

1950

# Madsonia Realty Company v. Zion's Savings Bank & Trust Company : Brief of Defendants and Appellants

Utah Supreme Court

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McKay, Burton, McMillan and Richards; Attorneys for Appellants;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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MADSONIA REALTY COMPANY,  
a corporation,

*Plaintiff and Respondent,*

— vs. —

ZION'S SAVINGS BANK & TRUST  
COMPANY, a corporation, as ex-  
ecutor of the Estate of Richard W.  
Madsen, deceased, and LaReta C.  
Madsen,

*Defendants and Appellants.*

Case No. 7589

**FILED**

DEC 2 1930

Clerk, Supreme Court, Utah

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BRIEF OF DEFENDANTS AND APPELLANTS

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McKAY, BURTON, McMILLAN  
and RICHARDS,

*Attorneys for Appellants*

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## BRIEF OF DEFENDANTS AND APPELLANTS

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### STATEMENT OF FACTS

In the course of the probate of the estate of R. W. Madsen, the plaintiff in this action, Madsonia Realty Company, a corporation, filed a petition for an order directing the executor to execute a deed to certain property known as 667 East 1st South Street, Salt Lake City, Utah, and also described in the petition as follows:

“Commencing at the Southeast corner of Lot 1, Block 60, Plat ‘B’, Salt Lake City Survey, and running thence North 160 feet; thence West 99 feet; thence South 160 feet; thence East 99 feet to the place of beginning.”

The petitioner alleged that "on or about the 1st day of January, 1937, R. W. Madsen sold to petitioner, Madsonia Realty Company," the aforesaid land. Madsonia further alleged that no formal deed was ever executed and delivered by said R. W. Madsen to Madsonia Realty Company, but there was an agreed price of Ten Thousand Six Hundred Eighty Dollars (\$10,680.00), which was paid by said Madsonia Realty Company to R. W. Madsen; that at the time of said sale R. W. Madsen was president of Madsonia Realty Company, and was its general manager, and said R. W. Madsen also kept the account books of said corporation; that as of January 1, 1937, said R. W. Madsen, as general manager of said corporation and as the bookkeeper thereof, made a record of sale by entering the same on the journal and ledger account of said corporation; that no actual cash or money was delivered to said R. W. Madsen, but his account was credited in the amount of said purchase price and the property was thereby paid for in full. (R. 3, 4)

Petitioner prayed that the Court direct the executor to execute a deed to petitioner to the aforesaid property. (R. 5) Subsequently the defendant LaReta C. Madsen filed a demurrer and answer to this petition, and an answer was filed in behalf of the executor. The Court thereupon directed that the matter be transferred from the Probate to the Civil Division of the court, and that the matter be tried as a civil suit against the estate of Mr. Madsen. (R. 1)

The real property involved was the home of R. W.

Madsen and his first wife. He inherited it from his mother and it was considered the family homestead.

Richard W. Madsen and LaReta C. Madsen were married on October 30, 1935, and they continued to be husband and wife until the time of the death of R. W. Madsen on May 17, 1948. (R. 71)

Letters testamentary were issued to Zion's Savings Bank and Trust Company, as the executor of the Last Will and Testament of R. W. Madsen, and at the time of the hearing this bank was acting as the executor. (R. 71) The Court found that R. W. Madsen was the sole owner of the premises at the time of the marriage to LaReta C. Madsen, and that on the 1st day of January, 1937, he "by oral agreement sold to petitioner, Madsonia Realty Company, the property described . . . for the purchase price of Ten Thousand Six Hundred Eighty Dollars (\$10,680.00); that R. W. Madsen evidenced such sale by entering the same on the books of Madsonia Realty Company in his own handwriting, he being the president, general manager and bookkeeper of said company." (R. 71) The Court found that he received the full consideration but failed to execute or deliver a deed to the property. (R. 71) The court found that between January 31, 1937, and June 6, 1946, the corporation collected all of the rents, paid all of the taxes and paid for the upkeep and repair of the property. (R. 71, 72)

The Court further found: "That on the 6th day of June, 1946, said property was sold to James O. Peterson and C. Amelia Peterson, his wife, for the price of Sixteen

Thousand Five Hundred Dollars (\$16,500.00); that said contract of sale was evidenced by an instrument in writing signed by James O. Peterson and C. Amelia Peterson, Madsen, as sellers; that said R. W. Madsen was in fact acting for and on behalf of Madsonia Realty Company in the signing of said contract of sale; that R. W. Madsen entered the sale of said property on the books of Madsonia Realty Company and credited said buyers on the books of Madsonia Realty Company with \$4,000.00, being the down payment on said contract." (R. 72) The contract provides for monthly payments of \$125.00, and the Court found that at the time of the death of R. W. Madsen there was a principal balance owing in the amount of Ten Thousand Seven Hundred Thirty Dollars and eleven cents (\$10,730.11). (R. 72) All of the money paid by the Petersons under the contract went to Madsonia. None of it was kept by Mr. Madsen personally. (R. 72, 73)

The Court found: "That neither at the time of the execution of the Peterson contract on or about June 6, 1946, nor at any time prior thereto, did the defendant LaReta C. Madsen know that Madsonia Realty Company had or claimed any right, title or interest in or to the aforesaid property; that at no time did R. W. Madsen personally, or did any other agent, officer or employee of Madsonia Realty Company, take any step whatsoever to put LaReta C. Madsen on notice of any claim or interest by the said corporation." (R. 74)



At the time of the bookkeeping entry on January 1, 1937, LaReta C. Madsen did not promise or agree to make any conveyance to the corporation or anyone else. In fact, she did not even know of the book entry or of any alleged transaction between R. W. Madsen and the corporation. At the time of the execution of the Peterson contract, neither Mrs. Madsen nor Mr. Madsen received any consideration. The Court found that the sole consideration and payment went to the corporation, and that R. W. Madsen was simply acting as the trustee or in some other fiduciary capacity to the corporation in executing the contract.

The Court found that Mrs. Madsen signed the Peterson contract for the purpose of releasing her statutory distributive share pursuant to Section 101-3-4 of the Utah Code Annotated, 1943, and that she did in fact release her dower interest. (R. 73)

R. W. Madsen left a Last Will and Testament which was admitted to probate and the Court found that "LaReta C. Madsen has elected to take under said Will and does not renounce the provisions thereof in her favor." (R. 73) The Court also found "that by electing to accept the provisions of the said will, said LaReta C. Madsen is not estopped and barred from claiming an interest in the property hereinabove described by reason of statutory dower or otherwise. (R. 73)

The provision of the will is as follows:

"5. Mindful that there is secured to my said wife by the laws of Utah, one-third of my real es-

tate in said State, if she survive me as my lawful wife, and that she will receive such one-third by the operations of the law and not under the terms of this will, I therefore make no provision in her favor respecting said one-third being conducted with the provisions of the State of Utah in her behalf and willing that she receive said one-third by the operation of law and not under the terms of this Will. The other and remaining two-thirds of my real estate in the said State of Utah, I give, devise and bequeath to R. W. Madsen, Jr., and Francis A. Madsen, in equal shares.” (R. 29)

In a codicil, Mr. Madsen reiterated the idea that his wife should receive one-third by operation of law, but in addition he gave to her expressly the entire ownership of certain real estate at 6974 Holladay Boulevard. (R. 32, 33)

The executor defended the action on the theory that there was no writing to satisfy the statute of frauds (U.C.A., 33-5-1), and no writing subscribed as required by 33-5-3 of the Utah Code Annotated, and that the action was barred by applicable statute of limitations (U.C.A., 104-2-5, 22(2), 23 and 30). Mrs. Madsen denied several of the allegations of the complaint, set up the statute of frauds and the statute of limitations, and further in defense and as a counterclaim to the plaintiff, Mrs. Madsen alleged that she received no consideration, and that if the Peterson contract was executed as alleged by the plaintiff, then she joined not with her husband but with a fiduciary for the plaintiff corporation, and that since neither she nor her husband received any consideration for the Peterson contract, she had never contracted

to convey her statutory share to the Petersons or anyone else. She alleged, moreover, that her husband owed a duty to her to disclose to her at the time of the execution of the Peterson contract the fact that he was acting as fiduciary for the corporation. She alleged that the corporation knew she did not have notice of its interest and that it did not at any time give her any notice of its interest, and that the failure to disclose the interests and the relationships of the corporation to her husband constituted a fraud upon her. She asked the Court to require the corporation to account for one-third of all the sums received under the Peterson contract and one-third of all sums to be paid thereunder. (R. 53-59)

The Court held that the plaintiff was entitled to specific performance of the alleged contract with R. W. Madsen, and it entered its decree requiring his executor to execute its deed to plaintiff. Madsonia was held to be entitled to all moneys received and to be relieved under the Peterson contract, but its request for a decree against Mrs. Madsen was refused. Mrs. Madsen was denied relief as against plaintiff, and her request that she be awarded dower in the seller's equity was also refused. (R. 75-76, 90-91)

## STATEMENT OF POINTS RELIED UPON

### POINT NO. I

THE ACTION OF THE PLAINTIFF IS BARRED BY THE  
STATUTE OF LIMITATIONS.

## POINT NO. II

PLAINTIFF PROVED NO COMPLIANCE WITH THE STATUTE OF FRAUDS.

- (a) *There was no memorandum reduced to writing.*
- (b) *No writing was subscribed by the parties to be charged as required by Section 35-5-3, U.C.A., 1943.*
- (c) *Plaintiff proved insufficient part performance to take the case out of the Statute of Frauds.*

## POINT NO. III

THE COURT ERRED IN ITS SECOND CONCLUSION OF LAW, WHEREIN IT FOUND "THAT LaRETA C. MADSEN BY THE SIGNING OF SAID CONTRACT TO JAMES O. PETERSON AND C. AMELIA PETERSON, RELEASED HER STATUTORY DOWER RIGHT AS PROVIDED BY SECTION 101-4-3, UTAH CODE ANNOTATED, 1943, AND SHE HAS NO PRESENT INTEREST IN OR CLAIM UPON SAID CONTRACT."

(a) *Since under the theory of plaintiff and the trial court R. W. Madsen executed the Peterson contract as trustee of plaintiff, the signature of Mrs. Madsen was ineffectual as a release of her dower as to any one, including the Petersons, since a wife cannot release inchoate dower unless joined by her husband.*

(b) *Even if LaReta C. Madsen agreed to convey her dower rights to the Petersons, that fact does not enlarge the rights of plaintiff.*

(c) *The seller under an executory contract of sale of real property retains a "legal or equitable estate in real property." Under our Statute the widow shares in in this interest.*

(d) *The execution of a contract to sell land does not extinguish the seller's interest in the land.*

## POINT NO. IV

THE SILENCE OF R. W. MADSEN, SR., AND THE

PLAINTIFF, AND THEIR FAILURE TO DISCLOSE THE ALLEGED INTEREST OF THE PLAINTIFF IN THE LAND AT THE TIME OF THE EXECUTION OF THE PETERSON CONTRACT, CONSTITUTED A FRAUD UPON MRS. MADSEN. PLAINTIFF SHOULD BE REQUIRED TO ACCOUNT TO HER FOR ONE-THIRD OF THE TOTAL SALES PRICE, AND SUCH RELIEF TO HER SHOULD BE A CONDITION TO ANY RELIEF TO PLAINTIFF IN THIS ACTION.

## ARGUMENT

### POINT NO. I

THE ACTION OF THE PLAINTIFF IS BARRED BY THE STATUTE OF LIMITATIONS.

Section 104-2-5 of the Utah Code Annotated, 1943, provides:

“No action for the recovery of real property or for the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, grantor or predecessor, was seized of the property in question within seven years before the commencement of the action.”

Section 104-2-22 (2) provides that “an action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section” shall be brought within six years.

Section 104-2-23 provides that “an action upon a contract, obligation or liability not founded upon an instrument in writing \* \* \*” shall be brought within four years.

Section 104-2-30:

“An action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued.”

The Court erred in the case at bar in failing to find that the action was barred by the statute of limitations. In substance and effect the Court found that plaintiff and defendant R. W. Madsen, Sr., executed a contract for the conveyance of real property on or about the first day of January, 1937. Conceding for the purpose of argument that the book entries relied upon by the plaintiff were sufficient to evidence the existence of the contract found by the Court and that the alleged contract is enforceable, it is nevertheless clear that the only contract made at any time between R. W. Madsen, Sr., and plaintiff was made and completed on January 1, 1937. The Court found in substance that at all times subsequent to this date R. W. Madsen, Sr., was acting as the agent and fiduciary of the corporation in his dealings with this land. The only contract ever made between R. W. Madsen and plaintiff, if indeed there ever was a contract, was entered into on this date, and the obligation of R. W. Madsen to perform, according to the terms of the alleged contract, must date from this time. There is no other time from which the time for his performance can be measured.

There can be no question that the statute of limitations commenced to run against R. W. Madsen, Sr., as of January 1, 1937. Whether the applicable statute is seven years, six or four under the Utah law is not material, because the time has passed in any event.

The findings of the Court are barren of any reference to the statute of limitations. The theory upon which

the Court denied the motion of the defendants based on the statute of limitations is not set out. The Court purports to enforce the contract between the plaintiff and defendant executed January 1, 1937, but fails to indicate in any manner whether the statute was tolled in some respect or by some act of the parties or what other reasons it may have for enforcing the alleged agreement at this late date. Clearly the Court erred in failing to make findings of fact on this important issue.

Plaintiff corporation is confronted with this dilemma: On the one hand, if it is attempting to enforce a contract entered into on January 1, 1937, this contract was executed by it entirely on that date and the performance of R. W. Madsen was due at that time, and the statute of limitations has long since run against its claim. On the other hand, if it is not attempting to enforce a contract entered into on this date, there are no findings and there is no evidence to support a judgment in its favor against the executor, because clearly no agreement was made between plaintiff and the deceased at any other time with respect to this particular piece of real property.

Some argument during the course of the trial was directed to the idea that plaintiff was attempting to enforce the terms of a trust. Because it is anticipated that plaintiff might make some argument about trust in its brief, we desire to lay a firebreak at this time as far as the statute of limitations question is concerned. The only way plaintiff can contend that there is a trust is by reason of the fact that R. W. Madsen did not perform

under the terms of the alleged contract. The use of "trust" language is misleading. There is no trust except as it arises by operation of law. The only way the law can operate is through the establishment of the contract. The trust theory, therefore, is applicable only in the sense that under plaintiff's theory the deceased owed an obligation to plaintiff to execute a deed on January 1, 1937, since deceased at that time had legal title to the property. Certainly Mr. Madsen was not a trustee in any sense except as he held the title. He had no actual duties as trustee. There was no trust agreement. If this is not an action to perform a contract, we challenge the plaintiff in its brief to tell the Court what the action is all about. If this is not plaintiff's theory it has certainly been successful in keeping its theory to itself during the entire trial and proceedings in this case.

It is submitted that the statute of limitations has run against plaintiff's claim, and that it cannot successfully maintain this action against the executor of R. W. Madsen, Sr., or against his widow.

## POINT NO. II

### PLAINTIFF PROVED NO COMPLIANCE WITH THE STATUTE OF FRAUDS.

(a) *There was no memorandum reduced to writing.*

Section 33-5-1 of the Utah Code requires that any contract for the conveyance of an interest in real property must be reduced to writing. Under the facts of this case the writing relied upon by the plaintiff to comply with the statute of frauds is insufficient, both in that it



does not adequately describe the real property which was the subject of the alleged contract, and in that it does not disclose the terms of the alleged contract.

The evidence relied upon by the plaintiff is a book entry in the books of Madsonia Realty Company, in the handwriting of R. W. Madsen, Sr., as follows:

"NAME Real Estate — 667 East 1st So. St.			
<i>Date</i>	<i>Items</i>	<i>Fol.</i>	<i>Debits</i>
Jan. 1, 1937	Ground	304	\$4120.00
Jan. 1, 1937	Building	304	6560.00"

In connection with this entry there was introduced evidence of an entry in the account of R. W. Madsen crediting him with the sum of \$10,680.00 on January 1, 1937. How many inferences can be drawn from these two book entries? It is possible to assume that the \$10,680.00 was the first payment on the real property and that other payments were to be forthcoming. If that is the case, it is absolutely impossible to ascertain the other terms of the contract. Whether plaintiff was to pay the balance at a time certain or in monthly installments, or pay interest, is certainly not apparent from these entries. It is possible to assume that the amounts shown were to constitute the entire transaction, and that Mr. Madsen was obligated immediately to convey his interest in the property. It is impossible to know whether R. W. Madsen agreed to convey only his interest or his own plus an inchoate dower right of Mrs. Madsen. The terms of any agreement cannot be ascertained from these book entries. Any attempt to spell out the agreement results in hazardous speculation and uncertainty.

The law is well settled that the entire terms of the bargain must be apparent from the writing itself to satisfy the statute of frauds.

“The general rule is that the memorandum, in order to satisfy the statute, must contain the essential terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence. A memorandum disclosing merely that a contract has been made, without showing what the contract is, is not sufficient to satisfy the requirement of the statute of frauds that there be a memorandum in writing of the contract.” 49 Am. Jur. 663, 664.

The plaintiff could conceivably contend that these two book entries, in connection with the acts of the parties, disclose the existence of a contract, and that the subsequent acts of the parties adequately define its terms. Such a statement would be inaccurate and extreme, but whether or not it is true is immaterial. The question is whether there is *writing* that satisfies the statute of frauds. That writing itself must contain the terms of the contract. The subsequent actions of the parties cannot be relied upon to disclose its terms, but that writing itself must do the job. In the case at bar there is no writing that satisfies the statute.

(b) *No writing was subscribed by the parties to be charged as required by Section 35-5-3, U.C.A., 1943.*

The Utah statute of frauds not only requires the memorandum referred to be in writing, but Section 33-5-3 of the Utah Code requires that the writing be sub-

scribed by the party to be changed. Under such circumstances it is held that the writing must be signed at the end thereof by the party.

In *Davis v. Shields*, (1841), 26 Wend. (N.Y.) 341, reversing (1840) 24 Wend. 322, a broker inserted the names of both parties in memorandum, but neither of the parties nor the broker signed it. The Court held that because of the change in the language of the New York statute of frauds by substitution of the word "subscribed" for "signed," the memorandum was not sufficient to satisfy the statute.

In *James v. Patten*, (1851), 6 N.Y. 9, 55 Am. Dec. 376, the defendants' names appeared in the body of the memorandum which was in the handwriting of one of the defendants. The Court held that the statute requiring that the memorandum be "subscribed" required that it be signed manually at the end of the agreement, and that the words "signed" and "subscribed" were not synonymous or equivalent.

In *McGivern v. Fleming*, (1884), 12 Daly (N.Y.) 289, 66 How. Pr. 300, the defendant's daughter at his direction signed a memorandum near the middle, and the Court held that the memorandum was insufficient both as to terms before and after the signature. The Court held that the memorandum was not subscribed. To the same effect is *Bisgeier v. Kellar* (1934), 122 Misc. 705, 203 N.Y. Sup. 797, where the defendant wrote his own name in the middle of the document.

A lease of property for more than one year was re-

quired to be subscribed and not merely signed in *Three Hundred West Avenue Corporation v. Warner* (1929), 250 N.Y. 221, 165 N. E. 271.

The California statute requires a memorandum to be subscribed. In *Re Clifford* (1873, C.C.) 2 Sawy. 428, Fed. Case No. 2893, a federal court held that the printing of the name of the seller at the head of a written paper would not satisfy the statute.

In the case at bar there is no writing signed by R. W. Madsen which evidences an intention to sell to the corporation. He did not sign any of the book entries and there can be no question that he did not subscribe any writing as far as the corporation is concerned. Certainly the Court is not justified in concluding that there was evidence to satisfy Section 35-5-3 of our Code with reference to the purported transaction between R. W. Madsen and Madsonia.

(c) *Plaintiff proved insufficient part performance to take the case out of the Statute of Frauds.*

The Court made no Conclusion of Law to indicate whether it felt that the contract between Mr. Madsen and the corporation was satisfactory under the statute of frauds, or whether there was sufficient part performance to take the case out of the statute. Failure to make such finding is reversible error in itself. This is a vital point of law. The issue was directly raised by answer and motion by both defendants. The Court completely ignored the contentions in its Findings, Conclusions and Decree.

Inasmuch as the partial performance idea was pre-

sented in the course of the argument, and it is not impossible that the Court applied the doctrine in this case, it is believed that consideration of it as applied to the facts of this case is worth while.

The doctrine of part performance is only applicable in those situations where the actions of the party so point to the existence of a contract with respect to a particular piece of property which is the subject of that contract that there can be no doubt of its existence. So fundamental is this principle that no citation of authority is necessary. The contract itself must be so clear and unmistakable that its terms can be understood and the rights of the parties to it can be protected by the court.

In the case at bar no such proof was adduced. Plaintiff produced no evidence whatsoever which in any way sheds any light on the question as to whether Mrs. Madsen's inchoate dower interest in the property was to be sold by Mr. Madsen to the corporation under the terms of his alleged contract with it. There is no evidence that Mr. Madsen received any actual consideration from the corporation for his interest in the property. The most the evidence can be said to disclose is that the books of the company show a credit of \$10,680.00.

Plaintiff presented the theory, and the trial court found, that the plaintiff paid the profits tax upon a profit to the corporation of \$9,428.41 showed some part performance. This fact certainly does not help plaintiff. In the first place, plaintiff apparently failed to take advantage of the installment provision of the tax statutes.

It paid a tax based on an anticipated profit which it may or may not receive, depending upon fortuitous circumstances over which it had no control. These circumstances include the future value of real estate, the possibility of default by the buyers on the contract and the collectibility of any judgment against the buyers. In the second place, it is purely a self-serving, hearsay kind of action. Even if it has some effect as an admission by R. W. Madsen and the interest he owned, it certainly does not constitute an admission against the interests of his wife or enlarge the corporation's claim to these rights.

Attention is invited to the fact that the decree of the Court has the effect of giving plaintiff the benefit of the conveyance of the interest of Mrs. Madsen to the Petersons, even though there is no evidence of any contract whatsoever between Mrs. Madsen and the corporation. It must be admitted by all parties that no evidence was produced concerning any agreement of any kind between Mrs. Madsen and Madsonia. The Court, in fact, refuses to enforce such a contract and says that the corporation cannot obtain specific performance against her. Despite this holding, the Court directs, in effect, the Petersons to pay to the corporation all sums which they agreed to pay to Mr. and Mrs. Madsen. Certainly under any theory of the case there is no evidence whatsoever of any agreement or part performance by Mrs. Madsen that justifies this conclusion.

### POINT NO. III

#### THE COURT ERRED IN ITS SECOND CONCLUSION

OF LAW, WHEREIN IT FOUND "THAT LaRETA C. MADSEN BY THE SIGNING OF SAID CONTRACT TO JAMES O. PETERSON AND C. AMELIA PETERSON, RELEASED HER STATUTORY DOWER RIGHT AS PROVIDED BY SECTION 101-4-3, UTAH CODE ANNOTATED, 1943, AND SHE HAS NO PRESENT INTEREST IN OR CLAIM UPON SAID CONTRACT."

(a) *Since under the theory of plaintiff and the trial court R. W. Madsen executed the Peterson contract as trustee of plaintiff, the signature of Mrs. Madsen was ineffectual as a release of her dower as to any one, including the Petersons, since a wife cannot release inchoate dower unless joined by her husband.*

The Court decided that Madsonia was not entitled to any relief against LaReta C. Madsen (R. 75; Conclusions of Law Nos. 2, 4, 5 and 6), but the Court indicated in Conclusions of Laws Nos. 2 and 3 that Mrs. Madsen has no interest whatsoever in this property. (R. 75) It is clear the Court finds that Richard W. Madsen signed the Peterson contract as a fiduciary of plaintiff corporation. The plaintiff in fact alleges in its petition that the Peterson sale "was in fact made by Madsonia Realty Company," and in substance that Richard W. Madsen executed the deed as trustee of the corporation.

The Court adopted this theory in the following language: "that said Richard W. Madsen was in fact acting for and on behalf of Madsonia Realty Company in the signing of said contract of sale." (Finding of Fact No. 6; R. 72) The situation therefore is that the Peterson contract was executed by R. W. Madsen as trustee of plaintiff and by Mrs. LaReta C. Madsen personally. It is a situation where Mrs. Madsen, as the wife of the de-

ceased, joined with plaintiff corporation in the execution of a contract of sale. No consideration of any kind went either to Mrs. Madsen or her husband.

The law is settled that unless a woman receives consideration she cannot release or convey her inchoate dower interest in land. It is to be noted that at the time of the execution of the Peterson contract, under the theory of the plaintiff and trial court the bare legal title to the property was in Mr. Madsen; the equitable beneficial interest was in the plaintiff corporation, and both of these interests were subject to the inchoate dower right of Mrs. Madsen. The trial court held that the signature of Mr. Madsen was in fact that of the corporation, and that the corporation's interest was subject to the contract. The question, therefore, is whether a married woman who receives no consideration can, by joining with a third person, convey her interest.

There is no question but that a married woman has only a contingent inchoate interest in the land owned by her husband. The cases repeatedly have held that she has nothing to convey or sell except as an incident to a conveyance by her husband. Therefore, if the deed is not with the husband and joined by him, or if the deed of the husband is set aside or annulled or disregarded for any reason, and the conveyance is held ineffective as to his interest, it is also ineffective as to the interest of his wife and her inchoate dower is restored.

Scribner in his work on Dower states the law as follows (2nd Ed., Vol. 2, Page 313, beginning at Section 49):



“A wife who joins with her husband is a conveyance of his lands, is not a party thereto, except for the purpose of relinquishing her dower. She is not to be regarded as alienating a real subsisting estate, but as releasing a future contingent right. Her renunciation of dower is to attend the conveyance of her husband; to endure while that endures, and no longer. Hence if the conveyance of the husband be inoperative, or if it be set aside, or avoided, the right of dower remains unimpaired.

“50. It is upon this principal that dower is restored where a conveyance in which the wife has joined, is set aside as fraudulent as to the creditors of the husband, and in a case where lands were sold on execution, and before the expiration of the time for redemption, the judgment debtor and his wife executed a mortgage upon the same lands, but the premises were not redeemed, and the purchaser received a sheriff's deed, it was decided that the right of dower was not barred by the execution of the mortgage, because the subsequent mortgage was extinguished by the failure to redeem from the prior sale. So where the wife relinquished her dower by joining her husband in a deed containing the usual covenants; and the grantee afterwards recovered judgment and satisfaction against the husband for an alleged breach of his covenants ‘that he was lawfully seized and had good right to convey’; it was held that such deed could not be made use of to bar the wife from her dower in the land. ‘The estate,’ the court said, ‘did not pass from Parsons to Hinckley, as appears from his own allegations and proceedings; and the relinquishment of dower by the wife cannot now avail, since there is no estate for it to operate on.’ So where a widow was administratrix of her husband's estate, surrendered her

dower in part satisfaction of a claim asserted against the estate, and the settlement was afterwards set aside at the instance of the creditor, it was held that the right to dower was thereby revived."

In *Robinson v. Bates*, 3 Met. (Mass. 1841) a husband and wife joined in a deed whereby she released her dower. A creditor of the husband subsequently levied on the land during the life of the husband and recovered the land in an action against the grantee of the deed in which the wife and husband joined, the creditor's theory was that the deed of the husband and wife was in fraud of creditors. The wife thereupon, after the death of the husband, sued for her dower right in the land and the judgment creditor objected on the ground that she released her interest in the deed. The Court said:

"In *Stinson v. Sumner*, 9 Mass. 143, it was decided that where a wife releases her claim of dower by joining her husband in a conveyance and the purchaser recovers back the purchase money on account of the grantor's defect of title to the land, the release of the wife thereby becomes inoperative and does not bar her right of dower after her husband's decease. The principal upon which that decision is founded applies conclusively to the present case. The tenant has avoided the deed of the husband and defeated the estate on which the demandment to release the dower was intended to operate. By law, therefore, and in justice she was thereby restored to her former rights."

Tiffany in his work on Real Property, 3rd Ed., Vol. 2, Page 384, Sec. 512, thus states the law:

“In common law the widow could, after the husband’s death, release her dower right, but the wife of a living husband has no such right. The only mode in which a married woman can convey or extinguish any interest belonging to her being by joinder with her husband in a fine or recovery. There are some states statutes authorizing the release by the wife of her inchoate dower and her right to release it by joining in her husband’s conveyance generally recognized.

“A release by the wife is usually ineffective unless the husband joins therein, sometimes by express provisions of statute, sometimes by reason of the general rule that a married woman cannot dispose of interest in land without the joinder of her husband. And the fact that the release is made to one to whom the husband has previously conveyed the land does not dispense with the necessity of joinder. If the widow marries again, her second husband must join in her release of dower rights in her first husband’s land.”

The principal is again recognized and applied in *French v. Peters*, 33 Maine 396. There the husband executed a mortgage on January 19, 1829. The wife did not join with her husband but by a separate conveyance written upon the back of the mortgage purported to convey to the same mortgage on February 4, 1829. She recited that this is “done by the consent of my said husband, testified by his being a party thereto,” but the husband was not a party to her conveyance. She received no consideration except the sum of \$12,000.00 which had been paid previously to her husband. The Court held that she encumbered no interest that had in the land.

She could not convey anything except as an incident to the conveyance of her husband. Since the husband had previously conveyed but he did not join in her conveyance, her supposed deed had no legal force or effect. The wife recovered her dower interest in the land.

And in *Fulk v. Robinson*, 140 Ark. 12, 215 S. W. 674, the Court stated the question to be: "Whether or not a wife can convey her inchoate right of dower and homestead to a stranger by executing a deed in which her husband does not join." The Court answered in the negative.

In *Page v. Page*, 6 Cushings Rep. 196 (Mass.), subsequently to the execution of a deed by her husband a married woman executed a document which purported to relinquish her dower in the land previously conveyed. *Held*, since the wife did not join with her husband in a deed or sale of the premises, her dower rights were not barred.

The principle is also recognized and applied in a number of Federal cases. See *In Re Lingafelter*, 104 C. C.A. 38, 181 Fed. 24, 32 L.R.A. (N.S.) 108; *Wilson v. Robinson*, et al. (C.C.A. 2, 1936), 83 F. (2d) 397, and cases and authorities cited.

In the case at bar the effect of the decree of the court and the effect of plaintiff's theory is substantially the same as though plaintiff was a creditor seeking to set aside the fraudulent conveyance. The plaintiff seeks to obtain the benefits of the contract executed by R. W. Madsen. The Court in effect permits it to obtain those

benefits and requires the executor to assign Mr. Madsen's interest at the time of his death to the plaintiff. Stated in another way, plaintiff says in effect: "Before Mr. and Mrs. Madsen executed the Peterson contract Mrs. Madsen had an interest in the property. It is true that that interest is subject to measurement and evaluation and it has a monetary value. To that interest we have no claim. After the Peterson contract, Mrs. Madsen has no interest because she had agreed to sell it to the Petersons. Not only now do we claim the interest Mr. Madsen had, but we also have a right to her interest."

This kind of logic is absolutely unsound and untenable. If Mrs. Madsen had an interest in the property before she signed the Peterson contract, how can the Court hold that all of the money under the contract should go to the plaintiff and that she is entitled to receive no part of it, despite the fact that the Court holds there is no obligation from her to the corporation to convey her interest to it?

Since the plaintiff claims the interest of R. W. Madsen.

Madsen and in effect claims his interest in the Peterson contract, it is inconsistent for the Court to hold that Mrs. Madsen "has no interest in and is not entitled to an accounting for any of the money received by Madsonia Realty Company as payment for James O. Peterson and C. Amelia Peterson, his wife, or which shall hereafter be paid by said buyers, and LaReta C. Madsen is not entitled to an accounting by Zion's Savings Bank

& Trust Company, as executor of said estate, on account of any moneys paid or owing by the purchasers of said property."

It is to be noted that the Petersons are not parties to this lawsuit and are not bound by the decree. Nevertheless, they are certainly interested parties in the sense that the findings of the Court may indicate to them to whom the payments should be made in the future. The Court went further than it needed to go in finding in effect that Mrs. Madsen was to receive no part of the Peterson payment, but whether it unduly extended itself or not, it is clear that the theory upon which the Court made this decision was manifestly erroneous.

It is submitted that the Court should have found in conformity with the proposed Findings of Fact and Conclusions of Law of the defendant LaReta C. Madsen to the effect that she retains the property interest in this land. (See R. 87, 88; Proposed Findings of Fact Nos. 8, 9, 10 and 11, and proposed Conclusions of Law Nos. 2, 3, 5 and 5.)

*(b) Even if LaReta C. Madsen agreed to convey her dower rights to the Petersons, that fact does not enlarge the rights of plaintiff.*

The point cannot be made too often that the decree of the Court has the effect of giving to the plaintiff more rights than it had before the execution of the Peterson contract. Madsonia itself takes the position that although it did not have the right to benefit from a conveyance of Mrs. Madsen's inchoate dower interest

before the execution of the Peterson contract, it should now receive all of the benefits, and the Court found in effect that the Petersons should pay all of the balance due to the corporation.

Even assuming for the purpose of argument only that Mrs. Madsen joined with her husband in the Peterson contract as a fiduciary of the plaintiff corporation, as it did under the Court's theory, the law is clear that such joinder would not help the plaintiff. If an owner of land deeds to A in a deed not joined by his wife, and subsequently conveys to B, his wife joining, the wife's release as to B is ineffective in an action by A to recover the land. A may recover but he does so subject to the dower interest of the wife.

At Page 307 of Volume II, Scribner (on Dower) states the law as follows:

*“Release to Stranger. No Bar of Dower.*

“40. It is well settled that it is no defense to an action of dower, that the widow has released her right to a stranger. In an early case in Massachusetts in which the defense was that the defendant had executed a release to a third person, the court said: ‘The deed relied on to bar the demandant shows no privity of estate, or connection of any kind between her and the tenant. It cannot avail the tenant in this action.’ (Citing *Pixley v. Bennett*, 11 Mass. 298)

“41. In a case where lands had been mortgaged by the husband during coverture, his wife not joining; and subsequently husband and wife united in a conveyance of the equity of redemption to a third person; and after breach of the mortgage there was a foreclosure and sale; it

was held, that the widow was entitled to dower as against a purchaser under the decree not connecting himself in any manner with conveyance of the equity. (Citing *Littlefield v. Crocker*, 30 Maine 1926). So where husband and wife after the recovery of a judgment against the husband, and while it was a lien upon his lands, joined in a conveyance containing full covenants of warranty and release of dower, and the grantee entered and occupied under the deed but was afterwards evicted by a purchaser at sheriff's sale under the judgment, it was held that the latter could not make the conveyance and release available for his protection against the claim of dower, either as a grant, or as an estoppel. (Citing *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63). So where lands had been mortgaged to secure the payment of a debt, both having joined in the mortgage, subsequently the lands were sold under a judgment against the husband, at the suit of a stranger to the mortgage, it was determined that as against the purchaser at such sale a wife was not divested of her dower. (Citing *Taylor v. Fowler*, 18 Ohio 567). The result will be the same if the mortgagee proceed at law and sell the mortgaged premises under ordinary judgment and execution, instead of foreclosing his mortgage. The purchaser under such a judgment cannot be said to be in privity with the mortgagee and therefore is not protected against dower. (Citing *Harrison v. Eldridge*, 2 Halst. 392).

“Upon the same principle, if husband and wife execute a deed of trust, and the lands are afterward sold in satisfaction of a mechanics lien subsisting at the date of the deed, the purchaser takes the premises subject to dower. (Citing *Gove v. Cather*, 23 Ill. 634).”



Plaintiff cannot and does not deny that it claims no privity with the Petersons. Madsonia makes no claim whatsoever against the Petersons in this lawsuit; in fact, its own evidence amply demonstrated that Petersons had a contract with Mr. and Mrs. Madsen and did not know of any interest of the plaintiff in the land until after R. W. Madsen's death. The theory of the plaintiff's suit is that it should stand in the place of R. W. Madsen; in fact, as an alternative ground for relief plaintiff prays "that the interest of Zion's Savings Bank and Trust Company, as Executor of the Estate of R. W. Madsen, deceased, and the interest of LaReta C. Madsen be declared to be subsequent and subordinate to Madsonia Realty Company.\* \* \*" In other words, plaintiff asserts the same right that a defrauded creditor might assert if such a creditor elected to stand upon the contract of sale and take its benefits. The Court agreed with plaintiff and held that the plaintiff was entitled to receive the interest of R. W. Madsen. The point is that the privity claimed by plaintiff is with R. W. Madsen and the right claimed is based upon an alleged agreement to sell to plaintiff prior to the Peterson contract.

The foregoing discussion by Scribner, and the cases which follow in this brief, therefore, are precisely in point. In each case, as in the case at bar, the person claiming that the widow released her dower is one who asserts a right prior and senior to the instrument which the wife executed. The cases are uniform in holding that the purported release is not effective, and that upon

the establishment of the prior right, the dower right is restored.

In *Pixley v. Bennett*, 11 Mass. 298, a widow brought writ of dower demanding that reasonable dower in certain lands situate in the county concerned be awarded to her. The defendant answered that the widow had for a valuable consideration released and quitclaimed her demand or account of dower to one Caleb and that this release was an ineffectual bar to her claim for dower in any of her husband's land. The defendant's theory was that having once released her claim she was estopped. The Court held:

"The deed relied on to bar the demandant shows no privity of estate, or connection of any kind between her and the tenant. It cannot avail the tenant in this action. *Littlefield v. Crocker*, 30 Maine 192. Arin C. Littlefield, the husband of the plaintiff, mortgaged certain land to one Aurin; the wife of Littlefield did not join in this deed. Subsequently, Littlefield and his wife joined in a deed conveying the property to one Morrill. The wife released her dower in the deed to Morrill. The mortgagee subsequently foreclosed and the present defendant is the assignee of the title obtained through the sheriff's deed. The defendant claimed that the plaintiff's release as to Morrill barred her. The court held that defendant's contention was unsound, that no release to Morrill affected defendant's title. Since the defendant was not a privy or party to the plaintiff's conveyance, plaintiff was not estopped from obtaining dower on land."

*Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63, was an

action to recover dower. The husband and the wife owned the land at a time when one R got a judgment against the husband. After the judgment was obtained and while it was a lien, before any execution, the wife joined with the husband in a deed containing a release of dower to the defendant, X, who went in possession. Subsequently there was a judgment execution and X was evicted by the title of the judgment holder. The court held that the release of dower to X was not availing for the defendant judgment creditor and that it was no protection against the claim of dower either as a grant and estoppel, or otherwise. The widow was assigned dower in the land. This case is clearly in point with the case at bar.

The principle of these cases has been recognized at least twice by the Utah Supreme Court. In the case of *Gee, et al. v. Baum, et al.*, 58 Utah 445, 199 P. 680, a husband and wife executed a deed to the children and grandchildren. The conflict in the evidence was as to whether the husband delivered the deed. The court held after reviewing the evidence that there was no delivery and no intent to deliver and it was, therefore, necessary for the court to decide whether the fact that the wife had joined in signing this instrument, which was held not to be effective as to the husband, was nevertheless a waiver of her inchoate dower in the land. The court said (452 Utah Reporter):

“The overwhelming weight of authority is to the effect that if the wife joins in a deed with her husband to release her dower right and the

husband's deed is set aside for any reason, then the wife has the same rights in the land that were attempted to be conveyed by the husband as though the conveyance had not been made."

The court quotes with approval Section 49 of Scribner on Dower hereinbefore quoted. The Court then states:

"A moment's reflection will, we think, convince anyone that the foregoing doctrine is entirely sound \* \* \* We are of the opinion, therefore, that when the deed of the husband in which the wife joins, his wife merely is held inoperative *as against him*, it also becomes inoperative *as against her*, and that the grantee in such a deed obtains no rights whatever as against the wife."

The second Utah case in which the principle was expressly recognized was *In Re Reynolds Estate*, 62 P. (2d) 270, 90 Utah 415. There it was held that the fact that a wife joins in a mortgage does not release her dowerable interest as to heirs, personal creditors or taxes in the estate. The only person who could take advantage of the release was the mortgagee himself.

Plaintiff may contend that it does not seek to set aside the Peterson contract. As to the Petersons that is true. Certainly plaintiff does assert that it is entitled to the interest of R. W. Madsen in this contract. R. W. Madsen's deal with the corporation was subject to the inchoate dower interest of his wife, and while the Court does not grant specific performance to the plaintiff against Mrs. Madsen, the effect of its decision is to cut out her interest, because in effect it holds that the Peter-

sons must continue to pay the sums due under the contract to the plaintiff, and that Mrs. Madsen must convey to the Petersons her interest by a deed when the terms of the contract have been fully executed. Certainly this holding operates to give to plaintiff more rights than it had in any proper theory of the case.

The contention of the plaintiff has been determined adversely to it. In the case of *Free v. Little, et al.* (1907), 31 Utah 449, 88 Pac. 407, the plaintiff alleged that he had had a contract as a buyer for the conveyance of certain real property by a man who was deceased at the time the action was brought. The wife made no agreement to convey her inchoate interest, and the purchaser knew that the seller was married at the time the contract was entered into. The probate proceeding had been completed at the time the action was brought but the Court held that the defendants' stood in the position of the deceased's husband, and also because of the peculiar circumstances involved, in the position of the wife. The principles announced were exactly the same as though the action was brought against the executor and the wife, as in the case at bar, for specific performance. This court expressly held that the action did not lie. It decided that specific performance could not have been obtained against the wife. Therefore, after the decease of the husband the action could not be maintained against the executor of his estate or persons standing in the shoes of the executor. The following language is illuminating.

“Could it be contended that, when the husband sold or conveyed lands without the consent of his wife, and the wife had afterwards claimed her interest and received it, the vendee of the husband could claim specific performance of the entire land against either the grantee or the donee of the wife? *Moreover, could any one reasonably contend that such grantee could not set up the defense that the husband simply attempted to sell what he could not sell, and that such grantee or donee claimed from the true owner of the fee, the wife?* Would not an exchange of property stand in the same legal position? These children, therefore, in legal effect, simply effected an exchange with their mother, and we think they had the legal right to interpose any defense to protect their title that the mother might have interposed, and could at least assert that the grantor, their father, had no right or title either to sell or convey. We think, therefore, that both upon principle and reason the appellants had the right to make the defense that they claimed in the right of their mother, that the father could not sell or convey her right without her consent, and that, therefore, the respondent could not and did not purchase the mother’s interest. While the authorities are not in harmony respecting the right of specific performance where the husband alone agreed to sell or convey without the consent of the wife, *we think there is no substantial conflict where, as in this case, it appears that the purchaser at the time the contract was entered into knew that the vendor was a married man, and where there is neither fraud, misrepresentation, nor concealment.*

“To enact a law giving the wife an interest in the husband’s real estate which he can neither

barter, sell, or convey without her consent, would be but an idle ceremony if the courts compelled specific performance against either the wife or those claiming under her or against the husband if living. The purchaser buys with full knowledge of both the interest as fixed by law and of his vendor's legal status. The purchaser knows he cannot obtain the interest of the wife without her consent, and that such interest is contingent only during the life of the husband, and that, upon his death, it immediately vests in the wife as a fee simple estate. This court in the case of *Kelsy v. Crowther*, 7 Utah, 519-522, 27 Pac. 695, recognizes the principle involved here, and it is there held that specific performance will not release her dower interest. Pomeroy, in his excellent work on *Equity Jurisprudence* (3d Ed.) vol. 7, Sec. 834 speaking upon this subject, says: '*The buyer's right to specific performance with compensation is subject to certain limitations; as, when it conflicts with the intervening rights of third parties, an instance of which is the case of the right of the wife to be protected in her dower interest. Where the wife of the vendor refuses to convey her inchoate dower interest in the land which the vendor has contracted to sell, equity, in many jurisdictions, denies specific performance with compensation against the vendor for the deficiency, viz., the dower interest, on the ground that compulsion upon the husband would tend to cause him to procure his wife's conveyance of dower against her will. For that reason the buyer must be satisfied to take less than he contracted for by the amount of the dower interest, or abandon the contract.*' In a note to the case *Barbour v. Hickey*, 24 L.R.A. 763, the cases upon this point are collected. See, also, Pomeroy on *Spec. Perf.* (2d Ed.) Sec. 461; *Hawralty v. War-*

ren, 18 N.J. Eq. 124, 90 Am. Dec. 613; Lucas v. Scott, 41 Ohio St. 636; Graybill v. Brugh (Va.) 17 S.E. 558, 21 L.R.A. 133, 37 Am. St. Rep. 894. We think the correct rule is well stated in the case of Hawralty v. Warren, supra, where, at page 128, it is said: 'The court will not order a defendant to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud.' It is perfectly clear from the evidence in this case that both respondent and her agent, her husband, well knew that the deceased was a married man; and hence, in view of the law of this state, could not affect the rights of his wife by an attempted sale without her consent. There is absolutely no fraud, no collusion, and no concealment in this case, and therefore no equity in favor of the respondent as against the children apart from the legal rights flowing from the contract itself, and this respondent is conclusively presumed to have accepted burdened with the provisions of law in respect thereto. *In view of the law as stated in the foregoing authorities, it is quite clear that an action for specific performance of the writing in question against James T. Little, if alive, could not be enforced, and the right to do so against the appellants is certainly no stronger in equity than it would be against him.*' (Emphasis supplied).

The law in this State is therefore that plaintiff's action cannot be maintained against the executor even though a contract is proved and there are no other barriers to recovery. Certainly the Utah cases announce the rule that the interests of Mrs. Madsen cannot be taken from her, under the circumstances of this case, by Madsonia Realty Company.



What equities does the plaintiff claim even as against the interests of Mr. Madsen? A *fortiori*, what equities can plaintiff claim against Mrs. Madsen to justify a decree which effectively cuts her out of any interest in this land? Certainly there is no justification for Madsonia's position that it obtained rights as a result of the Peterson contract, which it did not have by reason of the alleged transaction between it and Mr. Madsen.

(c) *The seller under an executory contract of sale of real property retains a "legal or equitable estate in real property." Under our statute the widow shares in this interest.*

It is immaterial whether at common law a seller's interest in an executory real estate contract was dowerable. A wife at common law had no dower in an equitable interest. The requirements of the dowerable estate were seizin, an estate of freehold and, of course, the death of the husband. Under Utah's distributive share statute, however (Section 101-4-3, U.C.A. 1943), not only does the widow obtain an interest in the "lands of freehold interest of which the husband dies seized," but she obtains a one-third interest in all the legal and equitable estates in real property. The seller under an executory contract does not have seizin and he does not have the entire fee interest but certainly he does have an equitable interest in the land. He owns an interest in real property.

In this very action plaintiff is granted a form of relief peculiar to real property. It was granted specific

performance of a 1937 contract with R. W. Madsen. It asked in the alternative for a decree quieting title to the land. If the seller under an executory contract for the sale of land has no legal or equitable interest in the land, the plaintiff cannot prevail against anybody on any theory in this case, because the only interests that it can assert to a claim are those which R. W. Madsen possessed as such a seller.

We agree that R. W. Madsen had in interest in real property at the time of his death and that if the plaintiff satisfies the other requirements involved it may maintain its action for specific performance. This being true, the Court erred in holding that Mrs. Madsen is not entitled to receive at least a one-third interest in the balance due under the contract at the time of R. W. Madsen's death. Under any theory of the case this is the very least that she is entitled to receive.

The seller in an executory land contract has an interest that is sufficient to enable him to maintain an action to quiet title or to remove a cloud on title. *Kern v. Robertson*, 92 Mont. 283, 12 P. (2d) 565. He has an interest that can be levied upon as real property, as is shown by the following cases:

In *Bauermeister v. McDonald*, 245 N.W. 403, X was the seller of land under an executory contract and \$12,000 remained to be paid at the time of his death. In his will X devised certain interests in the contract to his son Y. Z was a judgment-creditor of Y who levied an execution on "all interest in the land" that Y owned.

A lower court enjoined the sale of Y's interest on the theory that it was only equitable and not subject to a writ of execution. On appeal, the trial court was reversed. The court said that X held the legal title to the real estate "as security for the payment of the balance of the purchase price." The court said that unquestionably any judgment that might have been recovered against X in his lifetime would have been a lien upon the real estate to the extent of the unpaid purchase price from the buyer. The court cites the case of *When v. Fall*, 55 Neb. 547, 76 N.W. 13, 70 Am. St. Rep. 397, among other Nebraska cases, and quotes:

"A judgment in the district court against a vendor of land who retains the legal title acts as a lien to such land and as against a vendee in possession with actual notice may be enforced to the extent of the unpaid purchase price.

"Until the purchase price has been paid, while the vendor holds the legal title subject to an equitable obligation to convey to the purchaser on payment of the purchase money, he has, unlike an ordinary trustee, a personal and substantial interest which he may actively assert, or may transfer by written assignment." See *Tiffany on Real Property*, 3rd Ed., Vol. 1, Sec. 308.

These authorities are clear that a seller under a title retaining contract does have a real property interest.

*Tiffany on Real Property*, 3rd Ed., Vol. 1, Sec. 308, states:

"The statement that the vendor holds the legal title in trust for the purchaser, is to be

taken, it seems, with considerable reserve.

“ ‘That the contract is not a trust and does not create a fiduciary relation is the view taken in the Restatement, Trusts, Sec. 13. That the vendor is not properly referred to as a trustee see article by Professor Samuel Williston, 9 Harv. Law Rev. at p. 117, quoting Rayner v. Preston, 18 Ch. D. 1. See also 15 Colum. Law Rev. at p. 256, 36 Sol. Jour. 775, 784; Bogert, Trusts & Trustees, Sec. 18.’ (ftn. 22).

“ ‘He is trustee only to the extent of his obligation to perform the agreement between himself and the purchaser.

“ ‘A fiduciary relation does not exist between them. Englestein v. Mintz, 345 Ill. 48, 177 N.E. 746.

“ ‘All that is meant is that the vendee, because of the nature of the bargain, or the unpaid vendor, because the right should be mutual, may compel specific performance. Before performance is thus compelled, it is manifest that the vendor holds the legal title subject to this equitable right of the vendee to compel a conveyance, and that there is also an as yet unexercised right in the vendor to compel the vendee to accept and pay for the property. Hence, until specific performance, the vendee is regarded as the equitable owner, and the risk of loss is upon him; and the vendor holds the legal title subject to the vendee’s equitable rights which are analogous to the rights of a cestui que trust only in that a conveyance may be compelled, and, possibly, in that the vendee is entitled to increment in value, rents and profits, etc., if and when performance is had. So also with the statement that a contracting vendor of real estate holds the legal title’ ‘as

security for the payment of the purchase price.' ' This means, and was intended to mean, no more than that, while the vendee has a right to compel specific performance, the vendor will not be required to convey unless and until the purchase price be paid.' *National Bank of Kentucky v. Louisville Trust Co.*, 67 F. (2d) 97.' ' (ftn. 23).

"Until the price has been paid, while the vendor holds the legal title subject to an equitable obligation to convey to the purchaser on payments of the purchase money, he has, unlike an ordinary trustee, a personal and substantial interest, which he may actively assert, or may transfer by written assignment."

"*Shaw v. Foster*, L.R. 5 H.L. 321, per Lord Cairns. See *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Philadelphia Inquirer Co.*, 25 F. (2d) 701; *Berndt v. Lusher*, 40 Ohio App. 172, 178 N.E. 14.' (ftn. 24).

"*Culmbach v. Stevens*, 158 Wash. 657, 291 Pac. 705, holding that such an assignment is good as against the trustee in bankruptcy of the vendor and he takes at most only the naked legal title to the real property in trust for the assignee and the vendees.' (ftn. 25).

"Furthermore, a judgment against the vendor attaches as a lien on the land which may be enforced, as against a purchaser in possession with notice, to the extent of the unpaid purchase price." See *Bauermeister v. McDonald*, *supra*.

In Utah, therefore, under our statute, when a husband and wife join in an executory sales contract, the wife has a distributive share interest in the equity retained by the sellers, which she may assert against all the world, subject only to the right of the buyer upon his full performance.

There is another line of cases deserving of the Court's attention in considering the question of what interests are dowable under an executory land contract. The Utah case in point is *McNeil v. McNeil, et al.*, 61 Ut. 141, 211 Pac. 988. There the husband was a *buyer* in an executory land contract not performed completely, and the widow claimed the statutory equivalent of dower in this interest at his death. The court held that since the contract was not completely performed, and equity would not at that time compel a conveyance of the land, the interest was not dowable. States in accord with this rule are Alabama, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Nebraska, South Carolina and Tennessee. See 66 A.L.R., P. 67. If the wife of the *buyer* under such a contract has no dower, the *seller* must have a dowable interest; otherwise neither would get any and the way would be opened for men to bar dower on their wives simply by the use of a particular method of effecting a transfer of real property. Certainly the law would not sanction a device whereby two men could place both of their interests beyond the dower statute.

“The title must vest somewhere; and since the decedent did not divest himself of it by his contract, it vested in those who were entitled under the law to take by succession, viz., the heirs.” See *Tyler v. Tyler*, *infra*.

Moreover, it has been held that it is contrary to the policy of the law to apply a technical doctrine to defeat a wife's dower. In *Tyler v. Tyler*, 50 Mont. 65, 144 Pac. 1090, a husband and wife, for a consideration, gave to certain buyers the exclusive right to purchase

certain real estate in the form of an option. The deed, executed by both, was placed in escrow. When the husband died before the purchaser exercised his right to purchase and before the deed was delivered, the wife claimed a share of the proceeds of the sale as dower. Defendants, the other heirs, claimed that under the "relation back" theory of escrow, the delivery to the purchaser was effective as of the time of delivery to the escrow agent and no dower, therefore, could be awarded. The court held that the widow was entitled to the relief sought. It said:

"The rule contended for by defendants is a fiction of law, applied by courts of equity in exceptional cases to sustain a conveyance which would otherwise fail of its purpose, and thus defeat the intentions of the parties. (Citing illustrative cases). It has application to cases where it is necessary to uphold a right. For example, it might be invoked to uphold the title in Forbes and Ector (the grantees) but it cannot be invoked to defeat the right of the plaintiff which attached before the second delivery."

The court stated further that the widow was "clearly entitled to her dower in the proceeds of the sale. \* \* \*"

What is the difference in substance between the facts of this case and the facts of the case at bar as far as the interest of a seller in a land contract is concerned? It is recognized, of course, that there is technical difference between an option contract and the executory real estate contract in evidence in this case, but as a matter of substance and equity why should the wife under an executory contract be held to have any

less interest in the land it covers than if the same land had been conveyed under an option agreement? It is submitted that particularly under our statutes the theory of the Tyler case is controlling in the case at bar, and the Court should find that Mrs. Madsen retains an interest in the property.

We again emphasize to the Court that we do not believe that any legal effect can be given to the signature of Mrs. Madsen on the Peterson contract, since it is the case of a wife joining with a third person and is therefore not effective to convey inchoate dower. However, *even if the Court finds that the Peterson contract was joined by her as the wife of Mr. Madsen, it is nevertheless clear upon principle and authority that she retains a distributive share interest in the land which the plaintiff in this case has no right to acquire.*

(d) *The execution of a contract to sell land does not extinguish the seller's interest in the land.*

It is, of course, an elementary principle of law that the seller not only has the legal title after the execution of an executory real estate contract, but that he also is the equitable owner of the land to the extent of the unpaid balance on the contract. In other words, there is only pro tanto conversion—only conversion to the extent that the purchase price is paid by the buyer. In the case at bar none of the money was paid to Mrs. Madsen. She received no consideration from anyone. Why should she now be stripped of her right?

If A and B are tenants in common of Blackacre



and they execute a contract whereby they agree to convey to X by warranty deed upon the payment of twelve monthly installments in the amount of one hundred dollars each, and X makes six monthly payments to A, can it be said that without paying more X acquired any right against B under his contract? Without question the law would require the payments to be made to both A and B. On principle there is no reason why a buyer should be permitted to ignore the fact that the wife of the seller has an actual and subsisting, although inchoate, interest in the land.

The dower interest has been zealously protected by courts of law for nearly one thousand years. It is a part of the genius of the Anglo-American judicial system. It is designed to protect wives against the eventualities of the decease of their husbands and against both co conspiring and unwitting trespass upon their marital rights. A buyer should not be permitted to assume that a seller will account to his wife for her share in the proceeds of a contract any more than he should be permitted to assume that he will obtain her signature on the deed without obtaining her signature on the contract. The payments should have been made to Mr. and Mrs. Madsen, as sellers, rather than simply to Mr. Madsen.

If one is constrained to feel sympathetic toward the Petersons, it is well, nevertheless, to take a look at the result as far as Mrs. Madsen is concerned. She is the victim of a device which not only prevents her from enjoying the proceeds of the sale during her life-

time, as she had every reason to anticipate, but under the decree of the trial court she is precluded from any distributive interest either under the residuary clause of the will or under the distributive share statute of the estate with reference to real property.

It is submitted that the Court erred in finding and concluding as a matter of law that Mrs. Madsen has no present interest in the land.

#### POINT NO. IV

THE SILENCE OF R. W. MADSEN, SR., AND THE PLAINTIFF, AND THEIR FAILURE TO DISCLOSE THE ALLEGED INTEREST OF THE PLAINTIFF IN THE LAND AT THE TIME OF THE EXECUTION OF THE PETERSON CONTRACT, CONSTITUTED A FRAUD UPON MRS. MADSEN. PLAINTIFF SHOULD BE REQUIRED TO ACCOUNT TO HER FOR ONE-THIRD OF THE TOTAL SALES PRICE, AND SUCH RELIEF TO HER SHOULD BE A CONDITION TO ANY RELIEF TO PLAINTIFF IN THIS ACTION.

The Court found that R. W. Madsen, Sr., sold the property involved to the plaintiff on January 1, 1937, for \$10,680.00. After that time the property was carried on the books of the corporation and recognized by Mr. Madsen and the corporation as the property of the corporation. (Findings of Fact Nos. 5 and 6). On June 6, 1946, the Peterson contract was executed. The parties to the contract were James O. Peterson and C. Amelia Peterson as buyers and Richard W. Madsen and LaReta C. Madsen, his wife, as sellers. Since the Court found that Mr. Madsen had conveyed his interest in the corporation in 1937, Mr. Madsen had no interest to convey

at this time, but the Court found "That said Richard W. Madsen was in fact acting for and on behalf of Madsonia Realty Company in the signing of said contract of sale." (Finding of Fact No. 6). Madsonia entered the sale on its books and Madsonia received all of the payments between the initial payment and the death of R. W. Madsen. (Finding of Fact No. 6).

The Court found, "That LaReta C. signed said contract of June 6, 1946, voluntarily as the wife of Richard W. Madsen. That there were no misrepresentations made to LaReta C. Madsen by Richard W. Madsen or any other person as an inducement to sign said contract." (Finding of Fact No. 7). The Court found that Mrs. Madsen signed the contract for the purpose of releasing her statutory dower right, and that at no time did either Mr. Madsen or the plaintiff, or any other person, agree to give any portion of the purchase price to Mrs. Madsen. (Finding of Fact No. 7).

It is clear that Mrs. Madsen knew nothing of the alleged 1937 transaction between her husband and the corporation, and it is not questioned, and cannot be, that Mrs. Madsen did not know that the consideration all went to the corporation instead of to her. The Court found that "neither at the time of the execution of the Peterson contract on or about June 6, 1946, nor at any time prior thereto, did defendant LaReta C. Madsen know that Madsonia Realty Company had or claimed any right, title or interest in or to the aforesaid property; that at no time did either Richard W. Madsen personally, nor did any other agent, officer or employee of Madsonia

Realty Company, take any step whatsoever to put said LaReta C. Madsen on notice of any claim or interest by the said corporation." (Finding of Fact No. 10, R. 74).

Mrs. Madsen testified that she never discussed the Peterson contract with anyone other than R. W. Madsen; that Mr. Madsen brought it to their home and she signed it (R. 192). The record indicates that Mrs. Madsen believed all of the money from the sale of the home at 667 East 4th South went into the joint bank account that she and her husband had at the Utah State National Bank (R. 202-203).

There can be no question, in view of the findings of the Court, and as far as the record and facts are concerned, that Mrs. Madsen did not know that neither she nor her husband was to receive anything from the Peterson contract but that everything was going to the corporation. The failure to disclose these material facts was fraudulent. The Court found in effect that Mr. Madsen was acting as a fiduciary of the corporation. He was also acting in a position of trust and confidence with reference to his wife. He did not disclose that he was acting in behalf of the corporation. He did not disclose that the consideration was not to go to him but to the corporation. He failed to exercise the high degree of good faith required of a husband towards his wife. Since he was acting for the corporation and the corporation had knowledge of his wrongful conduct, and since the corporation participated in the transaction, it is charged with this fraud and must bear the consequences.

The law is settled that remaining silent under circumstances creating an obligation to speak is as much a fraud as actual misrepresentation.

“Fraud is the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; the suggestion of a fact of that which is not true, by one who does not believe it to be true; also a fraudulent misrepresentation by which one deceives another to the injury of the latter.”

26 C.J.S. 34 and cases cited. See also 26 Corpus Juris, 1134 at Note 24, and see generally Corpus Juris, Fraud, Sections 54, 93 and 95.

The law is stated by the editors of 37 C.J. Sec., p. 244, Sec. 16 of the discussion on Fraud, as follows:

“Where the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation.

“An exception to the rule that mere silence is not fraud exists where the circumstances impose on a person a duty to speak and he deliberately remains silent. It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence or concealment in violation of this duty with intent to deceive will amount to fraud as being a deliberate suppression of the truth, and equivalent to the assertion of a falsehood. The concealment of a fact which one is bound to disclose is an indirect

representation that such fact does not exist, and constitutes fraud. A similar rule has in some jurisdictions been affirmed by express statutory provisions. Whether a duty to speak exists in a given case is a question depending on the peculiar facts involved.

“*Misrepresentations by third person.* If one stands silent in the presence of a third person making misrepresentations which it is one’s duty to correct, such silence constitutes a fraud. \* \* \*

“Where a relation of trust and confidence obtains between the parties, there is a duty to disclose all material facts, and failure to do so constitutes fraud. \* \* \*

“The rule applies, it has been said, wherever confidence is actually reposed by one person to the knowledge of the other.”

The kind of good faith and full disclosure required by a husband in transactions with his wife are illustrated by the case of *Nissen v. Nissen Trampoline Co.* (1949 Sup. Ct. of Iowa), 39 N.W. (2d) 92. There the plaintiff and appellant was the wife of George P. Nissen during the time in question. Part of the property involved was owned in his own name and part of it was owned by him and his wife as joint tenants. The defendant and appellee, Nissen Trampoline Co., was a corporation and Mr. Nissen owned all of its stock. He had been its president since its organization and was acting as its president at the time of the execution of the deeds in question. Plaintiff contended that on or about the 1st day of March, 1947, she signed certain blank instruments which were presented to her by her husband, with his explanation

that they were papers in connection with the operation of the corporation. He represented to her that the documents were papers which required her signature as an officer of the corporation; in fact, the documents were deeds which conveyed three separate properties to the corporation.

The Court discussed in detail the evidence concerning the circumstances at the time the deeds were signed, and concluded that the trial court erred in failing to find that the wife had been defrauded. The Court held that the corporation was liable for the acts of the husband since he was admittedly its agent, stating:

“The liability of a principal for the acts of its agent growing out of the agent’s knowledge of certain facts as well as the liability of a principal under certain circumstances, including the situation where the agent is the sole representative of the principal, is commented upon in 2 Am. Jur. Agency, 300, par. 380, where it is stated: ‘A qualification of the rule that the knowledge of an agent engaged in an independent fraudulent act on his own account is not the knowledge of the principal has also been made where the agent, though engaged in perpetrating an independent fraudulent act on his own account, is the sole representative of the principal. It is held under such circumstances that the agent’s knowledge is imputable to his own principal, and that the case falls within the general rule imputing the agent’s knowledge to the principal. This qualification to the exception has been applied in cases involving agents and officers of corporations as well as in cases involving agents and other principals.’

“From a consideration of the many authorities we find the rule to be that a person is bound by the knowledge of his agent. This is predicated on the theory that it is the agent’s duty to disclose all material facts coming to his knowledge with respect to the subject matter of his agency, and it is presumed that he has discharged that duty. There is, however, an exception to this rule in cases where the knowledge of the agent is obtained while he is engaged in committing an independent fraudulent act on his own part, the communication of which to the principal would necessarily prevent its consummation. This exception or qualification is further qualified in the case of a fraudulent agent who is the sole representative of the principal and under such circumstances the imputed knowledge of the principal applies. See Annotations 48 A.L.R. 464, 468 and cases cited; Annotations 86 A.L.R. 537 and Annotations 2 L.R.A. (N.S.) 994 and cases cited.”

The Court held that the acts of the husband in relation to his wife in the obtaining of her stock were fraudulent in character and that the evidence was clear, satisfactory and convincing. The Court discussed the relationship between the husband and wife in the following language:

“The relationship between the appellant, the wife and George P. Nissen, her husband, was such as to create a confidential and fiduciary relationship. It has been our holding that where a fiduciary or confidential relation is shown to exist between the parties to a transaction the burden is upon the one claiming a benefit therefrom to establish entire fairness on the part of the party benefitted. *First National Bank v. Ten Napel*, 198 Iowa 816, 819, 200 N.W. 405. There can be



no doubt in this present case as to the confidential relationship between the appellant and George P. Nissen. It is true there was no confidential relationship between the appellant and the corporation but the fact that Nissen was the sole representative of the corporation in the transfer of the properties while acting in a confidential relationship to his wife can and should be taken into consideration in our determination of this case.”

It is settled law that a husband cannot so conduct his affairs that his wife is misled into a release of her dower right interest by fraudulent misrepresentations.

In *Kratli v. Booth, et al.*, 191 N.E. 180, 99 Ind. App. 178, a husband by fraudulent representations induced his wife to execute a deed to certain real property to a nominal trustee without consideration. After the husband's death the trustee conveyed the land to the children and grandchildren of the husband. The Court found that the widow was not divested of her interest because of the fraud practiced upon her in the inception and execution of the deed, and that the children and grandchildren, having knowledge of the fraud, were not in a position to object to the allotment of her dower. The Court said:

“Husband and wife occupy a relation of special trust and confidence toward each other, and owe, one to the other, the utmost good faith. Whenever the confidence resulting from such a relationship is abused, equity will intervene to right the wrong.” (Citing cases, see Page 182, Northeast Reporter.)

Further said the Court:

“As between husband and wife, the husband,

in the absence of facts showing otherwise, is presumed to exercise a superior dominating influence over the wife in business affairs to such an extent that she depends upon and suffers her conduct to be controlled by his wish and judgment."

The Court said that the husband induced the wife to join in the execution of the deed to the trustee with a promise that it would be sold and the proceeds invested. The husband's purpose was to have the bank convey the land to his children and grandchildren and to defeat the wife's rights as his wife or surviving widow.

"He did not exercise that high degree of honor and good faith toward his wife, and make a complete disclosure of all the facts surrounding the conveyance which the law demands from a husband when dealing with her in matters affecting her property and marital rights. 'He owed to her the utmost good faith and frankness.' These important duties he failed to fulfill. He concealed from appellant the important fact that he had an oral agreement with the bank to convey the land to appellee. He did not intend at that time to carry out the promise which he made to appellant to induce her to sign the deed. 'A present state of mind is a present state of fact. It was a fraud upon appellant to conceal from her his intention to have the real estate conveyed to his children and grandchildren. *Basye v. Basye*, supra.

"It has been held in this state that when one person designedly and knowingly causes a false impression or belief to be entertained by another, and the latter is thereby induced to make a contract injurious to his interests, such a contract

is so impressed with fraud that the courts will set the same aside.' *Kemery v. Zeigler* (1912) 176 Ind. 660, 96 N.E. 950, 954; *Sherrin v. Flinn* (1900) 155 Ind. 422, 58 N.E. 549; see *Westphal v. Heckman*, *supra*.

"Equity regards the substance of a transaction and not the form. This conveyance was made to a nominal trustee without consideration, it never accepted or had the management or control of the property, and after the death of John G. Kratli pursuant to his oral instructions, without consideration and at their request, conveyed the property to the appellees. They were not innocent purchasers for value and received the real estate burdened with any rights which the appellant had therein as surviving widow of her deceased husband.

"Facts not found in a special finding, as to such omitted facts, amount to a finding against the party having the burden of proof. The burden was upon the appellees in this case to establish the fact that when John G. Kratli induced appellant to sign and acknowledge the deed to the bank, he acted in perfect good faith, that he took no advantage of his influence or knowledge, and that the contract was fair, adequate, and equitable. *McCord v. Bright*, *supra*. The special finding of facts fails to show that appellees have discharged this burden. We hold therefore that on the special finding of facts and the presumptions of law that prevail in cases of this character, the execution of the deed from John G. Kratli and appellant to the bank was, as to her, procured by fraud practiced upon her by her husband, and was therefore void and not binding upon her, and that she is entitled to have her title quieted in a life estate in an undivided one

third of the lands of her deceased husband, as against the appellees.”

The Court’s attention is invited to the remarkable similarities in the case at bar. Here, Mr. Madsen conveyed to the corporation without his wife’s knowledge. Then, without disclosing the interest of the corporation, and without disclosing the fact that he was receiving no consideration, and without disclosing the facts of the case, and while acting, according to the theory of plaintiff and the trial court, as trustee and agent of the plaintiff, he presented to his wife a contract which he said was to convey “our home”. The corporation had knowledge of the real facts and knew that Mrs. Madsen had no knowledge of them. It participated in the transaction. Mr. Madsen then claimed that the stock in the corporation was held by his two sons, or in the will admitted to probate he left all of the stock in the corporation to them. The result of the transaction was to exclude his wife’s interest and to prevent her from receiving any benefits under the contract which she was fraudulently induced to sign. Certainly a court of equity should scrutinize closely the entire transaction and should prevent the plaintiff from being enriched by its own fraudulent conduct.

In connection with the good faith required of a husband toward his wife in transactions concerning property in which she has an inchoate dower interest, the attention of the Court is invited to *Stokes v. Stokes* (1922), 196 N. Y. Sup. 184, 119 N. Y. Misc. 168. In that case the wife brought an action alleging (1) that two

deeds were executed without consideration; (2) that their execution was obtained by fraud, coercion, suppression of facts and undue influence; (3) that the wife may not release her inchoate dower to her husband, and (4) that the procuring of her signature on the deeds in question was for the purpose of defrauding her in obtaining the release of her inchoate dower right in the property.

The husband claimed that there was an antenuptial agreement but he could not produce it, and the Court doubted its existence. The deeds in question were signed three months after the marriage of the parties, when the husband came to the wife's bedroom and asked her to sign them. The grantee was a corporation in which the husband owned all of the stock. The husband did not record the deeds until eight years later, when difficulty arose between the parties. The Court said that it was an elementary principle that a wife could not release her inchoate dower as to her husband.

“May she, by joining in a deed to a corporation, the stock of which is entirely owned by her husband, release that dower right? The corporation is ordinarily to be considered a separate entity, but when I consider all the circumstances before me—the claim of an antenuptial agreement and the evidence introduced to sustain that claim; the non-production of the agreement; the withholding of the deed to the corporation by defendant Stokes for over eight years; his possession of it during all of that time; the facts attendant upon the execution of the deeds as evidenced by the oral and documentary evidence—I do not believe a court of equity should be estopped by a mere legal fiction of ‘entity’.”

The Court said that it would not permit a mere device or contrivance to be used to do away with her inchoate right, and quoted *Hayes v. Henry*, 1 Md. Ch. 337, as follows:

“One of the badges of fraud in such case is the relation of the possession of the property by the husband after the transfer of the title, or keeping the deed in his hands after its execution.”

The Court discussed the superior knowledge of the husband, and the fact that he was a dominant party, and concluded that she was misled into not scrutinizing the instruments because of her trust in her husband's good faith. The relief prayed for by the wife was granted.

Can there be any doubt that the fact that the consideration in the Peterson contract was intended to go and did go to the corporation was a material fact, the suppression of which constitutes fraud? Mrs. Madsen had a legal relationship toward her husband; she shared in a joint bank account with him; she had an interest as his wife in his property; she expected that he was going to get the money under the Peterson contract. She had no legal relationship to the corporation, as to which she was legally a total stranger. It is an empty answer to say that she would have signed even if she had known of the facts. The case is to be decided on the facts as they occurred and not upon some speculation as to what might have been the result of different facts.

It is submitted that the Court erred in failing to

conclude that the acts of the plaintiff and Mr. Madsen constituted a fraud upon Mrs. Madsen, and that she should receive an accounting from the corporation of one-third of the amounts received by it under the Peterson contract, and that she should further be awarded an amount equal to one-third of the present value of the contract, including interest. Less than this relief permits the corporation to profit by its fraud. As framed, the decree is inequitable, unrealistic and contrary to law.

### CONCLUSION

If the Court agrees with appellants that the action of the plaintiff is barred either by the statute of frauds or the statute of limitations, then the Court must still determine whether Mrs. Madsen was defrauded and whether the plaintiff must account to her for one-third of the moneys it has already received on the Peterson contract. If the Court agrees with Point No. III of appellants and finds that Mrs. Madsen still has a one-third interest in the property, then the Court will not be required to pass upon the problem raised by Point IV of the argument, because Mrs. Madsen will still have the rights which the Court found she had released to the Petersons. At least with reference to the money still to be paid under the contract, Points III and IV of the argument are alternative positions and should be considered as such.

In any event, it is clear beyond question that the trial court erred in depriving Mrs. Madsen of any inter-

est whatsoever in both the land or the sales price under the contract.

Respectfully submitted,

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