

1930

Samuel Moore and Charles Moore v. Deseret Livestock Co. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Moore v. Deseret Livestock Co.*, No. 4930 (Utah Supreme Court, 1930).

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CASE NO. 4930

IN THE
SUPREME COURT OF THE STATE OF UTAH

SAMUEL MOORE and
CHARLES H. MOORE,
Plaintiffs and Appellants,

vs.

DESERET LIVE STOCK
COMPANY,
Defendant and Respondent.

APPELLANTS' BRIEF

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Statement of Fact

This appeal is from the final judgment in an equity action to quiet title to 393.6 acres of land located in Summit County, Utah. The decision was made by Honorable L. B. Wight, one of the judges of the Third Judicial District Court.

The complaint (Abs. 1-2) was in the usual form of an action to quiet title. The answer (Abs. 2-12) denied the ownership of the plaintiffs and appellants and alleged in substance that this land was exchanged for other land; that while the plaintiffs and appellants were not parties to a written contract for the exchange of this land for other land, they did acquiesce in what was done; that they had orally agreed to exchange lands with the defendant and deliver possession of the 393.6 acres to the

defendant; that the plaintiffs also accepted possession of the land they were to receive in payment; that the plaintiffs herein executed a deed to the defendant and placed it with the president of David Moore and Sons, Inc., a Utah corporation, who after some five years delivered the same deed to the defendant, and asked that plaintiffs be estopped from asserting title to the land.

The plaintiffs' reply (Abs. 12-16) admitted the signing of the deed and affirmatively alleged that they never delivered, or authorized anyone else to deliver the deed; that the plaintiffs had only had a limited use of the premises of the defendant in exchange for the use of land of plaintiffs, neither sufficient to be real possession; and that the things that were done to get the plaintiff Charles H. Moore to sign the deed and to accept a deed connected with the later phases of the exchange was done by fraud, misrepresentation, coercion and undue influence; and later by amendment the reply pleaded the Statute of Frauds, sections 4874, 5811, 5813 and 5113 of the Compiled Laws of Utah, 1917.

The case was tried at Coalville before Judge Wight in April, 1928, and the Findings of Fact and Conclusions of Law and Decree in favor of the defendant were all dated the 28th of December, 1928, just before Judge Wight went out of office.

After a Motion for a new trial (Abs. 25-26) had been overruled, the Notice of Appeal (Abs. 26-30) was given, and the case is here before the Supreme Court on appeal, asking a new finding of fact, new conclusions of law and either a new trial or a decree in favor of plaintiffs.

The Agreement (Abs. 26-30) from which this cause arose was made between the defendant company and Da-

vid Moore and Mary Moore, his wife, on the 8th day of May, 1919. Mr. and Mrs. Moore had a ranch adjoining a ranch of the defendant company and the agreement was for an exchange of land. Part of the land that Mr. and Mrs. Moore agreed to transfer to defendant was the land here in controversy, and these plaintiffs, sons of David and Mary Moore, then owned an undivided two-thirds interest in it. Soon after the agreement was made David Moore died. His estate was probated and practically all of his assets were transferred to a corporation known as David Moore and Sons, Inc., with Mary Moore and the other heirs of David Moore as the sole stockholders. Mary Moore died some time after the probating of her husband's estate.

In December, 1921, the Moore corporation, these plaintiffs and Dora Moore, wife of Samuel Moore, and others interested executed a warranty deed (Defendant's Ex. B) to the land in question. At the time it was executed Samuel Moore, without objection from any others, kept possession of the deed and remained in possession of it until the Summer of 1922 when Thomas E. Moore, who is also president of the Moore corporation, obtained possession of it. Thomas E. Moore retained possession of the deed until in November, 1927, when he delivered it to the defendant in connection with the exchange of land. This suit was filed the following month, December 27, 1927.

Assignment of Errors

The Assignment of Errors (Abs. 70-77) presents twelve major assignments. The first one is subdivided into twelve subdivisions, and it alleges that the court erred

in making its Findings of Fact for each of the twelve reasons set out in Assignment I. The second Assignment of Error is subdivided into four parts and it alleges that the court erred in making its Conclusions of Law for the four reasons set forth in its four subdivisions, and also it restates the twelve reasons given in the first Assignment of Error.

The third Assignment alleges that the court erred because the preponderance of the evidence was in favor of the plaintiffs. The fourth, fifth, sixth, seventh and eighth Assignments of Error are all made to some part of the court's procedure during the trial. The ninth Assignment invokes the Statute of Frauds. The tenth and eleventh Assignments are assigned as general error in making the decision. The twelfth Assignment alleges error in not granting a new trial.

Points and Authorities

This is an equity case, so it is the Supreme Court's duty to find its own facts as well as to pass on the Law, (Utah Constitution, Article VIII, section 9).

The decision of the lower court was a violation of the Statute of Frauds and particularly of Sections 4874 and 5811, Compiled Laws of Utah, 1917, because the contract was not complete (Testimony William Moss, Abs. p. 60, Trans. p. 72) (William Moore, Abs. p. 31, Trans. p. 32) (Henry Moss, Abs. p. 56, Trans. p. 155 and other places.)

This court has held in *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767, 770: "That the contract must also be complete and certain in its terms; and that "this element of completeness must exist in every contract which can be specifically enforced, whatever be its

external form, whether written or verbal, whether embodied in the memorandum required by the statute of frauds, or rendered obligatory by part performance, or by any other act which may obviate the prohibitions of the statute." Pomeroy, section 145."

See also 4 Pomeroy, Equity Jurisprudence, 3rd Edition, paragraph 1409.

The court erred in giving a decree of estoppel against these plaintiffs as the Moore corporation was able to respond in damages, if they did not deliver the land according to contract.

It has been held in *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767, 770: "When a verbal contract has been made*****to prevent a restoration of their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract, and thus to secure for himself all the benefit of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for his failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract by decreeing its specific execution.' "

See also Pomeroy on Equity Jurisprudence, Students Edition, para. 1401.

This land was already improved, and estoppel should not be granted where improvements are for personal convenience. *Price v. Lloyd*, supra, holding: "It is also the rule that the making of valuable, or substantial, or beneficial improvements by the donee in possession, or the doing of other analogous acts which would render a revocation and refusal to complete inequit-

able, is essential to the enforcement of a parol gift of land."

The preponderance of the evidence shows that Thomas E. Moore purloined this deed, so there was no delivery. (Abs. p. 40, Trans. p. 69; Abs. 34, Trans. p. 42;) In *Gould v. Wise*, 32 Pac., 576, 577 the California Supreme Court holds: "Again it has been repeatedly held that the fraudulent procurement of a deed deposited as an escrow from the depositary by the grantee named therein will not operate to pass the title, and the subsequent purchaser from such grantee, without notice, and for a valuable consideration derives no title thereby, and will not be protected. *Everts v. Agnes*, 6 Wis. 453; *Shirley v. Ayres*, 14 Ohio, 308; *Stanley v. Valentine*, 79 Ill., 544; *Harkreader v. Clayton*, 56 Miss., 383; *Henry v. Carson*, supra; *Tisher v. Beckwith*, 30 Wis. 55." And see *Devlin on Deeds*, para. 267, p. 401.

If he did not purloin this deed the evidence shows that he got it when Samuel Moore was "non compos mentis" (Abs. p. 40, Trans. p. 70; Abs. p. 32, Trans. p. 28; Abs. p. 48, Trans. p. 107, 108 & 109; Abs. p. 36, Trans. p. 53) and handing the deed when in that condition never constitutes delivery. *Brookshire v. Brookshire*, 8 Iredell, 75; 47 Am. Dec. 346, Note 4.

Handing the deed to Thomas E. Moore under conditions described by said Thomas E. Moore (Abs. p. 48, Trans. p. 109) only made him an agent, so the right to deliver was subject to revocation. On this subject *Wigmore on Evidence Vol. IV*, para. 2408 says: "But it is clear that there can be no fixed and invariable mark of finality; or, in the older phraseology, what amounts to a delivery depends upon the circumstances of the case. No specific manual act is decisive. On the one hand, it is well accepted that

the handing of the deed to a third person is not necessarily final; the document may still be withdrawn, or (less correctly) 'revoked'."

And the Supreme Court of Missouri, in *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337, 342 says: "The execution and acknowledgment of this deed, and putting the grantee in possession of the land alone, only constitute evidence that, at the time these acts were done, the grantor intended a future delivery, provided the grantee should accept. So long as the delivery remained incomplete the grantor had the right to change his intentions, and if he saw fit, to destroy the deed."

And the Supreme Court of Indiana holds in *Osborne v. Eslinger*, 155 Ind. 351; 58 N. E. 439; 80 Am. St. Rep. 240, 247: "Where the claim of title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee, to be delivered by such person to the grantee, wither presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and control over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such further delivery is for the use of the grantee."

See also, 18 C. J. 203-204 sec. 99 c. (1); *Bouvier on Delivery*; *Shirley v. Ayres*, 14 Ohio 307, 310; *Devlin on Deeds*, 401; *Holmes v. Salamanca Company*,

5 Cal. App. 659, 91 Pac. 160; Porter v. Woodhouse, 59 Conn. 569, 21 Am. St. Rep. 131; Sneathen v. Sneathen 104 Mo. 201, 24 Am. St. Rep. 326.

If Thomas E. Moore was the agent of Samuel Moore and Charles H. Moore when the deed was received, they had the right and power to revoke under circumstances shown in this case. Montagne v. McCarroll, 15 Utah 318, 49 Pac. 418, 420; 2 C. J. 533, para. 157; Walker v. Hancock Company, 80 N. J. L. 342; 79 Am. Dec. 354, 35 L. R. A. N. S. 153, 157; Park v. Frank (Cal.) 17 P. 428; Black v. Harshaw, 54 Pac. 21; Wilson v. Wilson, 128 Ill. 567, 49 Am. St. Rep. 176, 178; Cook v. Brown, 48 N. H. 460, 476.

If there was a delivery here it was conditional, and so was subject to revocation.

On this point Devlin on Deeds, 435, says: "To make a delivery to a third person valid, the delivery to him must have been unconditional, and the grantor must have parted with all control over the deed so that it would have been the duty of the depositary to refuse to return the deed to the grantor, if he should make such a request."

See also Pomeroy on Specific Performance, para. 135; Price v. Lloyd, *supra*; Osborne v. Eslinger, *supra*.

Revocation of agency may be express or implied.

2 C. J. 538, sec. 163, (2) says: "The revocation may also be implied from the words or conduct of the principal inconsistent with the continuation of the authority, as by a demand for property sent to the agent. However, revocation will not be inferred if the principal's conduct is not necessarily inconsistent with a continuance of the agency."

See also: Story on Agency, 9th Ed., para. 474, p. 586.

It is sufficient revocation of the agency that the third

party is notified to deal directly with the principal and not with an agent. *Troxell v. Lehigh Crane Iron Co.*, 42 Pa. 513.

The agency of Thos. E. Moore, if he ever was an agent, was terminated by the breaking into factions. Says *Corpus Juris*, vol. 2, page 543:

"No particular form is required for the abandonment of renunciation of an agency****it may be effected****by implication****where the agent puts himself in a position antagonistic to his principal****"

The power of attorney given to Samuel Moore by Charles Moore was notice of its contents under the Utah laws whether it was indexed or not:

An index is not a part of record, but is simply a convenience for the aid of a searcher of records, etc. 31 *Corpus Juris*, note 69 and *Curtis vs. Lyman* 24 Vt. 338, 342, 58 Am. Dec. 174.

Section 4875 of the Compiled Laws of Utah for 1917 provides that every instrument affecting real estate to be binding shall be proved, acknowledged, and recorded. There is not requirement of an indexing. It is then made full notice to third persons.

Section 4900 provides that

"Every conveyance or instrument in writing affecting real estate executed, acknowledged or proved and certified in the manner prescribed by this title*****shall from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagors, and lienholders shall be deemed to purchase and take with notice."

The deed obtained from Charles H. Moore and the one accepted by him were, as appellant contends, obtained and received under marked undue influence. The rule

in such cases is:

“Undue influence, either alone or in combination with other inequitable elements, is a very frequent ground for the cancellation of instruments so obtained. There seems to be little doubt that undue influence on one side, coupled with injury on the other, will be enough to set aside an instrument, even where there is no ground for imputing fraud or unfair dealing.*****

The courts have uniformly set aside instruments where, in addition to undue influence used in procuring them, there existed further inequitable elements such as mental weakness, inadequacy or want of consideration, pecuniary pressure, fraud, want of consideration and fraud, mental weakness and improvidence, etc.” 9 C. J. 1179-1180, Sec. 43.

“The relationship of the parties, the character of the transaction and the mental condition of the grantor are material matters in deciding whether undue influence has been exercised.” Devlin on Deeds, Vol. I, p. 134 (3rd Edition).

Argument

Under the appellants' theory of this case they particularly urge the Supreme Court to use its right to find its own facts in this case, for the findings of the lower court appear to them to be extremely inequitable.

The total want of any contract of appellants with the Live Stock Company seems self evident herein. William Moss, who then was, and now is, manager of the Deseret Live Stock Company (Abs. 61, Trans. 176) plainly stated when on the witness stand that this deal was made with David Moore and in no place does he claim that the Live Stock Company had any completed deal with either of the appellants. Samuel Moore (Abs. 33-34, Trans. 38-39) plainly states that in a separate conversation had with

William Moss, they arranged for each one to use the other's land, but in no place is it said that they had already traded land and under the trade delivered possession, or that the Live Stock Company considered that it had made a deal with either Samuel or Charles H. Moore. In the letter from Henry Moss, secretary of the Live Stock Company, to Samuel Moore on July 23, 1927, he says:

"Our people was willing to live up to the contract made with your father, prior to his death but they will not etc.*****I am asked to write you and forbid you cutting any hay off from ground that the deeds stands in the name of the Deseret Live Stock Company*****it appears as though the deal will have to be called off unless something is done in the very near future to bring it to a final settlement."

And on October 12, 1927, he again says:

"Will say that we have no contract for land deals in your part of the country other than (with) David Moore now an estate and inasmuch as you said that you was ready to do business with our company we have no contract stating that you are implicated whatever other than you are an heir of the estate and if we are unable to do business with the David Moore Estate then the contract is called off." July 23, 1927 I was authorized to write you and forbid you putting up hay on any land that the title stands in the name of the Deseret Live Stock Co."

President Hatch of the Live Stock Company (Abs. 57, Trans. 160) says: "I always understood they wanted to go through with the deal," but go through all of his testimony, or that of Henry Moss or of William Moss, and there is no place that they directly, or by the general intentment of they words, show that they considered that they had closed a trade with, or delivered possession of their land to, Samuel Moore and Charles H. Moore, or re-

ceived possession of land from them in return. In Henry Moss's letter of October 12, 1927 (Pltfs. Ex. 15-F) he asserted the right and threatened to enjoin Samuel Moore from using the Live Stock Company's land. The defendant's own witnesses never in one place show that they considered either the trade or the possession final.

It was certainly the duty of the Live Stock Company, when it came into court and asked for the equitable remedy of estoppel, to show from the existant facts that it was entitled to estoppel. Surely, under the case of Price v. Lloyd, *supra*, and under the general rules of Equity, they had to show, in order to avoid the effect of the Statute of Frauds, that the legal remedy of suing the Moore Company for damages for a failure to deliver the appellants' two-thirds interest in section sixteen was not open to them. There is not one word of evidence in the transcript to show that the Moore Company could not have responded in damages if the Live Stock Company had sued them. That failure of proof above, we contend, should reverse this case.

William Moss (Abs. 60, Trans. 172) plainly says, it would work no hardship on the Live Stock Company to take the land back. As an amendment to the defendant's answer and cross-complaint, Mr. Neeley, on the eve of trial, added an averment that the defendant would suffer irreparable injury if title to the land set forth in plaintiffs' complaint was decreed to the plaintiffs, but his own star witness, William Moss, (Abs. 60, Trans. 172) says that if the deal did not go through they would have to put the fences back on the line, and elsewhere he has testified that they had built about 5 miles of fence at a cost of about sixty dollars per mile, so the damage would

amount to about three hundred dollars only. This is all the evidence that the defendant has adduced to show that Utah's largest live stock company would be irreparably injured by a failure of the court to enforce the salutary Statute of Frauds and to grant it an estoppel in this case

The appellants contend strongly that the preponderance of the evidence in this case shows that Thomas E. Moore purloined the deed (Pltfs. Ex. 2) from his brother Samuel and the surrounding circumstances of both copies of the contract of February, 1921, going at about that time strongly confirms the contention. If he did not purloin it, the undisputed evidence shows that he got it after Samuel was (mentally) sick—'non compis mentis'. Dora Moore, Samuel's wife. (Abs. 40, Trans. 69-71) positively states that her husband had the deed up to August 1, 1922. Samuel Moore (Abs. 34, Trans. 42) states positively that he had the deed up to the time he took (mentally) sick in August, 1922. He states that it was still in his little safe (Abs. 34, Trans. 42; Abs. 38, Trans. 64) and that he never did deliver it to Thomas E. Moore, or authorize him to take it. It then was the duty of the trial court, and now is the duty of the Supreme Court to decide which of these parties is telling the truth. This family company is broken into two factions. Will the Court believe T. E. Moore, who is supported only by D. E. Moore, who has practically sold all his belongings in the company, and his employee nephew, C. F. Moore, who from his testimony herein shows a wonderful memory for anything derogatory to Samuel Moore, and is palpably forgetful no matter how recent of anything or everything that hurts T. E. Moore or the Moore corporation, and some sisters in California who know nothing of the busi-

ness? Or will it believe Samuel Moore and Dora Moore who are supported by William Moore, who was trusted by both factions to serve as administrator of his father's estate and who shows up here as a fair, "square shooter" and who was trusted to draw a contract of settlement (which has now mysteriously disappeared) for the Moore Company to get Samuel's and Charles' interests in Section 16? And by John E. Moore of Evanston, whose testimony and every act here shows an absolutely reliable, trustworthy, solid and truthful man in every regard?

How improbable it is that the contract made with Samuel Moore about February, 1921, 11 months before the execution of this deed, and of which there were two carbon copies (Abs. 31, Trans. 20) should disappear, together with both of the copies, and all so nearly at the same time unless there was some crooked work going on. (Abs. 31, Trans. 22) The questionable passing of the deed into the hands of T. E. Moore with the disappearance of all three copies of this agreement at about the same time, as shown by the testimony, both affirmative and negative, with the newly hatched-up story of the old buck pasture fence being the cross fence intended show wicked, deliberate fraud. Thomas E., when testifying for the defendant, (Abs. 48, Trans. 109) says that Samuel handed him this deed and told him to fix it up and deliver it to the Live Stock Company. He doesn't say when that was other than early in the summer of 1922, and Mrs. Dora Moore and Samuel Moore are positive that the deed was in Samuel's possession until the first of August of that year, when Thomas E. Moore arrested him because of his mental condition. It was on Thomas E. Moore's initiative that Samuel was then confined for one

year. Right while he was so confined the deed is obtained and the contracts disappear! For some occult reason, to be read between the lines, William Moore and John Moore, substantial, fair men, part ways with their brother Tom. Is it a fair delivery? (Abs. 40, Trans. 70; Abs. 32, Trans. 28; Abs. 48, Trans. 107-108-109; Abs. 36, Trans. 53.)

Even if Sam did hand the deed to Tom and say what Tom says he said (Abs. 48, Trans. 108-109) it was only a conditional delivery. Either the agency or the delivery was revocable. It is evident from first to last that at that time the written contract drawn by William Moore [Abs. 31, Trans. 22] was relied upon absolutely by Samuel Moore, and that Samuel executed the deed [Pltfs. Ex. 2] in reliance on the contract and the Moore company signed minutes of December 1, 1921. [Abs. 31, Trans. 22-23; Pltfs. Ex. 8] It is undisputed that Sam then kept the possession of the deed and retained it until Tom got it.

It is also undisputed that Samuel considered that written contract to be in force and in existence until at least the summer of 1923 and from Samuel's letter of July 20, 1922 [Pltfs. Ex. 14] coupled with the Live Stock Company's letter of December 12, 1921 [Pltfs. Ex. 12] it is farther evident that Sam depended on deeds from the Live Stock Company direct for the land between the tracks. It is evident that David Moore made his contract with the Live Stock Company relying on his ability to get the two-thirds interest that Samuel and Charles had in Section 16. Neither Sam nor Charlie had any part in it. The Live Stock Company relied entirely on it. Up to the time of his death it never considered Charlie or Sam as directly contracting with it. That after David

Moore's death the plaintiffs were unwilling to have further dealings through the Moore Company or the estate. Something of this must have been said to the Live Stock Company officials, for in its letter of December 12, 1921 [Pltfs. Ex. 12] the defendant and respondent by Henry Moss, tells Samuel that they are prepared to transfer the land TO HIM. It was this contemplated contract and it only that Sam wanted to complete. This was before the Moore Company divided into factions, before the execution of the deed [Pltfs. Ex. 2] and certainly a fair construction of this letter is at least an offer to Samuel Moore to go and contract directly with him. Search this case for direct evidence, or evidence between the lines, and it must be apparent to this Court that Samuel Moore never did anything that was inconsistent with his expectations that he was to deal directly with the Live Stock Company.

The Court will notice also that, taking Thomas E. Moore's own statement [Abs. 48, Trans. 109] of what happened when, as alleged, Sam handed the deed to him, it came to him with instructions for him to do something for Sam. That made him Sam's agent or else made it a conditional delivery. He then goes on to say that Sam never afterward complained as he remembers it. Tom is not sure. When Sam went back on the witness stand [Abs. 66, Trans. 202] he positively stated that at one time in May, 1925 he told Tom he did not want him to handle or to attempt to handle any matter of his business in any shape, manner or form. This specific conversation, though pointed out with surrounding instances, is never denied. It certainly constituted a revocation of either the alleged conditional delivery or appointment of an agent, as the defendant contends happened in this case.

William Moore (Abs. 31, Trans. 24) makes the statement, which is nowhere disputed, that his brother Sam and wife did not want to turn their interest (in section 16) and in the estate unless they got the meadow between the tracks, and so there was a written contract drawn up to that effect and for that purpose between William Moore as administrator of the estate of David Moore and Mary Moore, widow of David Moore, and Samuel Moore and his wife Dora. If the Court will follow the abstract and transcript closely, it will notice that in no place was there any repudiation, by either Thomas E. Moore or the Moore Corporation, of that understanding and agreement. In the Moore company meeting the following December it came before the stockholders and a failure to repudiate it certainly amounted to its ratification. The Court will also notice that Thomas E. Moore had possession of all the company papers, was manager of the business, and lived at Coalville, right by the ranch, and he could not help but know that everything Sam did was meant to be conditional upon that agreement. That is true even if Tom's story is the true one.

The cross fence meant in the agreement above referred to, and in the minutes of the meeting of December 21, 1921 (Pltfs. Ex. 8), must have been the one below the ranch house, because William Moore, who drew the contract, so understood it (Abs. 31, Trans. 24); Samuel so understood it (Abs. 35, Trans. 49); J. E. Moore so understood it (Abs. 45, Trans. 91); and J. E. Moore says: (Abs. 44, Trans. 91) that the agreement that Will drew was exhibited and read at the meeting of December 21, 1921. Any delivery was conditional upon Sam getting the land he traded for—that between the tracks.

If there was no other revocation of Thomas E. Moore's alleged agency, or delivery, the four and one-half years of strained, embittered relations between these two brothers (Abs. 51, Trans. 124) alone revoked it. The statement made by Sam to William Moss (Abs. 61, Trans. 176) that he wanted to have the deed made direct to him, his statement to President Hatch (Abs. 58, Trans. 162) that "We will expect deeds from the Live Stock Company for the land between the two tracks" made on July 20, 1922; Sam's letter to the Deseret Live Stock Company of May 20, 1927 (Abs. 56, Trans. 156; Pltfs. Ex. 15-C) six months before the delivery of the deed, saying: "We certainly object to him [T. E. Moore] trading or [our] property off for property under the name of David Moore & Sons, Inc. or any other Co. or persons name. When the proper deeds made out from your Co direct to Charlie H. Moore and Samuel Moore for certain lands north of the old U P R R Co right way then we can no dout get together on this," all constituted a revocation of the agency. *Perrine v. Jermyn*, 163 Pa. 497; 30 Atl. 202; *Troxell v. Lehigh Crane Iron Co.*, 42 Pa. 513. All Sam did up to that time, we contend, even according to T. E. Moore's story and that of the defendant only amounted to trying to fix up a trade. The right to do it was always revocable.

The well established and elementary rule of Agency that where a third person, is dealing with an agent authorized to transact only one piece of business, it is the duty of the third person to inquire into the extent of the agency is applicable here. The Live Stock Company's great mistake here was that even though it was warned and forewarned of the revocation of any possible agency

of Thomas E. Moore, [or of the Moore corporation] to do business for Samuel Moore or Charles H. Moore, these warnings went unheeded and it accepted a deed six years old when the age of the instrument alone would have been warning to it not to take it without investigating the right of Thomas E. Moore or the Moore Corporation to deliver it, knowing as they did know of the strained relations existing in the Moore family [Abs. 61, Trans. 176] [Abs. 56, Trans. 155] [Pltfs. Ex. 15-A, 15-C, 15-I] [Abs. 60, Trans. 171]. This all shows that far from making an inquiry, as it is required to do as a party dealing with an agent so commissioned should do, that the Live Stock Company wilfully closed its eyes and went into this thing blind.

After this case was filed in the district court, Thos. E. Moore and D. E. Moore went to Evanston, Wyoming, and got their brother Charles H. Moore, [who, [Pltfs. Ex. 18] Thomas E. Moore had said under oath on July 16, 1926, was so far mentally incompetent that he needed a guardian,] to give them a deed and to accept a deed from them. This was done though Samuel Moore had a power of attorney from Charles which was on file with the county clerk of Summit County, though not indexed. Under the laws of Utah, indexing is not required to make a recorded instrument constructive notice. This is so evidently a case of the use of undue influence that the writer of this brief does not deem it necessary to go into it further at this time.

Respectfully submitted,

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