

1949

Sidney Stevens Implement Company v. C. K. Bowerbank : Brief of Appellant

Utah Supreme Court

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Case No. 22820

IN THE

SUPREME COURT

OF THE STATE OF UTAH

SIDNEY STEVENS IMPLEMENT COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

C. K. BOWERBANK,

Defendant and Respondent.

Appellant's Brief

FILE
CLERK, SUPREME COURT

THATCHER & YOUNG,
Attorneys for Plaintiff and Appellant

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

SIDNEY STEVENS IMPLEMENT COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

C. K. BOWERBANK,

Defendant and Respondent.

STATEMENT OF CASE

This action involves the cost of a party wall. Plaintiff and defendant are the owners of adjoining business property situate on Ogden Avenue, Ogden City, Utah. Each contemplated the construction of a new building. On the 11th day of December, 1945, and before any construction had commenced, the parties entered into a written party wall agreement. It was mutually agreed that plaintiff would construct, as a part of its building, a party wall on the South, for their joint use. The agreement provided that the wall should be constructed in accordance with plans and specifications then being prepared by the architect employed by the plaintiff and that the boundary line as previously fixed by H. J. Craven and Son, Civil Engineers, (who had previously

surveyed the property and had marked the boundary line on the premises), should be established as the center line of the wall.

The agreement further provided that as soon as plaintiff's building was completed to a point where the total cost was ascertainable, defendant would pay plaintiff.

“the full one-half of the total cost of said wall and one-half the cost of the survey.”

The agreement is silent as to how this total cost was to be ascertained.

On or about December 1, 1945, Art Shreeve, a licensed architect, (who died before the trial), prepared general specifications for plaintiff's building, the South wall of which was to be the party wall in question, and invited bids for the construction of said building, in accordance therewith. The specifications contained the following provision:

“This contractor is to state in his bid a lump sum amount for the construction of the South wall.” See page 20.

Three well-known and responsible contractors submitted bids to the architect: C. B. Lauch Construction Company, Earl S. Paul, and Lawrence Mayberry.

Lauch's bid was for Sixteen Thousand Dollars (\$16,000.00) (Exhibit C), and it being the lowest bid, the same was accepted by plaintiff on the advice of its architect.

On December 18, 1945, Lauch wrote the architect as follows:

“Mr. Art Shreeve, Architect, Kiesel Building, Ogden, Utah. December 17, 1945.

Dear Sir: We propose to construct a building for the Sidney Stevens Implement Co. of Ogden, Utah, as per your plans and specifications under date of December 10th for the sum of \$16,000.00. Yours or Very truly yours, C. B. Lauch Construction Company by C. B. Lauch.”

On December 18, 1945, Lauch wrote the architect as follows:

“Mr. Art Shreeve, Architect, Kiesel Building, Ogden, Utah. In re Steven’s Implement Building. Dear Sir: In compliance with the last paragraph on page 20 of the specifications for the above building, we quote you for the South (party) Wall, which includes the excavation, footings with reinforcing steel, columns, and brick wall all according to the plans and specifications, the sum of \$4435.00 Yours very truly, C. B. Lauch Construction Company.” (See Exhibit D)

On December 26th, 1945, there was attached to the plans and specifications an addendum wherein certain changes were made in the plans and specifications. (See last sheet of plans and specifications, Exhibit B.)

The only change which in any way related to the party wall was the following:

Masonry.

Page 19, Exterior Walls: Change to read as follows:

“Balance of walls to be constructed of Lava Ash Blocks, as manufactured by the Utah Concrete Pipe Co., size 10 in. x 8 in. x 16 in.”

The original plans provided as follows:

“All exterior walls shall be 12 in. walls . . . exterior walls common brick.” (See page 19, Exhibit B.)

To fully understand the effect of this change, it should be noted that the plans call for the construction of reinforced concrete pillars which supported steel girders for the roof. The walls referred to above were the filling between these pillars and carried no weight from the roof.

On December 26th and after the addendum had been attached, a written agreement for the construction of plaintiff's building was entered into. (Exhibit G.) The total amount was \$15,377.00, making a reduction of \$623.00 from the original bid. Lauch gave plaintiff an itemized statement in support of the reduction made possible by the changes in the original plan. (Exhibit P.) It showed a reduction in the cost of all the exterior walls of \$200.00. The other items related to changes in the roof, the floor, and other parts of the building and had nothing to do with this wall.

When the building had been completed beyond the entire construction of the party wall, plaintiff billed defendant for the sum of \$2,217.50, plus \$85.00 for a chimney placed in the wall for the exclusive use of the defendant. This chimney charge is not questioned and will need no further reference.

Defendant refused to pay the bill, contending the same was excessive. Plaintiff filed this action to recover the above amount, with interest. Defendant answered, denying that the total cost to plaintiff of the party wall exceeded \$2,530.00. Defendant also filed a counterclaim against plaintiff. In this counterclaim defendant alleged that after the execution of the party wall agreement defendant caused a survey to be made by one William Stowe, a licensed surveyor, to ascertain the true division line, and that it was ascertained by this surveyor that the Craven survey did not designate the true boundary line but that the same was 10¾ inches North of the line fixed by Craven, and that upon being so informed plaintiff and defendant, by mutual agreement (orally) established the line as fixed by Stowe and agreed that the party wall should be constructed with this line as the center of the wall. That the plaintiff then proceeded with the construction of the wall and after its completion defendant discovered that the wall had been constructed on the Craven line and he prayed for damages in the sum of \$1000.00.

By its reply, plaintiff denied the existence of any valid contract as alleged, and alleged laches and estoppel as an affirmative defense to defendant's counterclaim.

The case was tried to a jury. At the conclusion of the case, plaintiff moved for a directed verdict on defendant's counterclaim. (Tr. 159-160) The motion was denied, to which plaintiff reserved an exception.

Plaintiff also, by its requested instruction No. 3, requested the Court to instruct the jury to return a verdict in favor of plaintiff as to defendant's counterclaim. This request was refused and exception taken.

The Court submitted the case to the jury on four special interrogatories which were answered by the jury as follows:

1. What was the cost of the party wall in question to the plaintiff?

Answer: \$2750.00.

2. Did Frank J. Stevens, Jr., and Henry Stevens, either or both of them, mutually agree with the defendant as to where the division line of their properties was to be located and establish the same based upon the William Stowe survey?

Answer: Yes.

3. Was the center of the party wall constructed along the division line of the properties as agreed upon?

Answer: No.

4. A. How far South of the agreed-upon division line of the properties was center of the party wall constructed?

Answer: 9.25 inches.

- B. What was the reasonable market value in the spring and early summer of 1946 of one foot frontage of unimproved property located on the East side of Ogden Avenue and approximately in the middle of the block between 25th and 26th Street?

Answer: \$196.50.

The Court received the answers, ordered the same filed, and thereafter, on December 30, 1948, entered findings

and judgment on the verdict, awarded plaintiff judgment for \$1375.00 and interest, and awarded defendant judgment for \$151.42 and interest, and set-off this amount against plaintiff's judgment, leaving a balance due plaintiff of \$1223.58 and interest from May 1, 1946.

On January 6, 1949, plaintiff served and filed a motion for new trial. On January 26th, 1949, the Court denied plaintiff's motion for the reason the same was not filed in time. (041)

Plaintiff then moved the Court to file the motion out of time under the provisions of

Section 104-14-4, Utah Code Annotated, 1943,
(047)

and supported its motion by affidavit of counsel. (048)

On February 11, 1949, the Court denied this motion.
(052)

Plaintiff appeals from the judgment and counter-claim and also from the order striking plaintiff's motion for new trial and from the order denying plaintiff relief if the motion was not filed in time.

STATEMENT OF EVIDENCE

At the outset, we might observe that the only question involved is

“What was the cost to plaintiff for the construction of the party wall?”

and the other question resolves itself into a question of law as to whether or not defendant is entitled to recover on his counterclaim.

In summarizing the evidence we will attempt to confine ourselves to these two propositions, there being no dispute as to the other questions involved.

C. H. Stevens, President of the plaintiff corporation, was the only witness called on behalf of plaintiff to establish a prima facie case. He identified, and the Court received in evidence, plaintiff's exhibits A to D, which were the party wall agreement, the plans and specifications, the Lauch bid, and the bid or break-down on the cost of the party wall. Exhibits E and F were not received. The Court received Exhibit G, the agreement between Lauch and the plaintiff. The Court also received Exhibits H, I and J, which showed partial construction estimates, certified by the architect, and paid by plaintiff to Lauch. The wall was completed before the March payment of \$8,712.50.

On cross-examination, it was disclosed that plaintiff was still withholding some \$1500.00 from Lauch for the reason that the building had never been fully completed, and that an action was pending wherein Lauch was attempting to recover this money. We make this observation at this point to clarify the reason why Hilton, Lauch's foreman, appeared to be an adverse witness. Lauch had left the state of Utah, and under date of November 17, 1947, he wrote a letter to Mr. Powell, attorney for defendant, in which he stated that the cost estimate of the party wall was \$3127.00. (Plaintiff's Exhibit L.)

By way of a defense, defendant produced as a witness Jack Hilton, who entered the employ of Lauch as Superintendent in April, 1949, after the Stevens building was well on its way to completion. He pointed out the change in the party wall from 12 inch brick to 10 inch Lava Ash blocks. Then the Court, over plaintiff's objection, permitted him to give his opinion as to what it cost Lauch to construct this party wall, to which was added a profit of ten percent. (Tr. 32-34, Defendant's Exhibit 1)

On cross examination, he admitted he had nothing to do with the construction of the wall. (Tr. 34) He estimated that the change from a 12 inch wall of brick to a 10 inch cinder block wall reduced the total cost of the entire building by at least \$1200.00 and reduced the cost of the South wall by at least \$1000.00. Tr. 36-41) He further admitted that the other changes in the plans reduced the cost to Lauch, and when asked why, if this were so, the contract was reduced by only \$623.00, and where the excess went, he replied:

“For the construction of the rest of the building, the contractor's overhead and profit, which I figure the contractor's profit is his own business.” (Tr. 41-45)

He further admitted that if the original bid was \$16,000.00 and the cost was reduced by more than the reduction in the contract, that the difference must inevitably have gone into profit to Lauch and that he did not know how much profit Lauch made on the contract. (Tr. 42)

Defendant then called other contractors. Fred Carr, Jr., was permitted, over plaintiff's objection, to give an opinion to the effect that the cost of construction of this wall was \$2348.87. (Tr. 57) Joseph M. Green, a subcontractor, was permitted, over plaintiff's objection, to testify what Lauch paid him for putting up the blocks, \$926.00, although this did not include the upper portion of the wall. (Tr. 84-85) He stated he did not know what Lauch charged the plaintiff for this work. (Tr. 85)

Andrew Isaacson, a contractor, was also permitted, over plaintiff's objection, to give an opinion as to the cost of the party wall, which he estimated at about \$2500.00. (Tr. 89) He also admitted that if the plans were changed and cheaper construction used, that the profits to the contractor would be greater unless the contract was reduced proportionately. (Tr. 95)

In the estimate furnished by Lauch himself to Mr. Powell, (Plaintiff's Exhibit L), he listed the cost to plaintiff of the blocks as \$1365.00, whereas, according to Green's testimony he paid Green \$926.00. Tr. 103)

By way of rebuttal, plaintiff also offered expert evidence, but in view of the jury's verdict it is unnecessary to review this evidence.

We shall reserve a review of the testimony in support of defendant's counterclaim and treat that separately in connection with other matters hereinafter referred to.

STATEMENT OF ERRORS UPON WHICH
THE APPELLANT RELIES FOR A REVERSAL
OF THE JUDGMENT APPEALED FROM

1. The Court erred in striking plaintiff's motion for a new trial on the alleged ground that the same was not filed in time.

2. The Court erred in not allowing plaintiff to file its motion for a new trial out of time.

3. The Court erred in admitting in evidence the opinion of the defendant's witnesses Jack Hilton, Fred Carr, Jr., Joseph M. Green, and Andrew Isaacson as to what it cost Lauch Construction Company to build the party wall.

4. The Court erred in not instructing the jury as a matter of law the plaintiff was entitled to recover the amount prayed for.

5. The Court erred in denying plaintiff's motion for a directed verdict as to defendant's counterclaim.

6. The Court erred in refusing to give plaintiff's requested Instruction No. 3.

7. The Court erred in giving the jury its second interrogatory.

8. The Court erred in giving its third interrogatory.

9. The Court erred in giving its fourth interrogatory, Subdivisions A and B.

10. The Court erred in entering its judgment on the verdict awarding plaintiff only the sum of \$1375.00 as one-half the cost to the plaintiff of the party wall.

11. The Court erred in entering its judgment on the verdict in favor of defendant on his counterclaim in the sum of \$151.42, and off-setting the same against plaintiff's judgment.

ARGUMENT

We will endeavor to discuss each of the statements of error in the order above set out, grouping together those assignments which may be conveniently discussed together.

Point No. 1

THE COURT ERRED IN STRIKING PLAINTIFF'S NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL AND IN REFUSING TO HEAR OR CONSIDER SAID MOTION FOR THE REASON THAT NO NOTICE OF THE ENTRY OF JUDGMENT WAS EVER SERVED UPON PLAINTIFF OR ITS ATTORNEY.

The rules of practice adopted by the District Courts of the Second District provide as follows:

“Rule 14.

Preparation of Findings, etc: When findings of fact, conclusions of law, and judgment or decree are required by statute to be in writing counsel for the prevailing party shall prepare them and serve a copy upon counsel for the adverse

party before delivering them to the Judge. Adverse counsel's acknowledgment of receipt of copies, or if he refuses to acknowledge receipt, prevailing counsel's certificate of such service shall be sufficient evidence of service. A certificate by counsel for the prevailing party of mailing shall be sufficient where adverse counsel lives in a city or town different from that of prevailing counsel.

“Rule 15.

Objection to Findings: On receipt by the court of findings, conclusions and judgment or decree in contested matters, served as required by Rule 14, the same will be held by the court for 48 hours, during which time counsel must file objections to the same. Provided, that the court may, in his discretion, grant counsel additional time in which to prepare, serve and file written objections or amendments to the proposed findings, conclusions and judgments or decrees, and may, in his discretion set time for argument thereon.

Rule 16.

Preparation of Orders: All orders desired or required to be made in writing shall be prepared by counsel for the moving party, unless the matter is contested and gone to a final decision, in which case they shall be prepared by counsel for the prevailing party.

“Rule 17.

Notice by Clerk of Decision: When a decision is rendered by the Court upon a matter under advisement or in the absence of counsel, such counsel as were absent shall be given, by the

Clerk, written notice of the decision my mail. Such notices shall contain the name and number of the case, a statement of the decision such as 'Defendant's demurrer overruled' or 'Judgment for plaintiff.'

"The presence of a member of a firm or one of the associate counsel at the time of the rendition of the decision shall dispense with the notice to them.

"Counsel in default or absent without cause shall not be entitled to notice.

"Nothing herein contained shall affect or relieve counsel of the necessity of giving such notice to opposing counsel as the statute may require in the case either for starting time to run or otherwise."

Pursuant to the above rules and in accordance with the practice which has prevailed for many years in this district, counsel for plaintiff prepared proposed Findings and Judgment on the verdict of the jury and served notice on counsel for defendant that he was presenting the same to the Court as his proposed Findings and Judgment. The record shows the service was made on the 24th day of December, 1948. The proposed Findings and Judgment were then left with the Court, unsigned and not filed. In accordance with the foregoing rules, the attorney who prepares proposed Findings and Judgment has no control over the same thereafter. The trial Court must wait 48 hours to give opposing counsel an opportunity to file objections. If none are filed the Court may accept the Findings and Judgment as proposed or may make such changes as he may desire.

There is no rule requiring the Court to sign the Findings and Judgment as proposed, nor is there any rule requiring the Court to sign the same at the expiration of the 48 hours or in any other time. The trial Judge may and frequently does hold them on his desk for days or weeks before actually signing the proposed Findings and Judgment. The record here discloses that the proposed Findings and Judgment were not signed by the Court until the 30th day of December, 1948. This rule of practice discloses the reason for rule 17, which requires the Clerk to give written notice to the absent counsel. No such notice was ever given, either in writing or orally, by the Clerk to counsel for plaintiff and counsel did not know that the Findings and Judgment had been signed until several days later. Immediately upon learning that the trial Court had signed and filed the proposed Findings and Judgment, with modifications and changes as made by the Court, he immediately prepared, served and filed plaintiff's notice of intention to move for a new trial. This was filed on the 6th day of January, 1949, only 7 days after the Court had signed the Findings and Judgment on the verdict, as modified by him.

When the motion for a new trial came on to be heard, counsel for respondent made oral objections to arguing the motion, for the reason that notice of motion was not filed within five (5) days after the entry of the judgment. The Court relied upon the case of

Cody vs. Cody, 47 Utah 456,
154 Pacific 952,

construing

Section 104-40-4, Utah Code
Annotated, 1943,

and thereupon struck plaintiff's motion and refused to hear or decide the same.

We believe the Court was in error for two reasons.

First, we contend that the rule announced in *Cody vs. Cody* does not apply where the rules of practice provide otherwise. If, as appears from the *Cody* case, counsel presents to the Court Findings and Judgment and the Court immediately signs the same, then of course we could see no reason why he should have notice of the signing of the Findings, but where, as in our case, counsel in whose favor the judgment is entered prepares proposed Findings and counsel on the other side has 48 hours to propose amendments, and neither party knows when the Findings and Judgment are actually signed, then it does seem to us that counsel on both sides are placed on an equal footing. Hence the adoption of Rule 17 which requires the Clerk of the Court to give written notice to absent counsel.

If the rule announced in the *Cody* case is followed under the rules of practice adopted by this district, the counsel who prepares proposed Findings must, at his peril, call the Court every day to find out if and when the Findings and Judgment are actually signed. Such a rule would place an unreasonable burden upon attorneys.

Second, we further contend that the Court erred in striking plaintiff's motion for a new trial for the ad-

ditional reason that no written motion to strike was ever served or filed by opposing counsel. Rules and orders made by the trial court, except as to admissibility of evidence during the trial, must be raised by some form of pleading or written motion, so that issues may be made and Findings and Judgment entered thereon. Such is and always has been the recognized procedural practice in the Courts of this state, both in the trial Courts and in this Court. Motions to quash service of summons, to strike pleadings, to grant extensions of time, to amend pleadings, to bring in new parties, to strike bills of exceptions, dismiss actions, or dismiss appeals all must be in writing and served upon adverse counsel pursuant to

Section 104-42-3, Utah Code
Annotated, 1943.

Point No. 2.

EVEN THOUGH THE MOTION WAS FILED OUT OF TIME, YET THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF RELIEF UNDER SECTION 104-14-4.

When the trial Court struck plaintiff's motion for a new trial, counsel immediately filed a written motion for relief to file out of time. The motion was supported by affidavit of counsel. At most, the ruling striking the motion was purely technical. The motion for new trial was actually filed within 7 days after the judgment was entered. No prejudice was shown or even suggested. It seems to us that the trial Court clearly abused his discretion in denying plaintiff's motion and in not per-

mitting plaintiff to file the same out of time, in view of the frequent pronouncements of this Court favoring the disposal of matters on their merits rather than upon mere technicalities. This Court has been very liberal in permitting the setting aside of default judgments, as well as in granting other relief out of time where the parties have acted with dispatch and no prejudice has resulted to the opposing party. We say, therefore, the Court committed reversible error both in striking plaintiff's motion for a new trial and in any event in refusing to grant the relief asked for under the provisions of Section 104-14-4, Utah Code Annotated, 1943.

Point No. 3.

IN THE ABSENCE OF A MOTION FOR A NEW TRIAL THIS COURT MAY NEVERTHELESS REVIEW ON THIS APPEAL PRACTICALLY ALL THE ERRORS RELIED UPON FOR A REVERSAL.

Should this Court sustain the rulings of the lower Court striking plaintiff's motion for a new trial, yet we contend that upon appeal this Court can review all orders, rulings and decisions of the lower Court relied upon for a reversal under the provisions of Section 104-41-5, as construed by the case of

Law vs. Smith, 34 Utah 394, 98 Pac. 300.

Point No. 4

THE COURT ERRED IN ADMITTING IN EVIDENCE THE OPINION OF DEFENDANT'S WITNESSES HILTON, CARR, GREEN, AND ISAACSON, AS TO THE AMOUNT IN THEIR OPINION IT

WOULD COST LAUCH TO CONSTRUCT SAID PARTY WALL AND IN PERMITTING THE JURY TO INFER OR DEDUCE THEREFROM WHAT AMOUNT LAUCH CHARGED PLAINTIFF FOR SAID CONSTRUCTION.

Assignment No. 3, 4 and 10 all relate to the foregoing proposition and can be discussed together.

When the parties entered into the party wall agreement, defendant knew and understood that plaintiff was about to commence the erection of a building upon its property and that plans and specifications were then being prepared by its architect. (The agreement so states.) No formula, however, was provided in the agreement for determining the cost. All the agreement provided was that when costs of the party wall were ascertainable, the defendant would pay one-half the cost thereof. The trial Court, correctly, we think, construed the agreement to mean that defendant agreed to pay plaintiff one-half of the actual cost to it for this wall. It was not a case of paying one-half the reasonable value of the wall nor one-half the reasonable cost based upon quantum meruit, but one-half the actual cost. If, by chance, plaintiff was imposed upon and paid too much for the wall, the defendant, by his contract, must share equally in plaintiff's bad bargain. How, then, was this cost to be determined? Clearly defendant knew that plaintiff was not going to actually construct this building. He also knew that the preparatory work was then in the hands of an architect who was actually preparing the plans and specifications. Likewise the architect knew of the existence of this party wall agree-

ment. Certainly, as a prudent architect, he could not submit to bidders separately a bid for the construction of the wall and a separate bid for the construction of the rest of the building. To have invited two separate contractors to take the job, one to build the wall and another to build the rest of the building, would not have been prudent or in keeping with ordinary construction procedure. We submit that the architect proceeded in a proper manner in determining a basis upon which to fix the cost of this wall. In his plans and specifications he provided that anyone desiring to bid on this job must separately state the cost of this party wall.

Three responsible bidders presented him bids. Lauch's was the lowest, for a total of \$16,000.00, and, in accordance with the specifications, he estimated the cost of the party wall at \$4435.00. His bid, being approved by the architect, was accepted by plaintiff.

It is our position that this acceptance fixed the cost to plaintiff for the construction of this wall just as effectively as the bid of \$16,000.00 fixed the cost for the entire building. Had the question involved been the cost of the entire building, no one could have questioned that the cost to the owner would be the entire contract price, and if that is so, then why is not a cost of a segment of a building arrived at in the same manner? A purchaser might offer ten thousand dollars for a bunch of cattle. In the bunch might be one particularly choice animal, which he offered one thousand dollars as a part of the total purchase price. Certainly the acceptance of the bid for the entire herd would fix the cost of the one animal just as effectively as if he had purchased only that one particular animal.

Defendant seems to contend that he was in no way concerned with the relationship which existed between the builder, the architect, and the owner. We deny this. We take the position that, under the terms of his contract, defendant was definitely tied into this relationship because he in effect became a participant in the building of this wall to the extent that he agreed to pay a sum equal to one-half its actual cost to plaintiff. In the negotiations plaintiff had nothing whatever to do with fixing this cost. We submit it proceeded in the usual and customary manner. It first employed a competent, experienced architect, whose honesty and qualifications are not questioned. The responsibility then rested upon the architect to draw plans, supervise the bids, supervise the construction of the building, determine costs, and in fact assume complete responsibility. Such are the duties of an architect.

Defendant intimates all through this case that the plaintiff had a motive in increasing the cost of the party wall to its advantage, but to imply such a motive to plaintiff likewise impunes the motives, good faith, honesty and integrity of both the architect and the contractor. Certainly there is no evidence of such improper motives, acts, or conduct by these parties.

This Court, of course, will not presume that these parties acted dishonestly in fixing in advance an exorbitant or untruthful cost of the party wall. The honesty and integrity of everyone is presumed until and unless evidence to the contrary is presented. We say, therefore, that the method arrived at for determining the cost of this party wall was arrived at in precisely the same

manner as was the cost of the entire building, and when accepted by the builder, it became the cost to him of such wall. True after the bid was accepted there were some modifications which reduced the bid by \$623.00, \$200.00 of which should be applied in reduction of the cost to plaintiff of the party wall. This matter will be discussed in more detail hereafter.

If this Court concludes that we are in error in the position taken, and if some other method for determining costs is deemed the correct method, still the undisputed evidence in this case shows that the party wall actually cost the plaintiff more than the sum awarded by the jury, and therefore the answer of the jury to the special interrogatory and the verdict of the Court entered thereon can find no support in the evidence. The evidence shows that Lauch bid the sum of \$16,000.00 for the construction of the entire building in accordance with the original plans and specifications. However, before the contract was signed, certain modifications were proposed and accepted. (See last sheet of Exhibit B) As a result, the total cost was reduced by \$623.00 and the written contract was then executed, which called for a payment of \$15,377.00. Only one of the changes in any way affected the party wall. Instead of a twelve inch brick, a ten inch lava block was substituted. According to Hilton, defendant's witness, who was superintendent for Lauch, this change effected a saving to Lauch of at least \$1200.00 on the total building and a saving to him of at least \$1000.00 in the cost to Lauch for the construction of the party wall. Yet in making the reduction in the contract price, he reduced the same by only \$200.00. (See plaintiff's Exhibit P.)

It may be that the contractor thereby obtained an advantageous bargain but again it must be remembered that we are not concerned with what it cost Lauch to build this wall. We are only concerned with what it cost the plaintiff. If, therefore, Lauch effected a savings to himself of \$1200.00 by changing from brick to block, then, unless he passed this saving to the owner by reducing his bid proportionately, he thereby increased his profits or his prospects of profits by that amount. This no doubt is the explanation for his letter to Mr. Powell. (Exhibit L) This letter was written by Mr. Lauch to Mr. Powell after a dispute arose between Lauch and plaintiff growing out of the contract, which dispute, however, had nothing to do with the party wall. In that letter he listed the cost of the blocks *to plaintiff* at \$1365.00, notwithstanding Green testified that he, Lauch, paid Green \$960.00 for the material and labor in placing these blocks in the wall, and we submit that plaintiff did pay Lauch far more than the actual cost to Lauch for the construction of this wall.

Defendant offered no evidence as to what Lauch charged the plaintiff. Neither did he offer any evidence as to the profit Lauch actually made. All that these expert witnesses testified to was that in their opinion Lauch could have built the wall for a certain amount which was based upon their opinions as to the reasonable cost for the labor and material, to which was added an arbitrary ten percent profit, but, as heretofore noted, the cost to Lauch certainly is not the cost to the plaintiff, nor is the assumed ten percent profit any proof of the actual profit made by Lauch on this job.

It is too well known to permit of serious argument that during the period in question contractors were not building buildings just for the experience. They were out to make a profit, and during this period exorbitant profits were made, as everyone well knows. .

Had defendant offered evidence as to the proportionate cost which the party wall bore to the entire contract price, that is, say they had offered evidence that the wall in question constituted thirty percent of the entire materials and labor supplied by Lauch in the entire building, there might have been some argument as to its admissibility, but defendant did not choose to offer that line of proof. He apparently relied on the assumption that proof of the reasonable cost to Lauch was proof of the cost to plaintiff, an assumption, we submit, which can find no support in the evidence. We submit, therefore, that the answer of the jury to the special interrogatory, to the effect that the cost of the party wall to the plaintiff was \$2750.00 and the judgment entered by the Court based upon said answer find no support in the evidence, but that the evidence conclusively shows that the party wall cost the plaintiff \$4435.00, less the \$200.00 reduction made by the contractor, or in any event not less than the \$3127.00 as stated by Lauch in his letter of November 17, 1947.

Point No. 5

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NON-SUIT AS TO DEFENDANT'S COUNTER-CLAIM, IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT THEREON, AND IN REFUSING TO GIVE THE JURY PLAINTIFF'S REQUESTED INSTRUCTION NO. 3.

By his counterclaim, defendant sought damages against plaintiff for breach of an alleged oral agreement to place the party wall at a point $10\frac{3}{4}$ inches North of the point where the wall was actually constructed. The lower Court submitted this issue to the jury in its Interrogatory No. 4, Subdivisions A and B, and the jury, by its answer, found that the division wall was placed $9\frac{1}{4}$ inches South of the agreed upon division line and assessed defendant's damages in the sum of \$151.42. The Court adopted the answers of the jury and awarded defendant a judgment on his counter-claim in the sum of \$151.42, with accrued interest, and off-set the same against the verdict and judgment for plaintiff.

Defendant obtained title to the property from two sources, the first being a deed from F. J. Stevens Estate, the owner of the property. The description used in this deed starts from the Southeast corner of Lot 10 and this is the description pleaded by defendant in his answer and counterclaim. Defendant also obtained a deed from Ogden City (owner of a tax title). This description commences from the Northwest corner. By reason of some excess in Block 17 there appears to be a difference of about $10\frac{1}{4}$ inches, depending on which point of beginning is used by a surveyor.

Jack Craven was employed to make the survey. He fixed the boundary line and marked the same upon the premises. In doing this he used the description contained in the Stevens deed. The party wall provided that

“The boundary line as heretofore fixed by said surveyor (Craven) and marked upon the premises

shall be considered the center line of said South (party) wall, and that the same shall be constructed one-half thereof on each side of said line so established as aforesaid.”

After this agreement had been executed, but before the contractor had started to construct said wall, defendant employed one Stowe, Ogden City Surveyor, to resurvey his property. In doing so, he used the description contained in the tax deed, and from such description concluded that the correct boundary line was about $10\frac{3}{4}$ inches North of the line previously established by Craven. Over plaintiff's objection, defendant was permitted to testify substantially as follows: That after the Stowe survey had been made, he, in company with Stowe, went to the office of plaintiff and talked with Henry (President) and Frank, Jr., (Secretary) relative to the difference between the two surveys. That Henry got out the two descriptions and Stowe showed him where the difference was in the two surveys. (Tr. 105-107) That then Frank, Jr., and defendant went to the property and and that they told the foreman Richardson where to put the wall, but that the wall was built on the line of the Craven survey. He further testified that he was upon the premises when the footings were laid and he watched both buildings go up and was about the premises every day. (Tr. 112) On cross-examination he testified that he and Frank, Jr., indicated the point where the wall was to be constructed and that thereupon Lauch's foreman made a mark where the wall was to be placed. (Tr. 115) That the foreman was in charge of the work and that defendant was there on the grounds when the forms were put in and the wall constructed, and that he raised no objection until after the wall was completed. (Tr.

116) Stowe testified along the same line and on cross-examination stated that there would be only a difference of $1\frac{1}{4}$ inches between where Frank, Jr., and the defendant fixed the line and where the wall was constructed. (Tr. 122)

We contend that this evidence was erroneously admitted and that the counterclaim was erroneously submitted to the jury for the following reasons:

1. STATUTE OF FRAUDS. The written party wall agreement fixed and determined the true boundary line between the properties, and provided that the center line of the party wall was to be constructed on this line. The effect of the alleged oral agreement was to transfer or convey to the defendant a strip of land, $10\frac{3}{4}$ inches wide, North of this line. We contend that such an oral agreement is void and unenforceable under the provisions of

Section 33-5-1, Utah Code Annotated, 1943

Thackery vs. Knight, 57 Utah, 21,
192 Pac. 263.

Bybee vs. Stuart,Utah.....,
189 P. 2d 118

Tripp vs. Bagley, 74 Utah 57,
276 Pac. 912, 69 A.L.R. 1417

11 C. J. S. 638

It is to be noted that it is not contended that either party was in default as to the terms of the party wall agreement at the time of the making of the alleged oral agreement. Neither is it claimed that there was a part

performance of the oral agreement so as to bring it within the provisions of

Section 33-5-8, Utah Code Annotated, 1943.

What defendant is seeking is the recovery of damages for failure to comply with the terms of an alleged oral agreement, purely executory, to place the partition line at a point $10\frac{3}{4}$ inches North of the line established by a written instrument.

2. NO SHOWING OF AGENCY. The second interrogatory propounded to the jury, to which plaintiff took its exception, is confusing and the answer thereto makes it impossible to determine what was the jury's answer. The Court asked the jury specifically:

“Did Frank J. Stevens, Jr., and Henry Stevens, either or both of them, mutually agree with the defendant as to where the division line of their properties was to be located and establish the same based upon the William Stowe survey?”

The jury answered:

“Yes.”

The Court asked three questions in one and the answer could be “Yes” to any of the three questions, but couldn't be a correct answer to all three. The jury may have believed that Frank, Jr., and the defendant made the agreement, and that is probably what the jury did mean by its answer, because he admitted going upon the premises with the defendant and agreeing upon a certain line which he contended was midway between the two lines, while Henry denied emphatically that he was a party to any agreement of any kind or character.

We contend that, in the absence of evidence of such authority, a Secretary and Treasurer of a corporation has no authority to bind the corporation in relation to the giving away of its real estate. What this purported oral agreement amounted to was a giving up by the corporation of its claim to 10½ inches of the corporation's real estate. No attempt was made to show that Frank, Jr., had any such authority to bind the plaintiff.

3. ESTOPPAL. The evidence shows, without dispute, that defendant and Frank, Jr., went upon the land, established a point where the wall was to be constructed, and that the foreman then marked the same upon the adjoining sidewalk. The contractor, Lauch, was employed by both parties to construct buildings simultaneously on each property, using the party wall as a wall common to both buildings. If, as contended by defendant, the contractor failed to place the wall where they had both directed him to do so, and there is not a scintilla of evidence that plaintiff had anything to do with it, then the fault was the contractor's and not the plaintiff's and he was as much the agent of defendant as of plaintiff. The evidence further shows that the defendant was in and about the premises every day, that he was there when the forms were put up for putting in the footings to the wall, and that he watched the work progress from that point to completion, and yet at no time did he make any complaint or assertion that the wall was not placed at the point agreed upon until after the wall was completed. Under such circumstances it seems to us that defendant ought, in equity, to be estopped from now claiming damages as alleged in his counterclaim.

Point No. 6

THE COURT ERRED IN SUBMITTING TO THE JURY, AS THE MEASURE OF DAMAGES, THE VALUE OF HIS LAND PER FRONT FOOT.

If, as contended by defendant, the South wall of plaintiff's building was placed 9.25 inches South of the point where the parties orally agreed that it should be placed, and if such agreement was binding, yet that fact would not give plaintiff title to the 9.25 inches of defendant's land for which plaintiff would be liable for its fair cash market value. In the first place, but for the written agreement fixing the boundary line, a most interesting legal problem is presented which would probably require a decision of this Court to settle, and that is, under the facts as disclosed where was the location of the true boundary line between the properties? Defendant acquired title through two sources, one of which was a deed from the previous owner. It is admitted that if a surveyor followed the description in this deed, the Craven survey is correct. The defendant also acquired a tax title from Ogden City. It is likewise admitted that if the surveyor followed the description contained in this deed, the Stowe survey is correct. As a legal proposition under such a state of facts, where is the true boundary line? However, the parties, by the terms of the party wall agreement, removed this uncertainty by establishing the line and there is no contention of fraud or mutual mistake involved. If thereafter there was a valid, enforceable agreement entered into between the parties that the wall should be constructed at the point designated by Stowe, and if there

was a breach of that agreement, and the wall was placed 9.25 inches South of that line, what would be the measure of damages? Certainly not the market value of the land, because defendant has never conveyed or offered to convey to plaintiff this strip of land. At most it would be an enroachment upon the defendant's land to the extent of this 9.25 inches, and, while defendant could not compel a removal of the enroachment, yet the enroachment would continue only so long as the building stood, or in other words the situation is similar to an easement or right to enroach upon the defendant's land during the life of the building. This is very different from the obtaining of a fee to this property. The measure of damages would be the difference between the value of defendant's property before and the value of the property after the encroachment.

2 C. J. S. 33.

However, there was no evidence upon which the jury could base a verdict. Therefore the most the defendant would be entitled to recover would be nominal damages, and it was error for the Court to submit to the jury the fourth interrogatory and particularly Subdivision B thereof.

CONCLUSION

It is appellant's contention that the Court misconceived the issue with respect to the issues presented on plaintiff's complaint by permitting evidence to be admitted to the jury as to what were reasonable costs to Lauch in the construction of the party wall and thereby

to permit the jury to speculate or to erroneously deduce therefrom what Lauch in turn charged the plaintiff for the construction of this wall, and that such error was prejudicial to the plaintiff and requires a reversal of of this case.

It is appellant's further contention that the Court erroneously submitted to the jury the issues presented by defendant's counterclaim and that under the undisputed facts in this case, this Court should direct the lower court to dismiss the counterclaim.

Respectfully submitted,

THATCHER & YOUNG,

Attorneys for Appellant