

1930

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

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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

vs.

DESERET LIVE STOCK  
COMPANY,  
*Defendant and Respondent,*

Case No.  
4930

FEB

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## Respondent's Brief

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## RESPONDENT'S BRIEF

### PLEADINGS

In their final analysis the pleadings are:

A complaint to quiet title by adverse possession to land lying north and west of the new railroad track in Section 16, Tp. 5 N. R. 7 E. S. L. M.

Answer denying plaintiff's title; alleging title in defendant, and pleading an estoppel to deny defendant's title by reason of a contract (verbal on the part of plaintiffs) and acts in pursuance thereof and the execution of certain deeds.

And plaintiffs reply and deny defendant's title; plead the statute of frauds to the verbal agreement, fail-

ure to authorize delivery of the deed, and attempt to plead fraud.

## STATEMENT OF FACTS

Plaintiffs appeal from a judgment in favor of defendant. Defendant and one David Moore entered into a written contract, (plffs. Ex. 1) for the exchange of certain lands in said contract described. Plaintiffs did not sign this contract, but the land in controversy was covered therein, and plaintiffs agreed to said contract and that their land should be governed thereby, in exchange for certain other land to be received by them separately, which lands are described in the answer. David Moore died and his interest was taken over by David Moore & Sons, Inc. The transaction became a triangular affair between the plaintiffs, David Moore & Sons, Inc., and the defendant. All parties went into the possession of the respective lands they were to receive, and were so possessed at the commencement of this action; each party made valuable improvements on the land it possessed, and Samuel Moore made most of defendant's improvements. Each party had the use and products from his said land to the commencement of this action. By mutual understanding the taxes were paid by the record title holder for the use of the equitable title holder in possession. The contract provided for deeds when certain surveys were made. The point and line of survey was determined at the time of making the contract. The survey was to determine the acreage. When David

Moore died, it caused delay in securing the deeds, but the deal was not called off. David Moore & Sons, Inc. and these plaintiffs owned the land in Sec. 16, Tp. 5 N. R. 7 E. S. L. Meridian., which is included in said exchange. These parties executed a deed conveying to defendant the part of Sec. 16 it was to receive under said exchange. Said deed was subsequently delivered by Samuel Moore to T. E. Moore, who was president of David Moore & Sons, Inc. "with instructions for him to close the deal and deliver the deed to defendant." These instructions were never modified or revoked. The survey completed and the acreage determined, this defendant conveyed the land intended in the contract to David Moore & Sons, Inc. David Moore & Sons, Inc. conveyed the land intended in the contract to defendant, and at the same time delivered the said deed to the land in Sec. 16.

Subsequent to the execution of plaintiff's Ex. 1, (the Contract of Exchange) these plaintiffs and David Moore & Sons, Inc. determined what land the plaintiffs were to receive in this exchange. (See Plffs. Ex. 8) Defendant tendered to plaintiff, Samuel Moore a deed to the land so determined, which deed was refused. A deed was tendered to plaintiff, Charles H. Moore, for his land, and by him accepted and recorded.

A dispute arose between the plaintiffs and David Moore & Sons, Inc., as to the land plaintiffs were to receive under Plaintiff's Ex. 8. It involved the location of the cross-fence. Defendant was not made aware

of this dispute until after the exchange had been completed between it and David Moore & Sons, Inc. Plaintiffs now seek to claim the land received by defendant from them in Sec. 16. Neither has offered to make good the expenditures of defendant under the contract of exchange; each continues in the possession of the land it was to receive under the contract of exchange, and the plaintiff Charles H. Moore holds a deed he had recorded to the land he received under the exchange. (Plffs. Ex. 7), and gave to Defendant a deed of further assurance. (Plffs. Ex. 5). David Moore & Sons, Inc., is not a party to the action.

## POINTS AND AUTHORITY

This exchange of lands is taken out of the provisions of Secs. 4874, 5811, 5813 and 5113 of the Compiled Laws of Utah, 1917, because there was part performance.

In that, there was a mutual assent and agreement that each party should and they did immediately enter into the possession of and claim as their own the respective tracts exchanged, and so continued to possess and claim up to the commencement of this action, and had an arrangement as to payment of taxes, and in reliance on said exchange the defendant, without objection by plaintiffs, made valuable and permanent improvements thereon, and each party to said exchange had the use and products from his respective land.

Each party entered the land and claimed it as his own: Testimony of Samuel Moore, (Abs. 23, Trans. 49, Abs. 37, Trans. 55-59, Abs. 38, Trans. 62, Abs. 39, Trans. 68); Charles H. Moore, (Abs. 43, Trans. 83-85); T. E. Moore, (Respts. Abs. 6-7, Trans. 98-100); William Moss, (Abs. 59, Trans. 168); Sterns Hatch, (Abs. 57, Trans. 59-60); Clarence F. Moore, (Abs. 62, Trans. 160-180).

In reliance on the exchange permanent valuable improvements were made: Testimony of Samuel Moore, "I built many of the partition fences for the Live Stock Company between 1919 and 1925", (Abs. 38, Trans. 60); William Moss, (Respts. Abs. 13-15, Trans. 165-171); T. E. Moore, Abs. (Abs. 46-7, Trans. 100-103; Clarence F. Moore, (Abs. 62, Trans. 162-180); Henry Moss, "I understand our company has relied on the deal and kept and improved the ground they were trading for", (Abs. 56, Trans. 154).

There was an arrangement between the parties as to payment of taxes. Testimony of Henry Moss, (Respts. Abs. 11-12, Trans. 152-155).

A verbal agreement to exchange lands when followed by possession, is thereby part performance, and will be enforced:

See: Pomeroy's Specific Performance of Contracts, Third Edition, Page 343, Sec. 134.

Also, Gilbert vs. Slaker, (Cal.) 12 Pac. 172.

And a fortiori, a parol exchange of lands followed by occupancy and substantial improvements thereon in

reliance on the exchange, and payment of taxes, all done with the consent and knowledge of the Vendor, in part performance, and will be enforced.

See: Hogan vs. Swayze, et al. 65 Ut. 380).

Also, Pomeroy on Contract (2d Ed.) Sec. 126, and 36 Cyc. Page 656, both cited in the above case as sustaining the rule.

“The plaintiffs never repudiated the contract, on the contrary, always acknowledged it.”

Samuel Moore, (Abs. 37-39, Trans. 60-68); Charles H. Moore, (Trans. 84); Sterns Hatch, “Sam and Charlie never repudiated the contract,” (Abs. 57, Trans. 159). (See other testimony heretofore referred to.) William Moss, (Respts. Abs. 15, Trans. 169).

The dispute was between David Moore & Sons, Inc., and these plaintiffs and involved the location of a certain cross-fence under a separate agreement between these parties. (See Plffs. Ex. 8), and Tstimony of William Moore, (Abs. 31, Trans. 24).

The trial court found said fence to be located as contended by David Moore & Sons, Inc., (See Abs. 18-19, Par. 5 of Findings).

This finding is supported by the greater weight of the evidence: Testimony of T. E. Moore, “Because Sam gets aproximately the same acreage as he conveyed when he takes to the cross fence in Sec. 21,” (Abs. 48-9, Trans. 110-12); “To give Sam to the cross fence in 32 he would get much more in value than he sold.” Abs. 48-9, Trans.



110-112); Sam on various occasions wanted to buy the land between the tracks in Sec. 32 from David Moore & Sons, Inc., Testimony of T. E. Moore, (Abs. 52-53, Trans. 133); Clarence F. Moore, (Respts. Abs. 19-20, Trans. 186); David E. Moore, (Abs. 64, Trans. 194); Finally Sam and J. E. Moore entered into a written agreement to purchase the land between the tracks including that in Sec. 32. (See Defts. Exs. C & D.), (Abs. 49, Trans. 113-120).

At no place in the record does it appear that the plaintiffs made it known to defendant that land to a certain cross fence in Sec. 32 was claimed by them, and it knew of no friction about the deal until 1927. Testimony of Henry Moss, (Abs. 56, Trans. 154); Testimony of Stearns Hatch, (Abs. 57, Trans. 159-60.) (See Plffs. Exs. 15a to 15j inclusive).

The deed tendered was in accordance with the above finding. (See Plffs. Ex. 4).

The above dispute between plaintiffs and David Moore & Sons, Inc., in no way involved this defendant in carrying out the contract of exchange, (Ex. 1).

At the commencement of this action the contract of exchange was complete. Testimony of T. E. Moore, (Respts. Abs. 10, Trans. 128.) (And also the foregoing testimony)

“The time at which the completeness must be ascertained, is the commencement of the action.”

See: Pomeroy's Specific Performance of Con-

tracts, Third Edition, Page 401, Sec. 158, and cases cited.

Plaintiffs' Ex. 2, the deed from Samuel and Charles H. Moore, et al. to the defendant is in pursuance of the contract of exchange, and there was a lawful delivery to defendant.

Testimony of T. E. MOORE, "I had the deed (Plffs. Ex. 5). Samuel delivered it to me sometime in the early part of Summer, 1922. Samuel and his brother tried to close the deal and met some difficulty. Sam handed me the deed and said, 'Fix this up as soon as you can; the Deseret Live Stock Company said they couldn't deal with Will and he is no brother of mine'. Apparently they had had a disagreement. Sam said to take it and deliver it to the Live Stock Company. He delivered it to me at the front door of my garage as I was coming out of the door. He never afterwards complained, as I remember, about delivering it nor asked me to return it." (Abs. 48, Trans. 108-110. On cross examination Mr. Moore testified: "I say that Sam gave me the deed in 1922 with explicit direction to close the trade, deliver the deed and that the directions were never changed, modified or refuted." (Abs. 55, Trans. 145).

A deed delivered to a third person with instructions to deliver to the grantee, with intent of the grantor that grantee become possessed of the premises is sufficient delivery.

See: 18 C. J. Pages 203-205, Secs. 99, 100 & 101.

"Delivery to a third person for the grantee, without any reservation by the grantor of a right to recall it, is sufficient in law, and effects a complete transfer of the title to the property." 8 R. C. L. Page 991, Sec. 57.

The live stock company was never told that there was a deed out in connection with this transaction which should not be delivered. Testimony, Smauel Moore, (Abs. 59, Trans. 66); Dora Moore, (Abs. 40, Trans. 71).

For this reason plaintiffs are estopped to deny the deed. *Bailarge vs. Clark*, (Cal.) 79 Pac. 268. The Syllabus to this case states: "One who executes a voluntary deed to her husband, which she does not deliver, but he steals from her possession, is estopped to assert title against an innocent purchaser from him, etc."

The foregoing discussion disposes of appellants assignments of error Nos. 1, 2, 3, 4, 5, 6 & 7, as to the Court's Findings.

Appellants at Page 9 of their brief refer to a certain power of attorney. (Plffs. Ex. 9) purported to have been given by Charles H. Moore to Samuel Moore, both plaintiffs in this action.

This power has no bearing in the case because it is a limited or special power and does not cover the point in controversy. And if it did the only conclusion that could be drawn between the plaintiffs herein and the defendant, would be that Samuel Moore has been empowered by Charles H. Moore to deal in his behalf in relation to this exchange of lands, and could do nothing contrary to the exchange as each were parties to it.

Appellants claim undue influence in obtaining the deed from Charles H. Moore. (Plffs. Ex. 5).

Such undue influence is not pleaded by plaintiffs.

(See Par. 12 & 13 of their reply) (Abs. 14-15). The only allegations are general and conclusions of law, while to plead undue influence the allegations must be specific and set forth the things constituting undue influence.

See: Bancroft's Code Pleading, Vol. 1, Page 99,  
Sec. 46, and cases cited.

To the introduction of any evidence of undue influence under such pleading the defendant made timely objection. (See Trans. 87-90). The matter was argued and at Page 90 of the Transcript the Court said: "I wouldn't want to pass on that in advance, I said we would receive it in evidence now and then as to the credence and the ruling in view of the allegation in the reply that matter could be taken up later."

At Pages 124-125 of the Transcript, the Court makes its ruling, holding that the objection is well taken and that the evidence should not be considered.

In executing said deeds Charles H. Moore acted voluntarily and with full knowledge of the facts. (Abs. 42-43, Trans. 76-90). And under these circumstances there was no undue influence.

Hatch vs. Hatch, 46 Ut. 218

Frubang vs. Tilley et al., (Ut.) 172 Pac. 676.

The above disposes of plaintiff's assignment of error No. 8 to the Findings.

Plaintiffs assign error because of the introduction of defendants Ex. "C and D." These exhibits do not represent an offer of compromise between the parties to

this action, but at any event the agreements were acted upon by ~~Plaintiff~~, Samuel Moore for nearly two years, and are admissions against him.

From the foregoing discussion it is clear that there was a contract of exchange, and that it was unambiguous, complete and certain, and that part of plaintiffs' land was included in the contract and that they acquiesced therein.

Now, if plaintiffs' Ex. 2 is good as a valid deed, then both are estopped by deed. 21 C. J. Page 1067, Sec. 26.

The same doctrine applies as to plaintiff, Charles H. Moore, if plaintiffs' Ex. 5 is good.

If the Court should hold that the above deeds are not valid, the plaintiffs are estopped to claim title by reason of passively looking on and suffering defendant to enter into the contract of purchase and expend his money on the land and cause the taxes to be paid in an erroneous opinion of title, without making known their claim.

Clark vs. Kirby & Wilson, 18 Ut. 258, wherein the maxim applicable to such a case is stated: "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to keep silent." The case is in point.

Also,

21 C. J. pp. 1160-61, Sec. 163.

48 L. R. A. (NS) pp. 754 and 759.

The plaintiffs are estopped from claiming title by failure to return the benefits at the time of filing their reply. This is particularly true of the defendant, Charles H. Moore, who held a deed for his part of the exchanged land. Plaintiffs' Ex. 7.

See:

21 C. J. Page 1206, Sec. 207.

Florence Oil, etc. vs. McCandles, (Colo.) 58 Pac.  
1084.

The above disposes of the remainder of plaintiffs' assignments of error to the Findings.

If defendant should fail in its defense through estoppel, it would still be entitled to specific performance.

The Court having attained jurisdiction of both the parties and the subject matter of the action, will retain that jurisdiction until justice is done.

Kinsman et al. vs. Utah Gas & Coke Co., (Ut.)  
177 Pac. 418.

Under the circumstances as outlined in this case the defendant is entitled to Specific Performance of the Contract of Exchange.

See Hogan vs. Swayze, 65 Ut. 380, where specific performance was granted.

In the case of Gallagher vs. Gallagher (W. Vo.)  
5 S. E. 299, the Court said:

“The fraud which will entitle the purchaser to a specific performance is that which consists

in setting up the statute against the performance after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired: so that the refusal to complete the execution of the agreement is not merely a denial of rights which it intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence, which have misled the purchaser to his harm, to be estopped from setting up the Statute of Frauds."

The above doctrine is cited with approval in the case of *Bracken et al. vs. Chadburn et al.* (Ut.) 185 Pac. 1021.

## EXCHANGE OF POSSESSION AND MAKING IMPROVEMENTS

Where in pursuance of an oral agreement for the exchange of lands the possession of the land which each party is to receive from the other is taken and valuable improvements are made thereon, it is universally held that this is a sufficient part performance of the contract for exchange to take the contract out of the operation of the statute of frauds so that a court of equity may decree its specific performance. *Purcell v. Miner*, 4 Wall. 513, 18 U. S. (L. ed.) 435; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 S. Ct. 286, 32 U. S. (L. ed.) 673, *affirming* 23 Fed. 168; *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172; *Armstrong v. Fearnaw*, 67 Ind. 429; *School Dist. No. 1 v. Holt*, 226 Mo. 406, 126 S. W. 462,

136 Am. St. Rep. 651; Brown v. Bailey, 159 Pa. St. 121, 28 Atl. 245; Jermyn v. McClure, 195 Pa. St. 245, 45 Atl. 938. In Evins v. Sandefur-Julian Co. 81 Ark. 70, 98 S. W. 677.

See Annotation in Am. Ann. Cas. 1912 A Pages 308-311.

The further comment is made that the Supreme Court will give much consideration to the trial Court's Findings.

Kinsman et al. vs. Utah Gas & Coke Co. (Ut.)  
177 Pac. 418.

And the Conclusions and Decree are such as would follow and are sustained by the Findings of the lower Court.

## ARGUMENT

There was a valid contract of exchange followed by the execution and delivery of deeds, with the exception of plaintiff, Samuel Moore, who refused the deed tendered.

At no place do the plaintiffs deny such contract, but seek to avoid it by claiming that they were entitled to the land between the tracks to the cross fence in Sec. 32, and claiming the right to deal with the Live Stock Company direct. Samuel Moore testified, "I am ready to deal with the Live Stock Company direct in this exchange. I would not deal with the Moore Company even if I get the same thing." "Neither company has ever offered me a dede to the ground betwen tracks west of Section 21



and down to the cross-fence." (Abs. 39-40, Trans. 68-69). Respondent believes that this testimony clearly sets forth the appellants' contention.

But they are not justified in taking this position against the Live Stock Company.

In the first place plaintiffs knew just what the deal was, an exchange of lands entered into between their father, David Moore, and the defendant company, which exchange included some lands of the plaintiffs. See Plffs. Ex. 1.

Second, Samuel Moore helped to make the deal, went over the ground and helped fix the lines, well knowing that part of plaintiffs' land was included and that defendant relied on getting this land. Samuel even built many of the fences. (Respt. Abs. 13-14, Trans. 164-166.

Third. The Deseret Live Stock Company went into the possession of the ground it received under the exchange, which included the plaintiffs' said land, made valuable improvements thereon in reliance on the contract, with the knowledge, consent and acquiescence of the plaintiffs. (Abs. 58-61, Trans. 163-172, and other testimony).

Fourth. These plaintiffs and David Moore & Sons, Inc., entered into the possession of the land received under the exchange from the defendant company, made improvements thereon and had the use and products of same (Respts. Abs. 5-7, Trans. 97-104. Testimony of Samuel Moore, "Since 1919 Charles and I have occu-

pied the land between the tracks, from the cross fence near the ranch house on Sec. 32 up to the South line of Section 16 by grazing my cattle and putting up hay on it. Live Stock Company has occupied that part of Sec. 16 north of the tracks." (Abs. 35, Trans. 49-51. Respts. Abs. 7, Trans. 99-101).

Fifth. Each party claimed the land as his own. (Respts. Abs. 6, Trans. 97-100.)

Sixth. An arrangement as to the payment of taxes on the lands exchanged was entered into whereby each paid on the record title for the use of the equitable titl holder. (Henry Moss, Respts. Abs. 11-12, Trans. 152-155).

Seventh. On December 1st, 1921, an arrangement (to which defendant was not a party and knew nothing of until the commencement of this suit, See testimony of William Moore, Abs. 67, Trans. 208) was entered into between these plaintiffs and David Moore & Sons, In., dividing the lands each was to receive under the exchange. (See Plffs. Ex. 8, and Testimony of Wm. Moore, Abs. 31, Trans. 19-24).

Eighth. Defendant continued to use the land it had received under the exchange in the same way and under the same conditions without objection on the part of plaintiffs until the fall of 1927, just prior to the commencement of this action. At the commencement of the suit defendant was in the same way holding the land.

Ninth. The plaintiffs and David Moore & Sons, Inc., at the commencement of the suit were likewise holding the land received from defendant

Ten. Sometime after December 1st, 1921, a dispute arose between the plaintiffs and David Moore & Sons, inc., as to the location of said cross-fence. This dispute was never communicated to the defendant. (See testimony of Sterns Hatch, (Abs. 57-58, Trans. 159-163); William Moss, (Abs. 58-60, Trans. 163-177); Henry Moss, (Abs. 56, Trans. 155-158). These parties merely knew there was some friction between the Moore interests.

Acting in accordance with the sum of the foregoing ten propositions, the defendant and David Moore & Sons, Inc. on Dec. 12, 1927, closed the deal by the execution of deeds and a mortgage to secure the difference, in accordance with the terms of the contract of Exchange, plffs. Ex. 1. Thus leaving the plaintiffs and David Moore & Sons, Inc., to settle between themselves any dispute they might have as to the division of lands received by them under the contract, such parties on Dec. 1st, 1921, having entered into such an agreement.

Defendant could not have dealt direct with the plaintiffs had it desired to do so. The contract which plaintiffs had acquiesced in and acted under and made their own from 1919 to 1927, was a contract between defendant on the one hand and David Moore and Sons, Inc. on the other hand. The consideration for plaintiffs letting part of their lands go to defendant under the contract was a division of lands which defendant let David

Moore & Sons, Inc. have under the contract. Such is clearly evidenced by the minute entry (Plffs. Ex. 8) and the testimony as to the location of the cross-fence. This exchange of lands involved many hundreds of acres of which the plaintiffs' land in the exchange was but a fraction. When David Moore & Sons, Inc. complied with its part of the Exchange Contract, defendant was bound to convey in accordance with the terms of said contract. It could not convey to the plaintiffs land which was under the contract to be conveyed to David Moore and Sons, Inc. without its consent. The point that plaintiffs overlook, is that through their actions and words over a period of years, and in the beginning at the inception of the contract, they made it their contract in so far as their land covered therein is concerned in this transaction.

“Equitable estoppel may be established by proof of silence when conscience requires one to speak, by acts or language.” (18 Ut. 258).

When plaintiffs brought this action the defendant pleaded the whole fact and was bound to make an offer of and do equity so far as in its power. To comply with this a deed was tendered to plaintiff Samuel Moore in accordance with David Moore & Sons, Inc. contention as to the location of the cross fence. Plffs. Ex. 4. This deed was refused. A deed was tendered to the plaintiff, Charles H. Moore for his part of the exchange and accepted. Plffs. Ex. 7. Plaintiffs could do no more, particularly in view of the fact that the whole of the dispute as to the land to be received by plaintiffs is

between themselves and a third party, whom they did not choose to make a party to this action.

Plaintiffs try to avoid their deeds. They claim that T. E. Moore purloined the deed, Plffs. Ex. 2. In view of the positive testimony of T. E. Moore, (Respts. Abs. 48, Trans. 109, Abs. 55, Trans. 149) and the surrounding circumstances, such is not the case. If he had stolen this deed, then why did Samuel Moore not convey the word specially to the defendant company? He said nothing. (See Abs. 39, Trans. 66). T. E. Moore was the president of David Moore & Sons, Inc. It was a grantor in the deed, and Moore was the natural person to have and deliver the deed in this exchange of lands with his company. Counsel for appellants deal in much inference in discussing this matter at page 13 of their brief. It is singular that both copies of the contract locating cross fence should disappear and the original too, and even more singular that none of them were given to Mr. T. E. Moore as President of David Moore & Sons, Inc., and that he should never have been apprised of them. (Respts. Abs. 8, Trans. 106). (D. E. Moore, Abs. 64, Trans. 191). D. E. Moore was a director of the company. And it is even more singular that counsel for appellants can find in the record one line where it states directly or by inference that Samuel Moore was (mentally) sick, "Non Compis Mentis". Or that D. E. Moore had practically sold all his belonging in the company. If the little safe has any bearings on the matter this discrepancy in the testimony of Samuel Moore and his wife

is shown: Samuel Moore testifies, "I am sure I got it (the safe) from T. E. Moore and not my wife." (Abs. 39, Trans. 65). Mrs. Moore testifies, "My children and I went to his house (T. E. Moore's house) and got it." (the safe) (Abs. 40, Trans. 70).

Plaintiffs try to avoid the deed of Charles H. Moore, Plffs. Ex. 5, on the ground of mental incapacity, etc. Their evidence in this respect was ruled out by the Court. (See Trans. 224-225.) However, this comment might be made in passing. Samuel Moore introduced in evidence a power of attorney executed by Charles H. Moore to Samuel on Sept. 14, 1926, Plffs. Ex. 9, and a purported lease executed by Charles H. Moore to Samuel Moore under date of Feb. 9, 1927, Plffs. Ex. 10. Each before the execution of said deed. Sam seemed to feel Charles was competent to do business.

Now, regardless of anything else in the case. If the cross fence to which Sam was to get the land was as contended by David Moore & Sons, Inc., on the west line of Sec. 21, and deeds were tendered substantially in accordance with this understanding, then certainly he has no cause of action.

The greater weight of the testimony sustains this contention. See minutes of Dec 1, 1921. Plffs. Ex. 8. Testimony of T. E. Moore. The cross fence referred to in the minutes of Dec. 21, 1921, was the cross fence a little west of the west line of Sec. 21. There is another cross fence in Sec. 32. It is about a mile below the

other cross fence. I do not recall that written agreement. I have been president of the company ever since its incorporation." (Abs. 47-8, Trans. 104-7.) David E. Moore, "There was in 1919 and now is one cross fence near the south line of Sec. 21. It is probably as old as I am. I saw it years ago. It is the first cross fence south of Sec. 16, and the next is down by the corner of 29 and 32." (Abs. 64, Trans. 192-194.) William Moss, (Respts. Abs. 16, Trans. 174).

Samuel Moore was in possession of this land as an employee of the company (land in Sec. 32) T. E. Moore, (Abs. 49, Trans. 11-13); D. E. Moore, (Abs. 64, Trans. 194); Clarence F. Moore, (Abs. 62, Trans. 181).

Samuel Moore tried to purchase from David Moore & Sons, Inc. the land in Sec. 32. Testimony Clarence F. Moore, (Respts. Abs. 19-20, Trans. 186); D. E. Moore, (Abs. 64, Trans. 194).

Sam and John E. Moore entered into a written contract to buy the land between the tracks in Sec. 32. See Defts. Exs. C & D., and testimony of T. E. Moore, Respts. (Abs. 8-9, Trans. 113-120). Being an employee and said contract to purchase accounts for Sam's possession of the land in 32 to the fall of 1927. His offers to purchase are admissions that he did not own it.

Sam gets approximately the same acreage when he is given whole interest in Sec. 16 and in 21 between the tracks. He gets much more in value if he also gets the

other acreage. Testimony of T. E. Moore, (Abs. 49, Trans. 110-112).

Further, to go between the tracks from Sec. 16 where Sam owns his land to the cross fence in Sec. 32 or visa versa, the cross-fence on the west line of Sec. 21 is crossed. Then why was it not explained or excluded unless it is the cross fence intended?

If the fences are moved back on the lines the loss to defendant will not be so much in damages, though this will amount to several hundred dollars, but the irreparable injury caused through being unable to keep the fences up on account of the snow. Testimony of Wm. Moss, (Respts. Abs. 13-14, Trans. 165-8.

Respectfully submitted,

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