1949

Mary Ballen v. George A. Gasparac, Jr. : Brief of Appellant

Utah Supreme Court

W. D. Beatie; Attorney for Plaintiff and Appellant;

Case No. 7354

IN THE SUPREME COURT
of the
STATE OF UTAH

MARY BALLEN,

Appellant,

— vs. —

GEORGE A. GASPARAC, JR.,

Respondent.

APPELLANT'S BRIEF

W. D. BEATIE,

Attorney for Plaintiff and Appellant.

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STATEMENT

This is an appeal from the judgment made and entered by the Honorable J. Allan Crockett, of the Third Judicial District, in and for Summit County, State of Utah, on the 30th day of November, 1948, and made final by the Order of said Court, overruling the Motion for New Trial in said case on the 21st day of March, 1949.

The Complaint alleges as follows:

"Plaintiff complains of defendant and for cause of action alleges:

1. That theretofore and particularly for a period of over two years, prior to this date, very friendly, confidential and social relationship existed between the plaintiff and the defendant, in that plaintiff had been engaged to marry the defendant, by which the close relationship hereinbefore grew out of.

2. That plaintiff and defendant were desirous of operating a business in which they were mutually and jointly interested in, and being one of the nature of a joint undertaking.

3. That during the period aforesaid, plaintiff had certain available money and avenues by which other monies could be obtained for the operation of a business, while the defendant was in reduced financial condition, such that plaintiff and defendant conceived the plan to purchase a piece of real property in Summit County, Utah, hereinafter described, and to erect thereupon a lodge, which would serve meals to traveling transients and would operate all the year around and particularly during the winter when skiing was in vogue.

4. That this undertaking was on the basis that plaintiff would supply what available money she had and what monies would be necessary to erect a lodge as aforesaid, and operate the same, and that defendant was to use his labor in the erection of said lodge, which would be charged as against an interest in said business and that the parties thereto would then determine the proportionate interest in said lodge undertaking.

5. That pursuant to said plan the plaintiff did advance to the defendant the sum of $500.00 on September 20, 1946 and $2,500.00 on October 17, 1946, which said sum of $3,000.00 was used to purchase the following described property located in Summit County, State of Utah, and more particularly described as follows, to-wit:

Beginning at the Northeast Corner of the Northwest quarter of the Southeast quarter of Section 10, Township 1 South, Range 3 East, Salt Lake Meridian; thence West 462.9 feet; thence South 82° 00′ West 250.9 feet; thence North 8° 00′ West 35.5 feet; thence West 603.5 feet; thence South 0° 02′ East 1320 feet; thence East 1320 feet; thence North 0° 02′ West 1320 feet to point of beginning, containing 39.898 acres more or less.

Beginning at a point 1,671.2 feet South and 1,577.1 feet West of the Northeast corner of Section 10, Township 1 South, Range 3 East, Salt Lake Meridian, which is a steel pipe set in concrete cap marked "Highway Right of Way;" thence South 48° 21′ West 362.8 feet; thence South 70° 00′ East 396.4 feet; thence South 10° 00′ West 304.6 feet; thence South 0° 02′ East 293.0 feet to the East-West center line of Section 10, where the Northeast corner of the Northwest quarter of the Northeast quarter of Section 10 bears East 21.9 feet; thence West 441.0 feet, thence North 82° 00′ East 193.5 feet; thence North 8° 00′ West 196.2 feet; thence South 82° 00′ West 418.8 feet, whence the Northwest corner 2 acre tract bears South 82° 00′ West 25.6 feet; thence North 0° 2′ West 445.8 feet; to intersection of Highway Right of Way, thence North 61° 58′ East 236.4 feet to High-

way Right of Way marker, thence North 60° 12′ East 501.0 feet to point of beginning, containing 9.572 acres more or less, together with all water rights appurtenant and belonging to said premises. Excepting, however, a Right of Way one and one half Rods wide from County Road to the Northwest corner of said Section 10 aforesaid.

6. That defendant did purchase the aforesaid property and did place the same in his individual name. That subsequently thereto, plaintiff advanced the sum of $600.00 on October 19, 1946, and $5,500.00 on December 7, 1946, which monies were used for the erection of what is known as Little Pine Lodge and that defendant upon the erection of said building did operate said Lodge and until on or about October, 1947, when said Lodge was closed.

7. That in addition to the aforesaid sums, plaintiff further advanced the sum of $4,343.00 to the defendant, which was used by the defendant in the operation of the said business.

7. That at the time of the defendant's acquiring the real property hereinbefore described and on numerous occasions, subsequent thereto, and as the inducement therefor, said defendant expressly declared, promised and represented that he would transfer to the plaintiff, by proper deed, her equity in the property when it was determined the amount of equity which the defendant had earned by his labor in erecting the Lodge on said premises.

8. That plaintiff upon numerous occasions since on or about the month of October, 1946, has requested the defendant to execute and deliver to her a proper deed to said land, but that defendant

has refused so to do, such that although plaintiff has paid for said land and the major portion of the erection of said Lodge, and therefore has an equitable title to the same, yet the legal title is still in said defendant.

9. That the defendant has never rendered an accounting of his labor in the erection of said Lodge, such that this plaintiff has no knowledge as to what proportionate interest is claimed by said defendant in the total expenditures for the purchase of the land and erection of the Lodge and operation of said business, and that no accounting of said business has been demanded and that defendant still fails and refuses to render such an accounting or transfer such proportionate interest as is equitable to the plaintiff in and to the real property hereinbefore mentioned.

10. That plaintiff is informed and believes and on such information and belief alleges that the said defendant has listed with the Multiple Listing Bureau of Salt Lake City, Utah, the aforesaid property for sale, and not to account for the proceeds thereof to the plaintiff.

WHEREFORE, plaintiff prays judgment that the defendant George A. Gasparac, Jr., be ordered to give a full and complete accounting of his stewardship in this matter of all of the sums, profits, rentals and amounts of every kind and nature ever collected in this operation.

That defendant be required to pay to plaintiff herein, the amount found to be due to her by reason of said accounting.

That upon determination of the proportionate interest of said plaintiff and defendant in said undertaking, that the Court enter a Decree, vest-

ing the title of said tract of land in the plaintiff, in the interest thereinbefore determined.

That an Order be made dissolving said joint undertaking and for all costs of suit and such other and further Order as may to the Court seem meet and proper in the premises."

(Duly verified)

The Answer and Cross Complaint of the defendant is as follows:

"Comes now the defendant and for answer to plaintiff's complaint on file herein admits, denies, and alleges as follows, to-wit:

1. Defendant admits the allegations contained in paragraphs 1 and 2 of plaintiff's complaint.

2. Answering paragraph 3, defendant admits the allegations contained therein except that part thereof which states that "the defendant was in reduced financial condition".

3. Answering paragraph 4, defendant alleges the undertaking was on the basis that necessary money or monies would be provided by one Anna Uriona also known as Anna Lujan, the mother of plaintiff, and that plaintiff and defendant would repay said Anna Uriona from any profits which might accure from the said undertaking. Defendant further denies that there was any agreement that a determination of the proportionate interest in the lodge undertaking would be made.

4. Defendant admits the allegations contained in paragraph 5 of plaintiff's complaint.

5. Answering paragraph 6, defendant admits that the said property was purchased and that the same was placed in his individual name and that a building known as Little Pine Lodge was erected and that defendant, upon the erection of said building did operate said lodge until on or about October 1947 when said lodge was closed; but having no knowledge concerning amounts of money allegedly advanced by plaintiff, denies each and every allegation referring to such advances.

6. Answering paragraph 7, defendant denies each and every allegation therein contained.

7. Answering paragraph 8, defendant denies each and every allegation therein contained.

8. Answering paragraph 9, defendant alleges that all of the records in connection with the erection and operation of said lodge have been kept by plaintiff under agreement between plaintiff and defendant and that defendant has not been granted access to said records by the plaintiff and is accordingly unable to render an accounting and further that he has no knowledge or information concerning the financial status of the undertaking.

9. Answering paragraph 10, defendant denies that said property was listed with the Multiple Listing Bureau of Salt Lake City, Utah, and further denies that there has been any sale of said property.

10. Defendant denies each and every allegation of said complaint not herein specifically admitted, modified or denied.

Cross Complaint

Comes now the defendant and for cause of action against plaintiff complains and alleges as follows, to wit:

1. That heretofore, and particularly for a period of over two years, prior to this date, a very friendly, confidential and social relationship existed between the plaintiff and the defendant, in that plaintiff had been engaged to marry the defendant, by which the close relationship hereinbefore grew out of.

2. That plaintiff and defendant were desirous of operating a business in which they would be mutually and jointly interested.

3. That during the period aforesaid, plaintiff had certain available money and avenues by which other monies could be obtained for the operation of a business, such that plaintiff and defendant conceived a plan to purchase a piece of real property in Summit County, Utah, hereinafter described, and to erect thereupon a lodge, which would serve meals to traveling transients and would operate all year around and particularly during the winter when skiing was in vogue.

4. That it was agreed between the parties that plaintiff would provide certain money and that her mother, Anna Uriona, also known as Anna Lujan, would also provide necessary money for the erection of a lodge as aforesaid. That the defendant was to contribute his services and labor in the erection of said lodge and that on the completion thereof plaintiff would leave her employment in Salt Lake City and would devote her full time to the operation of said lodge.

5. That pursuant to said plan, plaintiff and her mother, the said Anna Uriona, advanced certain sums of money, which money was used to purchase property, located in Summit County, State of Utah, and which is more particularly described in paragraph 5 of plaintiff's complaint on file herein; that said property was purchased in the individual name of the defendant.

6. That after the purchase of the property as aforesaid, defendant gave up his employment and during the period from September 1946 to February 1947, devoted his full time and efforts to and completed the erection of lodge on the said property which said lodge is known as Little Pine Lodge; that said lodge was erected as a result of the work and efforts of the defendant; that defendant devised the plans of said lodge, arranged for the installation of the equipment therein, the laying of necessary water mains and landscaped the surrounding premises; that as a result of his connection with various mining companies in Summit County, Utah, defendant was able to obtain critical building materials and other critical items which were difficult to obtain on the market and without which the lodge could not be properly completed; that the contribution of defendant to the erection of said lodge has a reasonable value of $8,000.00.

7. That after the erection of said lodge was completed and opened for business in February 1947, plaintiff and defendant worked at the lodge and operated the same during the period from February to May 1947; that during said period, the lodge operated at a profit and gave indication of becoming a prosperous undertaking; that in May 1947, plaintiff, contrary to her agreement as aforesaid, discontinued her work at the lodge and

from that time until the present time has not assisted in any way in the operation of said lodge except for a period of a few days in August 1947; that from May to November 1947, defendant was required to and did operate the lodge alone without help from plaintiff and that during this period no profits whatsoever were made from the venture.

8. That during the period from October to December 1947, defendant finished two upstairs rooms in said lodge, which rooms have substantially increased the value of the lodge.

9. That before and since the erection of the said lodge, defendant has made substantial monetary advances to the venture; that said advances have been used for the purchase of materials and for the payment of various expenses in connection with operation of the said business; that said advances amount to $1995.77.

10. That since February 1947, all records and accounts in connection with the venture have been kept and maintained by the plaintiff and that she still is the custodian of all books, records and monies of the said business; that defendant has no knowledge of the accounts incident to said business.

11. That plaintiff has at various times made monetary advances to the undertaking but that the amounts thereof and other details in connection therewith are unknown to the defendant.

12. That defendant has been at all times ready, willing, and able and is now ready, willing, and able to execute a deed to the plaintiff covering said property on receipt from plaintiff of the amount representing the value of his contribution to said business.

WHEREFORE, defendant prays judgment as follows:

1. That the complaint of plaintiff on file herein be by the Court dismissed and that upon said complaint Judgment of the No Cause of Action be made and entered by the Court in favor of the defendant and against the plaintiff.

2. That the plaintiff be ordered to give a full and complete accounting of her stewardship in connection with all sums, profits and amounts of every kind and nature whatsoever arising out of said undertaking.

3. That plaintiff be ordered to pay to defendant the amount found to be due him by reason of said accounting.

4. That a division order be made in connection with the proportionate share of each owner on said property.

5. That an order be made dissolving said joint undertaking and for all costs of suit and such other and further order as may to the court seem meet and proper in the premises."

(Duly verified)

The Reply of plaintiff is as follows:

"Comes now the plaintiff and for reply to defendant's Answer, admits, denies and alleges as follows:

1. Replying to paragraph 3 of defendant's Answer, plaintiff denies the same.

2. Replying to paragraph 8 of defendant's Answer, plaintiff denies the same.

For reply to defendant's Cross Complaint:

1. Replying to paragraphs 1, 2 and 3 of defendant's Cross Complaint, plaintiff admits the same.

2. Replying to paragraph 4 of defendant's Cross Complaint plaintiff denies "that it was agreed between the parties that plaintiff would provide certain money and that her mother, Anna Uriona also known as Anna Lujan, would also provide necessary money for the erection of a lodge as aforesaid". Admits " that defendant was to contribute his services and labor in the erection of said lodge", but denies "that on the completion thereof plaintiff would leave her employment in Salt Lake City and would devote her full time to the operation of said lodge".

3. Replying to paragraph 5 of defendant's Cross Complaint plaintiff admits "that pursuant to said plan, plaintiff advanced certain sums of money, which money was used to purchase property located in Summit County, State of Utah, and which is more particularly described in paragraph 5 of plaintiff's complaint on file herein; and that said property was purchased in the individual name of defendant", but denies that her mother, the said Anna Uriona, advanced certain sums of money, which money was used to purchase property located in Summit County, State of Utah, and which is more particularly described in paragraph 5 of plaintiff's complaint on file herein.

4. Replying to paragraph 6 of defendant's Cross Complaint, plaintiff denies the same.

5. Replying to paragraph 7 of defendant's Cross Complaint plaintiff admits "that after the

erection of said lodge was completed and opened for business in February 1947, plaintiff and defendant worked at the lodge and operated the same during the period from February to May 1947", but denies "that during said period, the lodge operated at a profit and gave indication of becoming a prosperous undertaking"; denies "that in May 1947, plaintiff, contrary to her agreement as aforesaid, discontinued her work at the lodge and from that time until the present time has not assisted in any way in the operation of said lodge, except for a period of a few days in August 1947"; denies "that from May to November 1947, defendant was required to and did operate the lodge alone without help from plaintiff, that during this period no profits whatsoever were made from the venture".

6. Replying to paragraph 8 of defendant's Cross Complaint this plaintiff has no information or knowledge as to the facts alleged in said paragraph and therefore denies the same.

7. Replying to paragraph 9 of defendant's Cross Complaint plaintiff denies the same.

8. Replying to paragraph 10 of defendant's Cross Complaint plaintiff denies "that since February 1947, all records and accounts in connection with the venture have been kept and maintained by the plaintiff and that she still is the custodian of all books, records and monies of the said business". Denies "that defendant has no knowledge of the accounts incident to said business"; admits that plaintiff has certain ledger accounts and check books which are incident and part of said business.

9. Replying to paragraph 11 of defendant's Cross Complaint, plaintiff admits that she has at various times made monetary advances to the

undertaking, but denies that the amount thereof and other details in connection therewith are unknown to the defendant.

10. Replying to paragraph 12 of the defendant's Cross Complaint, plaintiff denies the same.

WHEREFORE, plaintiff having fully replied to defendant's Answer and Cross Complaint, plaintiff prays judgment as follows:

1. That judgment be entered in accordance with the prayer of plaintiff's complaint and that defendant's Cross Complaint be dismissed."

(Duly Verified)

Upon these pleadings, the trial was had before the Court without a jury and the Judgment appealed from was entered in behalf of plaintiff and defendant, and to reverse and set aside this said Judgment, this appeal is taken.

ASSIGNMENTS OF ERROR UPON WHICH PLAINTIFF RELIES FOR REVERSAL

Plaintiff contends that the trial Court erred in the following particulars:

1. In admitting evidence offered by defendant and objected to by plaintiff in an attempt to prove the value of labor of defendant and monies expended by defendant in proof of defendant's counterclaim, when no bill of particulars was submitted until examination of defendant at trial, when bill of particulars had been duly demanded.

2. Not finding on material issues of accounting of

monies advanced by the plaintiff to the account of defendant.

3. In finding as it did in Paragraph 6 of the Findings of Fact as follows:

> "That during and since the erection of the lodge, defendant has made monetary advances to the venture totaling $1,388.49",

and entering its conclusions of law based on said finding that defendant was entitled to 23% of the proceeds resulting from the sale of the property for the following reasons:

(a) That defendant made no accounting of monies advanced nor did he show that there was not sufficient monies advanced by plaintiff or income from sales to pay the bills claimed by defendant.

(b) That monies claimed paid by defendant were not proven by competent evidence.

4. In finding as it did in Paragraph 8 of the Findings of Fact as follows:

> "That the services performed by the defendant from September, 1946 to February, 1947, in erecting the lodge have a reasonable value of $2,160.00, said amount being based on an average of ten hours work per day for six days per week for 24 weeks at the rate of $1.50 per hour; that the services performed by the defendant in managing, operating and maintaining the lodge during the period from February, 1947, until June, 1947, have a reasonable value of $1,440.00, said amount being based on an average of ten hours per day for six days per week for 16 weeks at

> the rate of $1.50 per hour; that the services performed by the defendant in managing, operating and maintaining the lodge for the period from June to November, 1947, have a reasonable value of $714.00, said amount being based on an average of seven hours per day for six days per week for 17 weeks at the rate of $1.00 per hour,"

and entering its Conclusion of Law based on said Finding that defendant after payment of debts from the proceeds of the sale of the property was entitled to 23% thereof, for the following reason:

(a) That the only evidence of the value of the service of defendant is the rate of $1.00 per hour and the total number of hours worked is speculative.

ARGUMENT

I.

IN ADMITTING EVIDENCE OFFERED BY DEFENDANT AND OBJECTED TO BY PLAINTIFF IN AN ATTEMPT TO PROVE THE VALUE OF LABOR OF DEFENDANT AND MONIES EXPENDED BY DEFENDANT IN PROOF OF DEFENDANT'S COUNTERCLAIM, WHEN NO BILL OF PARTICULARS WAS SUBMITTED UNTIL EXAMINATION OF DEFENDANT AT TRIAL, WHEN BILL OF PARTICULARS HAD BEEN DULY DEMANDED.

The statute here involved is *104-13-3:*

> "104-13-3. AN ACCOUNT, HOW PLEADED — BILL OF PARTICULARS.
>
> "It is not necessary for a party to set forth in a pleading the items of an account therein al-

leged, but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account when the one delivered is too general or is defective in any particular."

The record is further born out in that a demand for bill of particulars was served on the 29th day of July, 1948, and filed July 30, 1948 (R. 13).

The case proceeded to trial on the 15th day of November, 1948, appellant adducing her evidence, and respondent taking the stand and being asked general questions until the question of proof of the value of respondent's labor came up. (R. 78)

Direct examination of George Gasparac, Jr., by Mr. Neslen:

"Q. And how was that accomplished, did you, in fact, build the Lodge?

MR. BEATIE: Just a moment, I am going to object to that question on the ground that this particular witness is not competent, and I object, further, that the question in effect is an attempt to get a general statement with reference to the work entailed on the part of this particular defendant, which we object to, on the grounds that there has been a demand for a bill of particulars in this particular case which has been outstanding for over five months, and, up until the present moment, none has ever been supplied, nor delivered. We therefore object to any testimony with reference to any of the construction work by this

particular defendant, and I cite your Honor, I have a California case, a recent California case, with reference to this particular thing under our same statute, if you desire to hear it.

(Discussion.)

MR. NESLEN: May I state I have a bill of particulars here that I intended to file, but which, in view of the misunderstanding today, I wasn't able to do, and it has been signed by Mr. Gasparac.

(Discussion.)

THE COURT: This is off the record, Miss Reporter.

(Discussion.)

THE COURT: And I believe I am going to let you file it. I think it improper—I don't think this matter has had quite the attention it should have had, both with respect to its coming to trial today and also the filing of that, but I am reluctant to adhere to the penalty prescribed by statute because we just can't find out the facts apparently and do justice between these parties without looking into the matter of Mr. Gasparac's claims.

If this bill of particulars, by any reason, or for any reason, takes Mr. Beatie by surprise, or puts them to any disadvantage because of its late filing, I will simply continue the matter for sufficient time for him to meet any difficulties that might arise because of its failure and because of the failure to file it before this time, and you may file it at this time, and go ahead and receive evidence concerning the matter.

The last question was put to him wouldn't have been helpful, anyway, if he had answered. Did you build it? Let's find out what he did.

MR. NESLEN: That is what I want to ask him.

Q. Mr. Gasparac, in building this Lodge, just explain to the court what you did.

A. Well, I did just about everything—I mean, I took care of—

THE COURT: Let me see a copy of the bill of particulars, will you please?

MR. NESLEN: Do you want him to proceed, your Honor?

THE COURT: Yes.

MR. BEATIE: May I make one observation bill of particulars which is now served on me in with respect to this—may I make exception to the that the same does not disclose any material, such as, for instance, as an item after the total $22.021, "September '46 to July '47, full time work in building Lodge at the rate of $600 a month, eleven months, $6,600"; now, that doesn't disclose anything; he may have charged $600 one month and five hundred the next, and doesn't tell me whether that is a standard rate or whether there was any agreement or how many hours work or anything of the nature. I say, bill itself is very uncertain, gives me nothing except—reading—I don't know whether purchased Park City, Heber, or whether purchased Salt Lake City.

THE COURT: Don't know what kind of lumber, or anything of the kind; very general, I will say that, but let's go ahead and examine the witness."

Thus it is apparent that appellant in no respect knew how much labor respondent had expended or what monies were advanced by him in the building of the Little Pine Lodge.

The following cases are on this first point that without the filing of a Bill of Particulars the party required to file the same by statute cannot adduce evidence as to said account.

Inland Engineering & Construction Co., v. Maryland Casualty Company, et al, 290 Pac. page 367, 76 Utah, page 435.

J. Elias Hansen, said at page 377:

> "The penalty, and the only penalty, prescribed by statute for the failure of a party to furnish a bill of particulars when demand is made, is that the party so in default is "precluded from giving evidence thereof." Comp. Laws Utah 1917, No. 6598. If, therefore, a bill of particulars is demanded, but not furnished or filed, and if at the trial the party demanding the bill of particulars fails to object to the introduction of evidence upon the ground that a bill of particulars has not been furnished or filed, it would seem to follow that the failure of the adverse party to furnish or file a bill of particulars is thereby waived."

Sanborn v. Dentler, 166 Pac., 62, 97 Wash. 149, 6 A.L.R. 749.

J. Holcomb said at page 63:

> "It is contended by respondent that the requiring of a bill of particulars is a matter of dis-

cretion with the court, and that respondent was excused from furnishing the bill of particulars of these items under the allegation in connection therewith that the exact amount of medicine given at each visit, or its value, could not be positively ascertained, and that the fair value of such medicine given each visit could not be stated. It is true that in many cases the requirement of a bill of particulars is a matter of discretion with the court; but under our practice, under Section 284, Rem. Code, when an account is sued upon, unless the party, within 10 days after demand therefor in writing by the adverse party, shall deliver to the adverse party a verified bill of particulars of the items of the account, he is precluded from giving evidence thereof, and in case an itemized account stated is defective the court may order a further account. It was shown at the trial that the respondent kept an account book with all his accounts shown therein, and that the particular items of account with Mr. and Mrs. Woodman were kept in that book in the ordinary course of business, together with other accounts, and all the items of the visits and memoranda as to the nature of the ailments with which the patients were suffering were kept therein.

"In Plummer v. Well, 15 Wash. 427, 46 Pac. 648, we held that an allegation in connection with the bill of particulars, to the effect that it was impossible for the party relying thereon to comply with the order of the court any better than he had already done, or to make the bill of particulars any more specific on the points directed in the order of the court furnished no excuse; and it was stated that the bill of particulars furnished was insufficient, and "Its insufficiency cannot be excused upon the ground that plaintiff kept no books and cannot specify the services or state

their value. He assumed the burden of so doing when he brought this action in the present form.

* * * "The failure to keep an account of these services is the fault of the plaintiff and he must suffer for it, if any one' ". Again, in Moore v. Scharnikow, 48 Wash. 564, 94 Pac. 117, it was said:

"In a mercantile account, or in any account which is made up of several and distinct items, it is proper for the court to require that the value of each article be separately stated. So also a physician since he bases the value of his services on the number of visits made the patient, or the number of prescriptions given him, may be required to set out in his bill of items the charge made for each visit, or each prescription."

"It certainly was as possible for respondent to itemize the quantity and value of the medicine furnished by him at each visit, when making his entries in his book, and it was for him to itemize the number and length of his visits, the nature of the other services performed by him, and the kind of medicines furnished. If he could not, he is the one who should suffer. Under the statute heretofore quoted we think his evidence as to the amount and value of the medicines furnished should have been excluded for his failure to furnish, upon demand, a bill of particulars thereof."

Lonsdale v. Oltman, 52 N. W. 131, 50 Minn. 52.

C. J. Giffin said at page 131:

"In this case which was an action to recover for services as a surgeon and drugs and medi-

cines rendered and furnished by plaintiff on divers dates, the defendant, pursuant to the Gen. St. 1878, Ch. 66, Sec. 105, served written notice of demand for a copy of plaintiff's account, which was disregarded. At the trial the defendant at the proper time objected to evidence of the account for the reason that the demand had not been complied with and the objection was overruled. The statute is explicit, that upon failure to furnish the copy when demanded, the party shall 'be precluded from giving evidence thereof.' All that the party demanding need do at the trial is to make timely and proper objection bringing to the knowledge of the court the fact of such demand."

W. C. Early & Co., et al. v. Long, 42 So. 348.

C. J. Whitfield said at page 348:

"The court below should not have permitted any evidence to be introduced by the defendant for the reason that no bill of particulars was furnished by the defendant after demand made upon him in strict compliance with the statute. Sec. 1652 Code 1892."

Columbus & Greenville Ry. Co. v. Miss. Clinic, 120 So. 203.

J. Anderson said at page 205:

"Under the statute appellant was entitled to a bill of particulars of appellee's demand in order that appellant might intelligently make defense thereto. Anything less than an itemized account setting out each visit made by Dr. Yales and the charge therefore would not be a bill of particu-

lars. When the statute is not complied with in that respect by its express language no evidence is admissible to establish the account. Flint & Co. v. Brown, 133 Miss. 9; 96 So. 402. Wolff v. Hopkins, 145 Miss. 827, 111 So. 290. It follows that the court erred in admitting the testimony of Dr. Yales in the absence of such an itemized account."

Fisher v. Brotherton, et al, 255 Pac. 854, 82 Cal. App. 532.

J. Nourse said at pages 857-8:

"The error committed in permitting respondent, in the course of her examinations before the referee, to refer to the bill of particulars which had been prepared by her counsel, is of a different character. When the respondent gave her notice of rescission of the contract, she included a demand upon appellant that he pay the sum of $6,860 to reimburse her for the moneys expended by her in the care and maintenance of the ranch, which sum she alleged to be in excess of all moneys which she had received from the proceeds of the operation of the ranch. Her complaint was filed October 8, 1918, and on November 6, 1918, the appellant served upon her a demand for a bill of particulars covering such items. This demand was ignored, and the cause went to trial on December 20, 1918; the first trial resulting in a judgment for the appellant herein. Thereafter, and on the 18th day of June, 1920, a new trial having been granted, the cause again came on for trial and the matter of adjustment of accounts of operation of the respondent's properties was ordered heard before a referee.

"At this hearing a bill of particulars dated June 12, 1920, was offered by the respondent and the objection of the appellant that it was inadmissible, because a copy had not been delivered within the time required by law, was overruled. Exception to this ruling was certified to the trial court, and the ruling was sustained. This was error. Section 454, Code of Civil Procedure, provides that, when a party demands a bill of particulars covering the items of an account in suit, a copy thereof must be delivered within five days after the demand; otherwise evidence thereof is to be precluded. In St. John v. Consolidated Construction Co., 182 Cal. 25, 28, 189 P. 276, 277, the Supreme Court held that it was within the power of the trial court to relieve a party from his default in complying with the demand for a bill of particulars, and we assume that what was meant by this decision is that, when timely application is made under section 473, Code of Civil Procedure, for relief from the mistake, inadvertence, or neglect of the party, the court may grant the relief as if some order or proceeding had been taken against the party in default. There is, however, no uncertainty in the meaning of Section 454 of the Code that, when the demand is not complied with within the prescribed time, the party is thereby precluded from giving evidence on the subject-matter of the account. As the record stands here, no application for relief from this default was requested or granted, and all evidence touching the subject-matter included in that demand was improperly admitted."

Vassere v. Joerger, 68 Pac. (2d) 363.

J. Fullen said at page 364:

> "The defendant demanded a bill of particulars, the plaintiff failed to comply with this demand within five days as provided by section 454 of the Code of Civil Procedure, and defendant noticed a motion to exclude evidence thereof at the trial. This motion was granted conditionally, the court granting plaintiff an additional ten days in which to file a bill of particulars. No bill was ever filed, and upon that ground it was proper for the court to enter a judgment of dismissal of the action."

Elmore v. Tingley, 248 Pac. 706, 78 Cal. App. 460.

J. Hart said at page 710:

> "The failure of the defendant to deliver to the plaintiff within the time required a copy of the account upon which the counterclaim first set up in the answer was based, justified the trial court, in the exercise of its discretion, in refusing to allow defendant to introduce evidence tending to prove the account."

Munger v. Nelson, 201 Pac. 286, 61 Mont. 104.

The Court said at page 288:

> "Furthermore, it does not appear from the record that the plaintiff made any response whatsoever to the defendant's demand for a bill of particulars. On the face of the complaint it appears that this is a case where a bill of particulars may properly be demanded. Hence, had this default not been taken at all, the plaintiff could

not, as a matter of right, have demanded to be heard at the trial. Section 6569, R. C.; Martin v. Heinze, 31 Mont. 68, 77 Pac. 427; Scott v. Frost, 4 Colo. App. 557, 36 Pac. 910.

"We find no reversible error in this cause and recommend that the judgment appealed from be affirmed."

McManus v. Larson et al, 10 Pac. (2d) 523, 122 Cal. App. 716.

Justice pro tem Tappaan said at pages 524-5:

"Defendants on May 13, 1929, the plaintiff still having failed to comply with defendant's demand for a bill of particulars served upon plaintiff a notice that a motion to preclude the plaintiff from giving evidence of the account would be made on the 20th day of May, 1929. The court granted defendants' motion upon the day designated in the notice, and, on the same day the defendants' motion to preclude evidence was granted, plaintiff served and filed what purported to be a bill of particulars of the account. Thereafter plaintiff made a motion under section 473 of the Code of Civil Procedure, to be relieved from the order precluding evidence, and on June 6, 1929, this latter motion was denied by the court. The cause came on for trial on June 18, 1929, and the court acting under the order made May 20, 1929, precluding evidence, sustained an objection to the evidence tendered by plaintiff in support of the allegation of his complaint. Judgment was thereafter entered for defendants. Plaintiff appeals from the order precluding evidence, the order denying relief under section 473 of the Code of Civil Procedure, and from the judgment entered in defendants' favor.

"The first question upon this appeal is whether the trial court committed error in sustaining defendants' motion to preclude evidence. The failure on the part of plaintiff to comply with the demand for a bill of particulars, prior to the date upon which the motion to preclude evidence was heard and granted, is admitted, and in fact it appears. At the hearing had upon this motion, an affidavit of plaintiff's assignor was filed in opposition to the motion, in which affidavit the assignor stated that defendants, some years before the filing of the affidavit, had been informed of the items of the account and were aware of their nature, but that the account covered a long period, and because of its great detail required considerable time for preparation, which time assignor did not have because of other duties. The record shows that plaintiff had over 50 days since the service of the demand for the bill of particulars within which to prepare the bill of particulars, and that more than 40 days before the motion was granted defendants' attorney informed plaintiff's attorney that, if the bill was not furnished, he would object to the introduction of evidence of the account. That the procedure as adopted by defendants was justified under the circumstances is beyond question. Motions of this kind are addressed to the sound discretion of the trial court. The record fails to disclose that the trial court in granting this motion exercised other than a sound discretion. McCarthy v. Mt. Tecarte L. & W. Co., 110 Cal. 687, 693, 43 P. 391. Plaintiff had ample time within which to prepare the bill, was informed by defendants more than a month prior to the filing of the motion that defendants would stand upon the terms of the section of the Code precluding evidence if the bill was not served and at the time of the granting of the

motion the trial upon the merits was set only 11 days away."

Proto v. Chenoweth, 263 Pac., page 943.

C. J. Ross said at pages 944 and 945:

"The next assignment is that the court erred in permitting the plaintiff to testify as to the services rendered the deceased, for the reason that, although a demand had been made for a copy of plaintiff's account, or a bill of particulars, none had been delivered to defendant or his attorneys, and under paragraph 421 plaintiff should not have been permitted to introduce any evidence to support his complaint. The facts in connection with this contention we have heretofore stated. Paragraph 421 reads as follows:

"It shall not be necessary for the party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party within ten days after a demand therefor, in writing, a copy of the account, or be precluded from giving evidence thereof. The court or a judge thereof may order a further account when the one delivered is too general or is defective in any particular."

"The reasons given by the courts of code states, with a provision like our paragraph 421, for holding a pleading not setting forth the items of an account as invulnerable to demurrer, is that the adversary may have a copy of the account upon demand. The very provision of the statute relieving the pleader from pleading the facts of the account imposes upon him the duty to furnish his opponent the data omitted from the pleading, and precludes his giving any evidence of the ac-

count, if he fails to furnish it. Clearly the permissible omission in paragraph 421 disregards the other statutory provision (paragraph 419, Civil Code) that 'the pleadings shall consist of a concise statement of the facts constituting the plaintiff's cause of action, or the defendant's ground of defense,' unless such omission is supplied in the form of a bill of particulars. The common count in the face of the last provision finds no justification and can only be reconciled therewith by holding that the pleader who uses it must comply with the provisions of paragraph 421, and, when demanded, deliver a copy of this account to the adversary party. * * *

"The reason for requiring an itemized statement of the account, consisting of items and transactions running over a considerable period of time, is obvious. It is to inform the adverse party with what he is charged and to afford him an opportunity to marshall his evidence to meet the charges, otherwise he can justly plead surprise and lack of preparation, and especially is that true in a case like the one at bar. Even if Proto were alive and himself the defendant, instead of his personal representative, in all fairness he would be entitled to an itemized statement of what he owed—if not before suit, at least before trial. How much more is the need of such information on the part of the administrator, who must prepare the defense without any personal knowledge whatever of the items going to make up the claim against his testator? It is not unreasonable nor harsh treatment to require one, claiming to have rendered professional services on divers times and occasions for another, to furnish the latter, or his personal representative, a statement of such services in itemized form.

"It appears that the courts of those states whose statutes are like our paragraph 421, when the question of the rights of a party failing to furnish a bill of particulars on demand has arisen, have held the statute is peremptory, precluding such delinquent from offering any evidence of his account. Sanborn v. Dentler, 97 Wash. 149, 166 P. 62, 6 A.L.R. 749; Orange Saw Mill Co. v. Carmichael Lumber Co., 17 N. M. 69, 121 P. 608; Lonsdale v. Oltman, 50 Minn. 52, 52 N. W. 131.
* * *

"We have thus far considered the point under discussion as though no bill of particulars was served upon defendant or filed with the court, upon its order, and in doing so we are satisfied we are right. What was served upon defendant as bills of particulars did not in the least amplify or explain the general allegations of the complaint. The difference in the first bill of particulars and the complaint was merely verbal; the second one changed the claim from one for services rendered the deceased "and various other persons" to one for services rendered the deceased only; but in neither was there any inkling given defendant as to the number of visits made deceased, or the number made "various other persons," or the character of treatment administered, or medicines furnished. Since the rule is that a bill of particulars limits the proof at the trial to the items or particular services therein set forth, the effect, and the only effect, of the last so-called bill of particulars, was to eliminate any claim for services rendered 'various other persons' thus bringing the claim within the demand filed with the administrator for allowance. When the complaint and the two so-called bills of particulars are taken and considered together, they not only do not inform defendant what he is

required to meet but leave the issues in extreme confusion and obscurity.

"The complaint and last bill of particulars inform us that the services rendered deceased were so rendered, at his instance and request, continuously for 28 months, and that they were reasonably worth $500 per month. We understand from this allegation that the services were accepted and rendered under a mutual contract and as occasion demanded, but without any agreement as to the price to be paid or received for the various items of services. Under such circumstances the law says that the party receiving such services shall pay their reasonable value and no more. Now, how is that to be determined? It can only be determined by finding out what was done for the deceased and, by witnesses familiar with the value of that kind of services, prove the value. How necessary, then, it was that defendant should have been informed, in advance of the trial, of the amount and character of services claimed to have been rendered to his testator, that he might prepare his defense! To exempt a plaintiff from this duty would not only disregard the statute enacted expressly for the guidance of the court, but leave a defendant, such as the one here, and his testator's estate without much, if any protection."

Scott v. Frost, 4 Colo. App. 557, 36 Pac. 910.

J. Reed said at pages 910-11:

"The defendants made a demand in writing upon the plaintiff for an itemized statement of the account sued upon, to which no attention was paid by the plaintiff. Upon the trial, objection

was made to the introduction of any evidence which was overruled and an exception taken. Section 63 of the Civil Code is as follows: 'It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall within five days after a demand thereof in writing by the adverse party, deliver to him or file a copy of such account or be precluded from giving evidence thereof. The court or judge may on motion, limit or extend the time for delivering or filing such an account, and may order a further account when the one delivered or filed is too general or is defective in any particular.' The items of the different accounts were not set forth in the pleading, the statements were general,—only general aggregates or balances given,—and defendants were entiled to have each of the different accounts itemized so that they could contest any individual item of any of the accounts upon which the suit was brought. The statute is peremptory. Upon demand, he shall furnish the itemized account, and, upon failure to do so, 'shall be precluded from giving evidence thereof.' The court erred in receiving any evidence without the accounts. Defendants were entitled to be informed, not only of gross amounts claimed to be due, but of each item going to make up the aggregate. For this error the judgment must be reversed, and the cause remanded."

Orange Sawmill Co. v. Carmichael Lumber Co., 121 Pac. 608.

C. J. Roberts said at pages 608-609:

"The only proposition involved in this case is the construction of section 69 of the Code of Civil Procedure, which is as follows: 'It is not neces-

sary for a party to set forth in a pleadings the items of an account therein alleged, but he must deliver to the adverse party, within ten days after the demand thereof in writing, a copy of the account or be precluded from giving evidence thereof,' etc.

"No itemized statement of the account was set forth in the complaint, or attached thereto. From the record in the case, it appears that the attorney for appellee demanded, in writing, of appellant's attorneys, about four months before the trial of the case, an itemized statement of the account, which was never furnished him. Upon the hearing, counsel for appellant contended that an itemized statement of the account was attached as an exhibit to a deposition theretofore taken, and which was on file in the office of the clerk of the district court, from which appellee's counsel could have obtained the information desired.

"That statute is peremptory, and upon proper demand it was incumbent upon the plaintiff to furnish the itemized statement, and the mere fact that depositions may have been on file in the clerk's office, which contained an itemized statement of the account, will not obviate the plain provision of the statute. Upon the trial of the case, the plaintiff might not have read the depositions and could have proven an entire different account. The defendant was entitled to be served with a copy of the account, upon which the plaintiff expected to rely at the trial of the case.

"Several states have practically the same provision as section 69 of our Code of Civil Pro-

cedure. The Court of Appeals of Colorado, in the case of Scott et al. v. Frost, 4 Colo. App. 557, 36 Pac. 910, held that a similar statute was peremptory in this regard, and that, upon demand, the plaintiff was required to furnish the defendant with a copy of the account, and that if he failed to do so the court could not permit any evidence to be introduced as to such account. The Supreme Court of Minnesota, in the case of Lonsdale v. Oltman, 50 Minn. 52, 52 N. W. 131, announces the same rule. Appellant could have avoided the penalty of the statute by a compliance with its terms which are clear and explicit."

II.

NOT FINDING ON MATERIAL ISSUES OF ACCOUNTING OF MONIES ADVANCED BY PLAINTIFF TO THE ACCOUNT OF DEFENDANT.

Appellant in paragraph 9 of her complaint (R. 3) alleges:

> "9. That the defendant has never rendered an accounting of his labor in the erection of said Lodge, such that this plaintiff has no knowledge as to what proportionate interest is claimed by said defendant in the total expenditures for the purchase of the land and erection of the Lodge and operation of said business, and that no accounting of said business has ever been given by the defendant to the plaintiff although the same has been demanded and that defendant still fails and refuses to render such an accounting or transfer such proportionate interest as is equitable to the plaintiff in and to the real property hereinbefore mentioned."

To paragraph 9 of plaintiff's complaint, respondent in his Answer, (R. 8) alleges:

> "8. Answering paragraph 9, defendant alleges that all of the records in connection with the erection and operation of said lodge have been kept by plaintiff under agreement between plaintiff and defendant and that defendant has not been granted access to said records by the plaintiff and is accordingly unable to render an accounting and further that he has no knowledge or information concerning the financial status of the undertaking."

Thus the question of an accountancy of the monies advanced by appellant to respondent becomes a material issue to determine what the status of the partnership account was at the day of closing of the business.

There has been no Finding made nor any Conclusion or Decree with reference to whether or not respondent may have had monies available which he could have paid out on accounts of the partnership business instead of paying out of personal funds. Evidence of payment on at least one personal account is disclosed by the record as follows: (R. 108-9)

CROSS EXAMINATION OF DEFENDANT
BY MR. BEATIE

> "Q. Now, as a matter of fact, of these particular monies which were being put into your bank account, the operation of this business, you've expended over $700 of that sum on a purchase of a car for yourself, haven't you?
>
> A. No, sir.

Q. You haven't?

A. Yes, Mary gave me the check, that's right, sir, I am not—

Q. You made out the checks, didn't you, all the time?

A. Mary was a witness to that.

Q. Did you draw the check?

A. Yes, sir.

Q. And you would sign the check, wouldn't you, by which these bills were paid?

A. Yes, sir.

Q. Over the period of this time, you have paid $700 and some-odd dollars on your car, haven't you?

A. Yes sir, I believe Mary and I had an agreement on that.

Q. I don't care—

THE COURT: Let him tell us about it: I do care about it.

A. Well, sir, I think we had an agreement on it; I was getting little bit of the money from the Government, see, out—I mean, money I got from the Government, why, we used for just this and that, and I believe the $700, why, that Mary and I agreed on the car.

THE COURT: 746, something like that?

A. Yes, sir.

THE COURT: I saw that figure here once.

MR. BEATIE: December 24, I believe.

THE COURT: December 19, '46, there is a check to Motorway Service for $776.94.

A. Yes, sir.

THE COURT: That was paid by you on a car for yourself?

A. Yes, sir, but the agreement was between Mary and I on it."

This Court has repeatedly held:

> "It is the well settled law in this jurisdiction that it is the duty of the trial court to find upon all of the material issues raised by the pleadings, whether evidence respecting them was or was not adduced, and that it is prejudicial error for the trial court to fail to find upon issues raised by the pleadings and the evidence."

The following case is cited in support of the above statement:

Duncan v. Hemmelwright et ux 186 Pac (2d) page 965.

Justice Wolfe said at pages 968-9:

> "We pass now to consideration of the second assignment of error, i.e., the failure of the court to make findings of fact on certain issues. It is well settled in this jurisdiction that failure to make findings of fact on material issues is error, and is ordinarily prejudicial. Dillon Implement Co. v. Cleveland, 32 Utah 1, 88 P. 670; Holm v. Holm, 44 Utah 242, 139 P. 937; Snyder et al. v.

Allen et al., 51 Utah 291, 169 P. 945; Hall et al. v. Sabey, 58 Utah 343, 198 P. 1110; Baker v. Hatch, 70 Utah 1, 257 P. 673; Prows v. Hawley et al., 72 Utah 444, 271 P. 31; Simper v. Brown, 74 Utah 178, 278 P. 529; Piper v. Eakle, 78 Utah 342, 2 P. 2d 909; West v. Standard Fuel Co., 81 Utah 300, 17 P. 2d 292; Parowan Mercantile Co. v. Gurr et al., 83 Utah 463, 30 P. 2d 207; Pike v. Clark, 95 Utah 235, 79 P. 2d 1010."

III.

IN FINDING AS IT DID IN PARAGRAPH 6 OF THE FINDINGS OF FACT AS FOLLOWS: "THAT DURING AND SINCE THE ERECTION OF THE LODGE, DEFENDANT HAS MADE MONETARY ADVANCES TO THE VENTURE *totaling* $1,388.49," AND ENTERING ITS CONCLUSIONS OF LAW BASED ON SAID FINDING THAT DEFENDANT WAS ENTITLED TO 23% OF THE PROCEEDS RESULTING FROM THE SALE OF THE PROPERTY FOR THE FOLLOWING REASONS: (A) THAT DEFENDANT MADE NO ACCOUNTING OF MONIES ADVANCED NOR DID HE SHOW THAT THERE WERE NOT SUFFICIENT MONIES ADVANCED BY PLAINTIFF TO PAY THE BILLS CLAIMED BY DEFENDANT. (B) THAT MONIES CLAIMED TO BE PAID WERE NOT PROVEN BY COMPETENT EVIDENCE.

(a) The record discloses, as is set forth in the following schedule, the various sums advanced by appellant and I have thus segregated the schedule to show those payments made by appellant to respondent's bank account and those paid directly for the benefit of the business.

Advanced by Appellant to Respondent's Bank Account or Paid For by Respondent.

		Bank Acct.	Paid Out
R. 45	Admitted by pleadings		3,000.00
R. 50	Exhibit C	600.00	
R. 51	Exhibit D	4,500.00	
R. 52	Exhibit E	2,350.00	
R. 52	Exhibit F	900.00) 500.00)	
R. 54	Exhibit G		810.32
R. 55	Exhibit I		1,028.94
R. 55	Exhibit J		68.75
R. 56	Exhibit K		20.00
R. 56	Exhibit L		20.00
R. 57	Exhibit M		7.05
R. 59	Exhibit N		49.00
R. 60	Exhibit O		93.70
R. 62	Exhibit P		625.00
		8,850.00	5,722.76

Money placed in bank account	$8,850.00
Money expended for business	5,722.76
Total	$14,572.76

Exhibit A discloses that there was income from the operation of the business, as shown in recapitulation of receipts, the sum of $1492.05, by sales of merchandise,

and $453.10 from machine—Jute Box, etc., making a total of $1945.15, which said latter amount was received in the operation of the business. By adding the sum of $8,850.00 advanced by appellant to respondent's bank account and the total item of cash receipts of the operation of the business, the cash sum is $10,795.15, no amounts of which are accounted for by the respondent.

III.

IN FINDING AS IT DID IN PARAGRAPH 6 OF THE FINDINGS OF FACT AS FOLLOWS: "THAT DURING AND SINCE THE ERECTION OF THE LODGE, DEFENDANT HAS MADE MONETARY ADVANCES TO THE VENTURE TOTALING $1,388.49."

(b) The Court allowed the defendant and respondent the sum of $1388.49, which is made up of the various items in the Bill of Particulars:

Utah Power and Light Company	$ 261.38
Mulholland Lumber Company—Exhibit 1	462.51
Park Record—Exhibit 3	12.60
Mulholland Hardware Co.	250.00
Young Electric Sign Company	402.00
Total	$1388.49

With reference to the various amounts, the aforesaid item of $261.38, there is no testimony in the record to prove said amount and the only reference to the same is (R. 88):

> "THE COURT: Let me ask him about these items, Mr. Beatie, ask your client what about this power and light. You doubt they paid $261.38 in connection with the operation there?
>
> MISS BALLEN: I don't know anything about it. I know part of the power and light was paid out of the business, out of the money taken in. You can check books if you want; I don't know whether part of that was paid; I don't know how they could have light bill of that size when not in operation."
>
> THE COURT: What about an item for slot machines?"

The above is the only reference to the aforesaid item and is not evidence of the payment of any bill to the Utah Power and Light Company.

The next item is for the sum of $402.00.

The following testimony is the only evidence with reference to the same: (R. 90-91-92)

> "MR. BEATIE: Object to this ex parte statement; no—
>
> THE COURT: Don't know whether material or not; right now just inquiring about bills, or

about Young Electric Sign Company rental on neon sign; you got documentary support on that?

A. I paid it up to July.

THE COURT: July, '48?

A. Until April, yes, sir.

THE COURT: What do you mean by "until April"?

A. All I had to give them $110 when they put sign in, before they put sign in, from there until April, I paid them $36.50 a month for the rental of the sign. From April, I told them I didn't want the sign any more, and they sent me this bill for—

THE COURT: Then, since April, '48, you haven't paid it?

A. No, sir.

THE COURT: But $402 is the total you paid on that sign rental up to April?

A. Yes, sir.

MR. BEATIE: May I inquire just this with reference to that? Perhaps stipulate; Mr. Gasparac, $402, that included the $110 down-payment?

A. Sir, I paid them, the—

MR. BEATIE: Just answer the question: Does it, or doesn't it?

THE COURT: Just told me before it did while you were talking to your client.

MR. BEATIE: It does include—

THE COURT: It does.

MR. BEATIE: We can not so stipulate, that was paid by them because I am informed that $110 will show as expenditure in the journal, which is Exhibit A.

A. Sir, I gave Mary receipt for that money, but I paid that money myself. Mary wasn't at the Lodge at the time I got that sign. I gave her receipt for that sign in November.

THE COURT: The $110?

A. Yes, sir.

THE COURT: You paid the rest of it; that is you—

A. That sign—

THE COURT: All right.

Q. Did you make any payments after April of '48 on that sign?

A. I have made one, I believe, fifty-dollar payment; I have no receipt for it, and they sent me the bill for the balance of the sign."

From the above testimony it is clearly evident that there is no testimony at all with reference to the sum of $261.38, nor is there any proof, other than the statement of respondent that he paid the sum of $292.00 on account of Young Electric Sign Company.

The Court erred then in giving credit on the item of $261.38 and $402.00, assuming that evidence of the credits are proper.

IV.

IN FINDING AS IT DID IN PARAGRAPH 8 OF THE FINDINGS OF FACT AS FOLLOWS:

"THAT THE SERVICES PERFORMED BY THE DEFENDANT FROM SEPTEMBER, 1946, TO FEBRUARY, 1947, IN ERECTING THE LODGE HAVE A REASONABLE VALUE OF $2,160.00, SAID AMOUNT BEING BASED ON AN AVERAGE OF TEN HOURS WORK PER DAY FOR SIX DAYS PER WEEK FOR 24 WEEKS AT THE RATE OF $1.50 PER HOUR; THAT THE SERVICES PERFORMED BY THE DEFENDANT IN MANAGING, OPERATING AND MAINTAINING THE LODGE DURING THE PERIOD FROM FEBRUARY, 1947, UNTIL JUNE, 1947, HAVE A REASONABLE VALUE OF $1,440.00, SAID AMOUNT BEING BASED ON AN AVERAGE OF TEN HOURS PER DAY FOR SIX DAYS PER WEEK FOR 16 WEEKS AT THE RATE OF $1.50 PER HOUR: THAT THE SERVICES PERFORMED BY THE DEFENDANT IN MANAGING, OPERATING AND MAINTAINING THE LODGE FOR THE PERIOD FROM JUNE TO NOVEMBER, 1947, HAVE A REASONABLE VALUE OF $714.00, SAID AMOUNT BEING BASED ON AN AVERAGE OF SEVEN HOURS PER DAY FOR 6 DAYS PER WEEK FOR 17 WEEKS AT THE RATE OF $1.00 PER HOUR," AND ENTERING ITS CONCLUSION OF LAW BASED ON SAID FINDING THAT DEFENDANT AFTER PAYMENT OF DEBTS FROM THE PROCEEDS OF THE SALE OF THE PROPERTY WAS ENTITLED TO 23% THEREOF, FOR THE FOLLOWING REASON: (a) THAT THE ONLY EVIDENCE OF THE VALUE OF THE SERVICE OF DEFENDANT IS THE RATE OF $1.00 PER HOUR AND THE TOTAL NUMBER OF HOURS WORKED IS SPECULATIVE.

The following is the record which discloses the testimony of the respondent as to the amount of work ex-

pended and the rate of pay on the building of the Little Pine Lodge. (R. 80)

"MR. NESLEN: That is what I want to ask him.

Q. Mr. Gasparac, in building this Lodge, just explain to the court what you did.

A. Well, I did just about everything—I mean, I took care of—" (R. 81)

"Q. Well, what specifically did you do Mr. Gasparac, in building the Lodge?

MR. BEATIE: Let's tie the time, will you, so we can at least have right of cross examination.

Q. When did you start to build this Lodge, Mr. Gasparac?

A. I don't remember exact date; it was in September.

Q. Had you done any work in connection with this venture prior to September, '46?

A. I was the one that looked over the property and made arrangements for the property. I made arrangements for the survey, and I did most of the work checking the property and everything.

Q. Now, did you hire any help in connection with the building of this Lodge?

A. Yes, Mary's brother and the two friends and the carpenter." (R. 82).

"Q. Did you yourself do any work in connection with the building of this Lodge?

A. Yes, I did.

Q. Manual work, what was the nature of that work?

A. I worked on it from the time we started; I worked with her brother from the first time we started it right on up until it was finished, I did everything." (R. 83)

"Q. Now, what hours did you work in the construction of this Lodge?

A. Oh, I couldn't—couldn't put it down as any amount of hours; I mean, I worked all day and some of the nights.

Q. Did you have any other employment during that time?

A. Mary's brother helped me.

Q. I mean, did you have any other job during that time?

A. Oh, no; none at all. I devoted my full time to the Lodge from the time I started it until it was finished.

Q. That was a period of about how many months?

A. That was from September till July; I never worked except at the Lodge from September till July." (R. 84)

"Q. After the Lodge was completed in February, what work did you do in connection with this venture?

A. Well, I run the Lodge, and Mary also; I mean we worked; we opened it up and we run it at night; in the daytime, I would work around the Lodge with things that had to be done. The Lodge wasn't fully complete; it isn't fully com-

pleted to this day. The upstairs isn't completed, and I worked on it all the time.

Q. Did you do any other work on the building of the Lodge after February?

A. Yes, I worked all, in the summer doing the landscaping, and we have a pumphouse that we had to build, reservoir and everything; all that had to be fixed." (R. 100-101)

"MR. BEATIE: No further cross examination, your Honor.

MR. NESLEN: No further questions.

THE COURT: I would like to ask him one or two questions.

MR. BEATIE: I hope it isn't what I didn't desire to cross on.

THE COURT: I don't care what your hopes are, Mr. Beatie, I have to find out about these things; that is, certain things, I see, that are not covered in the testimony to my satisfaction. I still don't know what kind of work you did in building that Lodge, except that you were the general supervisor of the work; are you a carpenter, or do you do carpenter work?

A. Yes, sir.

Q. You did do some carpenter work?

A. Well, sir, if you would let me, I could probably tell you in my own words just what—there was no question—I mean, when we built the Lodge, between Mary and I, there was no question as to whether I was a carpenter or not. I was to handle the building of the Lodge, and I did everything. I did everything from digging ditches to pouring cement, carpenter work.

THE COURT: I am not talking about whether you are a technical journeyman with a card, but you haven't told me what you did as yet. Right now, you told me more than you did before. You did every kind of work with your hands?

A. Yes, sir.

THE COURT: You didn't stand around watching other people work, and hiring them; you actually got in and worked?

A. Yes, sir.

(The following examination is by THE COURT)

Q. What do you base this figure of $600 a month on? How do you arrive at a figure of $600 a month? You just pick that out of the air, or actually base on some hourly rate on what you did, or how did you arrive at it?

A. I can't answer that, I mean, the way you put the question.

Q. Answer it way you would like to answer it, but tell me where you arrive at that figure somehow or other.

A. My full time—I might be able to tell you this way: My full time from the time I started that Lodge has been spent with it. I spent all my time with it; that is all I did. If it wasn't building it, it was something concerning it. I wasn't, or I was doing something all the time. (R. 103-104)

Q. Let me ask you this: How much did you pay these boys that did the labor you referred to, two boys besides her brother?

A. I believe Mary has—

Q. You can't tell me?

A. I don't remember, sir, I never handled any of the books.

Q. Pay by the day or by the hour?

A. Yes, sir, paid by the hour.

Q. Do you know what the hourly rate was?

A. A dollar an hour, sir.

Q. Well, was your time worth—more valuable than theirs?

A. Well, no, I wouldn't say that.

Q. How many hours did you actually put in on this place?

A. Sir?

Q. How many hours did you actually put in on this place, working on it?

A. Some days, I would put in fifteen hours on it.

Q. Well, could you give us some idea of how many hours you put in, altogether?

A. No, I couldn't, sir.

Q. From September until February—September, 1946 till February, 1947 when it opened, that is when it was substantially constructed; wasn't it?

A. Yes, sir.

Q. Then, thereafter, you both operated the lodge, and also did more construction work?

A. Yes, sir.

Q. Fixed up and painted and other incidentals necessary to keep the Lodge in a proper—

A. Yes, sir.

Q. —shape. You ever compute the hours you put in on this Lodge?

A. No, sir, I never; I never even thought about it. I never kept a receipt or anything. I never had any reason to do that.

Q. You have a reason, now, don't you, you are claiming some compensation for your efforts there?

A. Well—

Q. I understand you didn't ever keep a current account of the time you put in, but, since that time, and since this lawsuit haven't you computed about how much time you put in on this Lodge?

A. No, sir, I am paying bills right now for—and still paying bills on it, and I still don't keep the receipts for it.

Q. Now, I understand your testimony is the same as hers about the matter of your agreement to construct the Lodge together?

A. Yes, sir." (R. 106)

REDIRECT EXAMINATION

By MR. NESLEN:

"Q. I believe you testified, in answer to the Judge, that you were—rate of pay in building the Lodge was not worth any more than these laborers; did you say that?

A. Well, yes, I mean, not the way he put it, I mean I didn't—when I was building the Lodge, I wasn't hired out; I wasn't hired out for any rate of pay."

From the above evidence it is clear that there never was any testimony on the part of the respondent or any other person that his services were worth more than $1.00 per hour, thus the Court would be in error in computing the first two items of work on the part of the respondent between September 1946 and June 1947 at the rate of $1.50 per hour when the third item of labor is only at the value of $1.00 per hour. It is further contended that there is no proof of the working of any ascertained number of hours on the part of the respondent between September 1946 and November 1947.

CONCLUSION

The Judgment in favor of plaintiff and defendant should be reversed. That the Court erred in admitting evidence on the part of the respondent to prove the value of labor and monies expended when no Bill of Particulars was filed. Further, in not finding as to the material issues and accounting of monies advanced by the plaintiff, plus the monies in the sum of $1,945.15 income from the operation of the business, in a total sum of $10,795.14, of which not one penny is accounted for. Further, that there was no showing or any finding of there not having been sufficient monies advanced by appellant or income from sales to pay all bills claimed by respondent, and that there was not any proof of said bills, claimed

paid by respondent which the Court gave credit for, nor were the monies claimed paid by defendant on account of business debts proven by competent evidence. Further, that the testimony upon which the defendant was granted an aggregate sum of $4,314.00 for services performed, is in error, that defendant never proved his services worth more than $1.00 per hour and no certain number of hours were ever proven to be the basis of his work credit.

It is therefore respectfully submitted, that the case should be reversed and remanded to the trial Court for accounting in the matter and further proceedings.

Respectfully submitted,

W. D. BEATIE,

Attorney for Plaintiff and Appellant.