said land. The record shows that the tract encircled in red contains under 6 acres and the testimony was that \$200.00 was expended for irrigating the disputed strip.

It is claimed by the appellants in Argument Number 3 found on page 8 and 9 of their brief that the court could not find a boundary by Agreement on two grounds; first that there is too much land involved and secondly that such a finding violates 25-5-1 Utah Code Annotated, 1953. The argument that there is too much land in the disputed area is certainly unique and is not supported by any case.

The second objection of the appellant which concerns the Statutes of Frauds has been discussed in a number of cases by this court. The objection has been disposed of upon the following theory: That when the location of a boundary between two tracts of land is not known a parole agreement between the adjoining land owners fixing the location of the boundary line between their properties is not regarded as transferring an interest in real property but merely determines the location of existing estates. *Brown vs. Milliner*, 232 P. 2d 202 (Utah 1951); *Tripp vs. Bagley*; 74 Utah 57, 276 Pac. 912 (1928).

V

The appellants contend that the evidence is not sufficient to support the court finding that there has been a mutual mistake in executing the deed from the appellant and his wife to J. W. Neil and that therefore the court erred in reforming the deed. In the case of *Sine*

vs. Harper, 222 P. 2d 571 (Utah 1950), this court stated that the trial court before it can grant reformation must find that the evidence of the mistake is clear, definite and convincing. The Court further stated in the case:

“That evidence be clear and convincing does not require that it be undisputed in all details. It would be most unusual to have a trial on the merits where witnesses did not disagree on some of the circumstances, on parts of the conversation, and on some of the facts. The test of clear and convincing is whether, taking the evidence as a whole, preponderates it to a convincing degree in favor of the plaintiff. If it does, then it meets the test.”

In the course of the opinion the court outlines the function of the Appellate court as follows:

“Our function as an appellate court is not to substitute our judgment for that of the trial judge, but is to determine whether his findings are based on the evidence which we can say meets the minimum standards of being clear and convincing.

The trial court is in a more favorable situation to deal with many of the imponderables arising in a trial of an action than we are. We acknowledge his vantage point on such things as demeanor and credibility and we realize that the “live show” he watches is far more effective in disclosing the ultimate truths than are the typewritten pages of a transcript. We appreciate his better opportunities for searching out inaccuracies, untruths, exaggerations, and concealed bias or interest and if we are to fully accept his **advantageous position** we must allow some latitude in giving weight to

elements we are unable to evaluate.”

CONCLUSIONS

The evidence in this case clearly supports the Findings of Facts, Conclusions at Law and Decree entered May 10th by the trial judge and therefore the trial court judgment should be affirmed.

Respectfully submitted.

BULLEN & OLSON,

E. F. ZIEGLER

Attorneys for Plaintiff and
Respondent.