1965

Eastern Utah Development Company v. General Insurance Company of America, A Corporation, and Fred Reynolds : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

EASTERN UTAH DEVELOPMENT COMPANY, a corporation,

Plaintiff and Respondent,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, and FRED REYNOLDS,

Defendants and Appellants.

Case No. 10359

RESPONDENT'S BRIEF

Appeal from Judgment of the Third District Court of Salt Lake County
The Honorable Merrill C. Faux, Judge

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STATEMENT OF KIND OF CASE

This action has for its background the construction of a concrete-lined irrigation ditch approximately 6 miles in length from the Koosharem Reservoir to the town of Koosharem in Sevier County, Utah.

Plaintiff claims the sum of $29,720.32 for equipment rental and miscellaneous accounts from defendant, Fred Reynolds, and his bonding company, General Insurance Company of America, for rental and material consumed in the course of the construction project. Plaintiff claims this amount

for (1) Breach of contract and in the alternative (2) Damages for negligence by defendant, Fred Reynolds, in the construction of the canal.

DISPOSITION IN THE LOWER COURT

The action was tried to a jury on Special Interrogatories. The jury found in favor of plaintiff and judgment for plaintiff's claim in the amount of $29,720.32 was entered by the Court.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment, an accounting between plaintiff and defendant Reynolds and an award to General Insurance Company of America of its costs and attorney's fees against plaintiff.

STATEMENT OF FACTS

The statement of facts in the Brief of Appellants are as they contend them to be and not as they must be viewed on appeal favorable to the verdict and hence a further statement in this Brief is necessary.

Plaintiff is a corporation generally engaged in the business of ready-mixed concrete, sand and gravel, road gravels, and canal linings. It maintains its principal place of business at Price, Utah (R. 118).

Defendant, Fred Reynolds, also resides in Price, Utah and for many years has been a general con-

tractor. Over the years defendant Reynolds had purchased concrete from the plaintiff and at the time the Koosharem Canal Project came up, he was contemplating the purchase of a stock interest in Eastern Utah Development Company (R. 133).

In August or September, 1961, Eastern Utah Development Company had received an invitation to bid on the Koosharem job. Mr. Fausett, vice president of plaintiff, and Mr. Reynolds had discussed the job in Mr. Fausett's office in Price, Utah in that both had equipment that could be used on this project (R. 133). Later both Reynolds and Fausett visited the Richfield office of the United States Soil Conservation Service and obtained plans for the project and at the same time both had visited the project site and walked over it to determine what special problems would be involved.

We digress at this point to explain the nature of the work involved in concrete canal lining because of its importance to plaintiff's theory of the case.

Old irrigation ditches in this state for the most part were constructed without patient attention to detail. The farmers simply didn't have the equipment necessary to properly construct a ditch. Consequently the gradient from water source to point of use was often not uniform and this would materially decrease the volume of water that a ditch could carry. Concrete linings of these canals if done properly increase the efficiency of the ditch, the volume

of water that it can carry, and they avoid water loss through seepage.

Proper concrete lining construction requires that first the ditch be cleaned by removing rocks and vegetation and then it must be cut deeper and wider than the finished ditch will eventually be. This rough cut is then completely filled with good clean fill material free of large rocks and debris. This fill is brought up to what will be the finished grade. In construction parlance this is called the pad. The ditch is then re-cut to proper depth and slope of sides. This must be done in order that the concrete lining will have a good compacted base. A boat or slip form is then placed in the newly cut ditch and pulled along the ditch as the concrete is poured into the form and rolled off to the bottom and sides of the new canal. Each of these steps must be done precisely in order that the finished concrete ditch will conform to the specifications. For instance, the specifications of the Koosharem canal do not permit a variance in grade of more than plus or minus one-tenth of a foot in 100 feet (R. 264).

The Koosharem ditch was cut with a parsons cutter. This is essentially a trenching machine with side cutters. As it moves along the ditch, it removes the newly placed fill material, throws it to the side, and at the same time shapes the slope of the sides of the ditch. If the old ditch has not been properly cut and cleaned and if the fill material is not free from rocks and debris, the cutter can-

not do its job properly. Improper cleaning of the ditch and rocks and fill will cause the cutter to be out of alignment or grade or both.

The proper construction of the pad has been mentioned in detail at this point because the evidence shows conclusively that the pad was not constructed properly by defendant Reynolds and this is what led to the difficulties that prompted this law suit.

Continuing the history of this case, we find that after the preliminary talks between Max Fausett and defendant Reynolds a bid for this job was put together by these two and submitted to the Koosharem Irrigation Company. Thereafter a contract to construct the cement-lined ditch was awarded to defendant Reynolds. Reference to Ex. 2d will show that Mr. Reynolds entered into this contract on his own. His is the only signature that appears on the contract documents. At about the same time (October or November, 1961), defendant Reynolds obtained a bond from the defendant, General Insurance Company of America, for the payment of labor and materials used on the project and to guaranty performance of the contract. Reference to Exhibit 3d will show that defendant Reynolds is the only principal named on the bond. In fact, at that time the bonding company had no knowledge of any arrangements entered into by plaintiff and Fred Reynolds and, in fact, General Insurance Company of America would not accept Eastern Utah Develop-

ment Company as a principal on the bond had application been made therefor (See the testimony of insurance agent, Dale Barton, R. 224).

Prior to the bidding of this construction project, plaintiff and defendant Reynolds had agreed that each would contribute certain equipment to the prosecution of the work and that plaintiff would furnish two of its foremen, namely Jack World and Frank Williamson, to supervise the construction of the pad, cutting the same, and pouring the concrete.

After the contract was let to Mr. Reynolds and a bond obtained by him, it was determined by plaintiff and Reynolds that the actual construction of the pad should be sub-contracted to a contractor in the Richfield area. For this purpose Mr. Fausett and Mr. Reynolds went to Richfield the following week (R. 146). Mr. Reynolds knew Mr. L. A. Young who had the necessary equipment to construct the pad and he advised Mr. Fausett that Mr. Young would get on the job and get the work done. However, Mr. Reynolds was never able to get Mr. Young on the job to do that work (R. 206-207). Mr. Fausett was unable to proceed in that regard because from the moment the contract was signed, Mr. Reynolds took the attitude that it was strictly his job and he would depend on Mr. Young (R. 183). Thereafter Reynolds never did get sufficient equipment on the job to efficiently clean, fill, and grade the pad.

The only other work done during the winter of 1961-1962 was to stock-pile gravel from the reservoir to the construction site. This gravel haul was performed by the plaintiff.

In April of 1962 Mr. Reynolds moved his trailer to the job site and commenced clearing the old ditch in Section 5 which would be the section of the ditch fartherest from the reservoir (R. 148-149). (For convenience the construction project was divided into 5 sections running consecutively from the reservoir to the town of Koosharem—Ex. 6). After Mr. Reynolds had been there for a short period, he and Mr. Fausett had a telephone conversation. Rather than just clean out the old ditch, Mr. Reynolds indicated that he had run into real good fill dirt and had used it to back fill practically all of Section 5.

Three or four days later during the first part of May, 1962 Mr. Fausett visited the job site and found that Mr. Reynolds had back filled the most part of Section 5 (R. 152). The back filling done by Mr. Reynolds appeared to be too rocky and Mr. Fausett again explained to Mr. Reynolds, as he had before any construction started, that rocky fill material would cause the cutter to jam and be out of alignment and grade and the resulting ditch would not pass the Government specifications (R. 153). At that time Mr. Reynolds assured Mr. Fausett that he would not use that type of material in the rest of the construction and that he would permit the plaintiff's supervisors, Jack World and

Frank Williamson, to run the actual construction of the pad (R. 155).

Mr. Fausett visited the construction site several days later at a time when the pad in Section 5 constructed by Mr. Reynolds was being cut (R. 156). At that time Mr. Fausett observed that the cutter was cutting material that was full of rocks, that the cutter was being bumped and jarred, that the resulting ditch was jagged and rocky, and the ditch was not suitable for the concrete pour that was to follow. This observation can be readily seen by reference to Ex. 1p which is a photograph showing the cutter in operation on the Section 5 pad that was constructed by Reynolds. Again he and Mr. Reynolds had a conversation and Mr. Fausett stated to him that they could not tolerate the type of material the cutter encountered in the pad. Mr. Reynolds replied that he could see that, but also stated that he would have better material in the future (R. 158).

At a further time in June of 1962, in response to a call from the men on the job, Mr. Fausett again visited the project site. At this time approximately 20 per cent of the pad had been cut. His testimony cncerning what he found at that time is significant.

> "Q. When you got there, what did you observe?
>
> "A. I found that the same conditions existed that — the rocks were still there in the pad — the center line of the ditch — in

fact, in some instances, it was not even kept track of.

"They were even cutting out away from the old ditch, the dirt that had not even been disturbed; also, there was not grade stakes for the cutter to follow. The pad was too narrow."

He further found that the cutter was working much less than its potential capacity, that they were cutting only from 140 to 160 feet per day, and the cutter should have been making from 600 to 800 feet per day. The cause, of course, was simply that the cutter could not cut the rocky material that defendant Reynolds had been using to construct the pad (R. 161).

On that day the most important event of this case occurred. Mr. Fausett and Mr. Reynolds had a meeting in Mr. Reynolds' trailer and at that time Mr. Fausett stated his dissatisfaction with the way Mr. Reynolds was running the job and informed Mr. Reynolds that he wanted no further part of it and that he was pulling off the job. He told Mr. Reynolds that he wanted no part of the profits on the job and would no longer be responsible for the results because Reynolds was going to get in trouble if he continued with the methods he had been using. Mr. Reynolds replied that he was bonded and that he could not finish the job without the cutter. Mr. Fausett then stated that he would leave the cutter and the other equipment on the job providing that

Mr. Reynolds would agree to maintain the cutter and pay for the equipment rental and continue to pay the labor and material accounts that had been agreed to. Mr. Reynolds agreed to this providing Mr. Fausett would leave the cutter on the job and also plaintiff's employee, Jack World (R. 162).

Mr. Reynolds admits that such a meeting occurred and that he was informed by Mr. Fausett that Eastern Utah Development Company was pulling off the job. He does not admit the change in the original agreement, but did admit that the subject of rental payment was discussed (R. 397).

The testimony of Mr. Fausett and Mr. Reynolds framed the single most important issue in the case and that is whether the agreement between Eastern Utah Development Company and Mr. Reynolds had been changed as a result of the meeting that took place in June of 1962. The jury resolved this issue in favor of the plaintiff.

In the Special Verdict given to the jury, the following question was given and the following answer given:

> "2. In the said talk between Mr. Fausett and Mr. Reynolds, did they agree that their original agreement would be modified in the future conduct of the job, in that Eastern Utah Development Company's equipment would remain on the job until completion of it, but that instead of sharing in the profits, Eastern Utah Development Company would re-

ceive from Mr. Reynolds rental payments for said equipment during its use?

Answer: Yes

Signed: Everett A. Bird

Foreman"

Support for the jury's finding of an agreement between the plaintiff and Mr. Reynolds is found in the testimony of Mr. Fausett and also payments made to plaintiff by defendant Reynolds. From the time construction first started, Mr. Fausett would contact Mr. Reynolds about every 30 to 60 days concerning payments of the various accounts. Each time Mr. Reynolds would receive estimates from the Canal Company, he would make a payment to Eastern Utah Development Company without specifying any application of funds and at no time did he deny his agreement to pay the various accounts including the rental account (R. 172 and Ex. 26d).

After the meeting between the two principals in this case in June of 1962, Mr. Reynolds remained on the job and finished it. The following year in the spring of 1963 it became necessary for him to make some corrections on the work he had completed. Mr. Reynolds contacted Mr. Fausett and asked if Mr. World would accompany him to Richfield for this purpose. This was agreed to providing Mr. Reynolds paid Mr. World's salary and made an agreement

with him concerning his subsistence. Mr. Reynolds agreed to this and Mr. World did work on the job site in the spring of 1963. Part of his salary was paid by Mr. Reynolds. (See Exhibit 26d for payments to Mr. World in May and June of 1963.) Even after this corrective work was done, the job did not meet the Government's specifications. Mr. Harold Brown the Government engineer assigned to this project testified (R. 263-268) that the specifications permitted only 1/10 of a foot in 100 feet out of grade. Later the canal company decided to allow a plus or minus 2/10 of a foot in 100 feet to push the project along, but even so the gradient of the ditch exceeded this tolerance in many instances — Section 1 - 36 per cent; Section 2 - 38 per cent; Section 3 - 21 per cent; Section 4 - 30 per cent; and Section 5 - 25 per cent. The project also called for certain concrete structures that were the responsibility of Mr. Reynolds. We refer the Court to Exhibits 12, 13, and 14 which are photographs of certain of these structures taken in the spring of 1963, less than a year after Mr. Reynolds did the work. They quite clearly depict very poor construction methods as the concrete is severely cracked and broken.

The above is a history of this matter. When Mr. Reynolds stopped making payments on Plaintiff's account this lawsuit was commenced.

ARGUMENT

POINT I.

THE DEFENDANT BONDING COMPANY IS FULLY LIABLE TO THE PLAINTIFF AND IS NOT ENTITLED TO INDEMNITY AGAINST THE PLAINTIFF.

Points I and III of appellants' Brief contain common or related questions of law and are, therefore, appropriately argued under a single point.

In appellants' first and most extensively arfued point, the defendant bonding company says the action against it should be dismissed as a matter of law. The two defendants made common cause against the Complaint of plaintiff in the lower court, but now the bonding company seeks to cut its principal, the defendant Reynolds, adrift and asked that it be absolved from any liability concerning the bond it wrote guaranteeing completion of the Koosharem Canal Company job and payment for materials and supplies so far as concerns the claim of plaintiff.

It says in effect that since plaintiff started the project as a joint venture with its principal, Fred Reynolds, that plaintiff too is a principal and cannot claim the benefits of the bond. No cases of guaranty or suretyship are cited to the Court. It ignores the facts of the case. Indeed its thinking is stratified in certain legal principles of partnership which have little or no application to this case.

It fails to mention that the Koosharem contract was awarded to Fred Reynolds alone; the bond was

written in his name alone as principal; whatever contract existed between Reyonolds and the plaintiff was unknown to defendant bonding company when it issued its bond; and all funds from the owner were received by their principal Reynolds, deposited in his account, and drawn on his sole signature.

A detailed analysis of the facts of this case will show that the bonding company is liable. It is true that plaintiff and defendant Reynolds started the project as a joint venture. However, from the very first the aspects of partnership were missing. Joint control did not exist. Defendant Reynolds assumed control of the project immediately to the exclusion of the plaintiff (R. 183). He took the contract in his own name. (Ex. 2d). The bond was issued in his name alone (Ex. 3d). Early in the game Reynolds made it abundantly clear to the Government engineers that he was the contractor on the job. Mr. Harold Brown, the project engineer employed by the United States Soil Conservation Service, testified:

> "A. He (Reynolds) told me in words to the effect that he was the contractor on this job; that all orders would be given to him, and he was going to run the job as his work, as he saw fit, and I was to have no connection in any way with Eastern Utah Development Company." (R. 263)

Reynolds agreed to pay and in fact did pay for all or part of all labor and material accounts in-

cluding those of plaintiff. (Ex. 26d — See also the testimony of defendant Reynolds, R. 382.)

Further as expressly found by the jury in this case, defendant Reynolds agreed to pay the rental account of plaintiff and in consideration plaintiff claimed no profits on the job (R. 54 - 57). It is just the same as if the defendant Reynolds had hired the equipment of some third person to complete the job. This being the case the bonding company becomes liable to the plaintiff just as it would be liable to any other third party. This is particularly true when by its own evidence it admits that it had no knoweledge of plaintiff's interest in the contract and placed no reliance on the plaintiff's credit. But on the other hand, they wrote the bond solely in the name of its principal, Fred Reynolds, and relied solely on his indemnity agreement.

In point is the case of *Jennings et al vs. Pratt et al*, 19 Utah 129, 46 P. 951. This was a suit to collect a promissory note. Evidence developed that one of the plaintiffs seeking relief was a member of the partnership and association that executed the note. Defendants argued that the action could not be maintained and that plaintiffs' only remedy was a suit for contribution. The Court ruled:

> "The rule is doubtless well settled that, in the absence of a settlement of accounts, one partner cannot sue another at law upon a demand which has grown out of a partnership transaction, but when the claim of one part-

ner against co-partners arises out of a transaction which is not properly a partnership matter, the rule does not apply. Nor is there any sound reason why a partner should be prohibited from transacting business with his firm, the same as any other person; and when the transaction is not intended as a part of a partnership business, or to be accounted for as such, no reason is apparent why such partner should not be entitled to the same remedy as another individual would be . . . Where partners have seen fit to deal with each other without reference to the final accounting, the transaction is not subject to the necessity or delay of such an accounting." See also Prows vs. Hawley, 72 Utah 444, 271 P. 31.

Associated closely with the bonding company's claim that it should be dismissed as a matter of law, is its claim that plaintiff is bound to indemnify it as argued under its Point III. The legal obligation of indemnity is merely assumed by the defendant bonding company. They cite no authoritative cases nor does it present any arguments as to why legally this obligation should exist.

The fact of the matter is that the indemnity agreement (Ex. 33d) that the bonding company relies on is dated 11 July 1960 and signed by Fred M. Reynolds and Charlotte J. Reynolds. It is dated long before the contract for the Koosharem Canal Company was let and long before any negotiations between plaintiff and defendant Reynolds concerning the construction of the canal. The bonding com-

pany had no knowledge of any interest of plaintiff in the contract with Koosharem Canal Company; its placed no reliance on its credit; and would not under any circumstances issue it a bond. There is no legal reason why a partner cannot deal with a partnership as any third person providing it is understood that the item of business is not treated by the partners as partnership business which is this case.

Curiously on the one hand, the bonding company says that Eastern Utah Development Company is a principal on the bond and thus estopped from claiming under the bond. It welcomes the plaintiff as a principal for this purpose. On the other hand, it says that it would not accept Eastern Utah Development Company as a principal on any bond in any case. The bonding company agent, Mr. Dale Barton, testified.

> "A. The bank in Price had called us to see if we would license them to handle bonds for them, and he was mentioned — Mr. Hill mentioned Eastern Utah Development Company.
>
> "We then, of course, obtained credit information, and it was very poor. We were not interested in handling the account."

The stance assumed by the bonding company is to say the very least awkward.

The contention of the bonding company regarding indemnity finds no support in the law. In the

case of *Southern Surety Company vs. Plott*, 28 F. 2d 698 (CCA 4th 1928), one of the partners in a road construction company obtained a contract with the State in its own name and also a bond from the plaintiff in its own name. There was no evidence that the plaintiff surety company knew of the partnership. After the surety company incurred a loss on the project, it brought action against each of the partners for reimbursement. A demurrer to the Complaint in the lower court was affirmed on appeal. The appellant court held that a surety can obtain indemnity or reimbursement only from that person who is a principal on the bond and a party to the indemnity agreement. The Court quoted with approval Pingrey on Suretyship, Section 179:

> "The surety can look for reimbursement only to the rights of his principal, and not to a stranger. Where a surety is on the bond of one of several partners, he cannot look to the partnership for indemnity, if he has to pay the debt, though the bond was given to secure a partnership debt. A surety cannot charge any other person as his principal except the one who is principal at the time of making the contract of suretyship. No privity can exist between the parties except that which arises on the bond or contract, and an implied assumpsit cannot arise beyond the partners on the bond or in the contract."

In accord with the principle announced in the above case, are *Spokane Union Stockyards Company vs. Maryland Casualty Company*, 178 P. 3 (Wash.);

and *School District No. 6 of Wallowa County vs. Smith*, 127 P. 7, 97 (Ore.).

For an analogous Utah case, see the recent case of *New Hampshire Insurance Company vs. Ballard Wade, Inc., et al*, ... Utah 2d ...., 404 P. 2d 675. In that case the plaintiff fire insurance company paid a fire loss to the lessor of property and sought to recover from the lessee on the lessee's agreement with the lessor to indemnify for loss. The Court stated in part:

> "That when the assignee here has accepted a consideration to cover a risk, it hardly lies in its mouth to claim indemnity from one who has made a written guaranty against loss, to which agreement the insurance company was neither a party nor expressly or impliedly a beneficiary, . . . "

POINT II.

THE ISSUE OF WHETHER PLAINTIFF REMAINED A PARTNER WITH DEFENDANT, FRED REYNOLDS, WAS NOT BEFORE THE LOWER COURT.

The issue before the lower court was whether plaintiff and defendant Reynolds had terminated or modified their agreement to the extent that plaintiff would give up its claim to partnership profits in exchange for payment by defendant Reynolds of its rental account. The jury on special interrogatories specifically found that the agreement was modifed to this extent and that the parties did agree that plaintiff would give up its claim to partnership

profits in exchange for payment by Reynolds of its rental account.

In Point II of appellants' Brief, it is urged that the Court erred in failing to rule as a matter of law that plaintiff remained a partner for the purpose of winding up partnership business. This point cannot be related to any finding of the jury (R. 54-57) or to any action of the trial judge. (Reproduced herein as Appendix "A" is the Memorandum Decision of the lower court which concisely sets forth the claims of the parties, the issues, and the results.) Appellants cite no portion of the Record where this point is raised. Whether or not plaintiff is a partner seems to be a moot point because the jury found that the agreement was not terminated, but modified.

Appellants do however make statements in Point II of their Brief concerning certain evidence in the case which must be challenged.

On Page 16 of appellants' Brief, they state that plaintiff admits that Reynolds protested the plaintiff's leaving the job and cite Pages 162, 364-366 in support thereof. Page 162 of the Brief contains the testimony of Mr. Fausett and this testimony is to the effect that defendant agreed to the new arrangements wherein he would run the job and pay the plaintiff its equipment rental. Pages 364-366 of the Record contain the testimony of defendant Reynolds which differs from the testimony of

Mr. Fausett only in that Mr. Reynolds states that he did not agree to the new arrangement.

Again on Page 16 of appellants' Brief, they state:

> "The evidence clearly shows that the plaintiff did not reach a mutual understanding with defendant Reynolds concerning the termination of the partnership."

The same pages of the Record, namely Pages 162, 364-366, are cited. The evidence is not as clear as appellants would have this Court believe. In fact, the testimony of these two men frame the disputed issue as to what understanding was reached and the jury decided that question in favor of the plaintiff.

POINT III.

THE COURT DID NOT ERROR IN FAILING TO GIVE ANY OF DEFENDANTS' REQUESTED INSTRUCTIONS ON THEIR THEORY OF THE CASE.

The lower court submitted this case to the jury on special interrogatories pursuant to Rule 49 (a) of the Utah Rules of Civil Procedure. Submission to the jury in this manner is discretionary with the Court. *Hanks vs. Christensen*, 11 Utah 2d 8, 354 P. 2d 564; *Utah Home Fire Insurance Company*, 15 U. 2d 257, 391 P. 2d 290. It should be added that where, as in a case like this, the evidence is lengthy and the issues complex, it is desirable that the jury be asked to answer specific questions rather than reach a general verdict after a lengthy complicated

set of instructions. In Moore's Federal Practice, Second Edition, Section 49.03 (3), it is stated:

> "Use of the special verdict eliminates the necessity for and use of complicated instructions on the law, which are a normal concomitant of the general verdict . . . When the special verdict is used, the Court should give to the jury only such explanation and instructions as it deems necessary to enable the jury to make intelligent findings upon the issues of facts submitted."

Appellants in this action say the Court committed reversible error in failing to give any of their requested instructions, respecting their theory of the case. We are not told in their Brief what particular theory of law they are referring to nor have they shown in what manner they have been prejudiced thereby. They do state that the Court failed to inform the jury of the rights and duties of partners to each other in the performance of partnership obligations and failed to instruct the jury as to the rights and duties of the partners in regard to the bonding company and a failure to instruct on the obligations of partners in winding up partnership business. In reply, respondent asserts that each of the matters set forth by appellants are matters of law for the determination of the Court and not matters of fact with which a jury need be concerned. Further, the issues in this case are whether or not defendant Reynolds agreed to pay the plaintiff for its equipment rental and whether he was

negligent in the prosecution of the construction project. The matters raised by appellants in their Brief and their requested instructions are concerned with law that is outside the scope of those issues.

Aside from the considerations above there is even a more fundamental answer to appellants' contention of error in failing to give their requested instructions. In 53 Am. Jur. Trials, Section 638, it is stated:

> "Where a special verict is required, it is improper to instruct the jury generally concerning the law of the case, for the reason that inasmuch as the jury are not to apply the law to the facts, instructions as to the law can serve no useful purpose."

It would have been reversible error had the Court given a general charge on the rights and duties of the parties and the effect their answers to special interrogatories would have had on those rights and duties, 90 A.L.R. 2d 1040. Analysis of the requested instructions of the appellants will show that this is exactly what they sought by their requested instructions. In other words, the requested instructions state principles of law which would have informed the jury as to the effect of their answers to special interrogatories or upon the ultimate rights or liabilities of the parties and the final judgment in the litigation, which is improper.

The special verdict given by the lower court and the general instructions as to the burden of

proof accurately and adequately framed the issue for the jury. There is no error.

POINT IV.

THE COURT DID NOT COMMIT ERROR IN FAILING TO SUBMIT TO THE JURY THE ISSUE OF DAMAGES.

Plaintiff in this action claims from the defendant the sum of $29,720.32. This amount is made up of the following accounts:

R. 383	Parsons Cutter	$ 600.00
Ex. 7	Miscellaneous Accounts	311.14
Ex. 8	Labor Account	1,177.03
Ex. 9	Equipment Rental	19,886.79
Ex. 10	Gravel Haul	6,889.25
Ex. 11	Cement Account	856.11
	TOTAL	$29,720.32

Plaintiff claimed this amount on two theories. Namely, that the defendant, Fred Reynolds, had agreed to pay the accounts and had breached his agreement and that defendant Reynolds was negligent in the management and operation of the construction project and caused damage to plaintiff in the amount of the above accounts. In each theory plaintiff claims the same amount.

In their Fifth Point of Argument, defendants contend that the jury found both plaintiff and defendant Reynolds guilty of negligence in the commencement of the project, but that after plaintiff abandoned the project, Reynolds was free of negli-

gence. Hence, plaintiff can claim no damages and the Court committed error in awarding damage.

Defendants overlook the fact that the jury did find that Reynolds had breached his agreement and, therefore, plaintiff was entitled to a judgment in the amount of its account. No error was committed by the lower court in finding plaintiff was entitled thereto as a matter of law. There can be no question concerning the accuracy and completeness of plaintiff's accounts. In each instance an original invoice was made on or near the time of the event in question. At the end of each month a copy of the invoice and a copy of the ledger account was mailed to defendant Reynolds (R. 164). On numerous occasions during and after the completion of the project, Mr. Fausett asked Mr. Reynolds for money on the accounts and periodically from the start of the job until after its completion unspecified payments in lump sums were made. The last payment was February 13, 1963.

The only account questioned in this law suit is the equipment rental account, Ex. 9. Mr. Reynolds had already agreed to pay other accounts (R. 168).

At trial defendants offered no evidence in explanation or denial of the items set forth on plaintiff's Exhibit 9. Instead defendant Reynolds introduced an Exhibit 31 (d) prepared by himself and his son (Ex. 31d) for the purpose of trial which merely reflected defendant Reynold's memory con-

cerning the time the equipment of the plaintiff was on the job. He testified:

"Q. Now, you claim this was made up from your own records?

"A. Yes Sir.

"Q. Where are they?

"A. In my head I guess."

Comparison on the Exhibits shows that the defendant Reynolds admits the sum of $14,889.00 owed on the equipment rental account as compared to $19,886.79 as shown by plaintiff's Exhibit 9. Further comparison will show that defendant has simply rounded off the length of time the equipment was on the job and omitted other periods of time that were recorded by plaintiff at or near the time of the event. Obviously these periods of time were forgotten by defendant during the period between the completion of the project and this law suit.

If the question had been submitted to the jury, they could return only one amount for the other if they found for the plaintiff. Necessarily one account or the other had to be rejected. To accept defendant's memory, the jury would have to ignore the actual records of plaintiff made at the time or near the occurrence of the event. They would have to further ignore the fact that defendant had received monthly statements of the account and had made general unspecified payments to plaintiff after the account was rendered. Such a verdict would

have been speculative and against the manifest weight of the evidence. These paramount factors made this issue a matter of law for the Court and was correctly withheld from the jury.

POINT V.

THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES WERE NOT INCONSISTENT.

Appellants in Point VI. of their Brief argue that the jury's answers to Interrogatories #2 and #3 are inconsistent and, therefore, should be totally disregarded. These two Interrogatories and the answers given by the jury are as follows:

> "2. In the said talk between Mr. Fausett and Mr. Reynolds, did they agree that their original agreement would be modified in future conduct of the job, in that the Eastern Utah Development Company equipment would remain on the job until completion of it, but that instead of sharing in the profits, Eastern Utah Development Company would receive from Mr. Reynolds rental payments for said equipment during its use?
>
> Answer Yes
>
> Everett A. Bird
> Foreman
>
> "3. In the meeting between Mr. Fausett and Mr. Reynolds, did they agree that their original arrangement would be completely terminated as of that time; that Mr. Reynolds would take the job over him-

self, but that Mr. Reynolds would be permitted to continue to use the equipment of Eastern Utah Development Company on a rental-payment basis,

Answer No

Everett A. Bird
Foreman"

The import of the two questions is (1) Whether the parties agreed to modify their original agreement, or (2) Whether they agreed to terminate their original agreement. There is substantial evidence in the Record to support an affirmative answer to each of the questions. Only if the jury had answered "yes" to each question would there have been a contradiction.

The testimony of Mr. Fausett shows that at the June meeting of the two parties it was then agreed that plaintiff would leave its equipment on the job until its completion, but that instead of sharing profits, Mr. Reynolds would make rental payments to Eastern Utah Development Company. This evidence is entirely consistent with the jury's affirmative answer to Question #2.

Appellants made no specific objection to the form of Questions No. 2 and 3 nor did they contend that they were confusing or that answers thereto could be contradictory. In the case of *Baker vs. Cook*, 6 Utah 2d 161, 308 P. 2d 264, this Court held that under a similar Record, these matters

could not be raised for the first time on appeal. See also the case of *Milligan vs. Capital Furniture Company*, 8 Utah 2d 383, 335 P. 2d 619 for a discussion of the matter of inconsistency in answers on a special verdict.

POINT VI.

PLAINTIFF'S RIGHTS ARE NOT LIMITED TO THAT OF AN ACCOUNTING FROM DEFENDANT, FRED REYNOLDS:

At the time of the trial of this action, the irrigation company had paid to defendant Reynolds approximately $100,000.00 and there was still due and owing to him the sum of approximately $39,000.00. (R. 321).

Defendant Reynolds alone signed the contract with the irrigation company. He alone has the power to deal with them and if necessary, to obtain the money still due and owing by legal process.

Again the Court is directed to the Utah case of *Jennings et al vs. Pratt et al* (supra) where this statement is made:

> "Where partners have seen fit to deal with each other without reference to the final accounting, the transaction is not subject to the necessity or delay of such an accounting."

The facts in this case show that the parties agreed that Reynolds would pay the accounts of plaintiff and that plaintiff would waive any claim for profits to be made on the job. By this agreement, these accounts were not intended as part of

the partnership payments and, hence plaintiff had a right to bring action therefor prior to the time that Reynolds had collected the balance due on the construction project.

More specifically, appellants did not ask for an accounting in the lower court. They merely asserted that this was the only remedy available to plaintiff (see Pre-Trial Order — R. 46). The judgment of the lower court is without prejudice to an accounting (see appendix A). In view of this reservation and the holding of *Jennings v. Pratt* (supra) there is no error.

CONCLUSION

Plaintiff brought this action for the collection of its account in the amount of $29,720.32. Its theories were (1) That defendant breached an agreement to pay said account and (2) That defendant was negligent in his construction efforts and thus caused plaintiff damage in the amount of its account. The Court submitted the questions to the jury on a special verdict and the jury found that defendant had agreed to make payment of the account. Accordingly, judgment was awarded to the plaintiff.

Based upon defendant's agreement to pay and plaintiff's waiver of any claim for profits out of the job, the parties have treated the matter as being outside the scope of the partnership business

and hence, an accounting for this item is unnecessary.

The agreement of defendant to pay the account places the plaintiff on the same footing as any other third party furnishing labor and materials to a construction project and the bonding company is, therefore, liable on its performance and completion bond. It cannot set up the bar of indemnity because it has no indemnity agreement with the plaintiff. It cannot set up the bar of partnership because it had no knowledge of plaintiff's interest in the contract and would not have accepted plaintiff as a principal on the bond in any event, and the parties treated this account as an item outside the partnership business.

It relied strictly on the ability and financial capacity of defendant, Fred Reynolds, and cannot be heard to complain if compelled to pay for labor and materials that its principal, Reynolds, agreed to pay.

No error was committed by the lower court in the conduct of the trial and the verdict of the jury and judgment of the Court should be affirmed.

Respectfully submitted,

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