

1951

Madsonia Realty Company v. Zion's Savings Bank & Trust Company : Brief of Plaintiff and Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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.

FILED

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Utah Supreme Court, U

BRIEF OF PLAINTIFF AND RESPONDENT

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Case No. 7589

BRIEF OF PLAINTIFF AND RESPONDENT

STATEMENT OF FACTS

The statement of facts by appellants (pp. 1-7) is correct but incomplete. Appellants do not dispute or complain of any of the findings of the trial court and we believe a more complete statement of the issues framed by the pleadings and facts as found by that Court will facilitate the work of this Honorable Court.

This case was commenced by the filing of a "Petition for Order Directing Executor to Execute Deed" in the Probate Division of the District Court in the matter of the Estate of Richard W. Madsen, Deceased. The only relief prayed was that Zion's Savings Bank & Trust Company, as Executor of the Estate of Richard W. Madsen, deceased, execute and deliver to Madsonia Realty Company a deed to certain property which had been bought and paid for by Madsonia Realty Company. LaReta C. Madsen intervened and filed a demurrer to the petition. She acted in her individual capacity as an heir and widow and not for or on behalf of the executor. The executor also filed an answer to the petition. The demurrer of LaReta C. Madsen was overruled and she filed an answer and counterclaim to the petition. The petitioner, Madsonia Realty Company, filed a reply joining issue with LaReta C. Madsen on her claim to a dower interest in the real estate or an interest in the proceeds from the sale. The case was transferred to the civil division of the court, given a civil number (87361) and a fee was paid by the plaintiff as in the case of filing an original civil action. The case was then designated "Madsonia Realty Company, Plaintiff, vs. Zion's Savings Bank & Trust Company and La Reta C. Madsen, Defendants" and was thereafter treated in all respects as a civil action rather than a petition in probate.

The Madsonia Realty Company is a corporation which was organized in 1923 (R. 71, Finding No. 1). R. W. Madsen had been previously married and his first

wife died in 1932 (R. 182). R. W. Madsen and LaReta C. Madsen, the widow of the deceased, were married October 30, 1935 (R. 71, Finding No. 3). At the time of the second marriage, R. W. Madsen owned the property at 667 East 1st South Street in Salt Lake City which had been his family residence (R. 71, Finding No. 4). On January 31, 1937, R. W. Madsen sold the property in question to Madsonia Realty Company for \$10,680.00 (R. 71, Finding No. 5). The consideration for said property was paid to R. W. Madsen, but no deed was ever executed by him to the corporation (R. 71, Finding No. 5). From the date of sale until the death of R. W. Madsen the property was treated in all respects by him and by Madsonia Realty Company as the property of the company. The specific acts regarding ownership of the property by Madsonia are:

(a) The sale was entered on the books of the corporation in the handwriting of R. W. Madsen, President and General Manager of the corporation (R. 71, Finding No. 5).

(b) From that date until June 6, 1946, all rents were collected by the corporation and Madsonia Realty Company paid all taxes, upkeep and repairs on the property (R. 71, 72, Finding No. 5).

(c) On June 6, 1946, the property was sold to James O. Peterson and C. Amelia Peterson for \$16,500.00. While the contract of sale was signed by R. W. Madsen and his wife, LaReta, as sellers,

“said Richard W. Madsen was in fact acting for and on behalf of Madsonia Realty Company in the signing of said contract of sale” (R. 72, Finding No. 6).

(d) This sale was also entered on the books of Madsonia Realty Company in the handwriting of R. W. Madsen and the \$4,000.00 down payment was entered as a credit to the buyers on the books of such corporation (R. 72, Finding No. 6).

(e) Madsonia Realty Company showed a profit on its books at the time of the sale of \$9,428.49 (R. 72, Finding No. 6). (The excess in profit over the actual difference between the purchase price and the sale [\$16,500.00—\$10,680.00=\$5,820.00] is accounted for by depreciation which had been entered on the books).

(f) This profit was reported by Madsonia on state and federal income tax returns for the year 1946 and the taxes paid (R. 72, Finding No. 6, R. 187, Exh. T., U., W and X).

(g) All payments on the contract made by the Petersons and their successors in interest were deposited to the account of Madsonia and entered on its books, this being done personally by R. W. Madsen (R. 72, Finding No. 6).

Subsequent to the death of R. W. Madsen the payments were made direct by the purchasers to Madsonia Realty Company (R. 72, 73, Finding No. 6).

LaReta C. Madsen signed the Peterson contract of June 6, 1946, voluntarily as the wife of R. W. Madsen for the purpose of releasing her statutory dower under Section 101-4-3, Utah Code Annotated, 1943, and at no time did R. W. Madsen or any other person promise her all or any portion of the purchase price (R. 73, Finding No. 7). There is *no* dispute but that R. W. Madsen was paid the full agreed purchase price for the property. Not only was his account with the corporation credited with the full purchase price, but by April 5, 1937, (three months after the sale and credit to his account) his credits had been withdrawn and the account balanced (Exh. F). The account had previously been balanced and reopened ^{Oct. 14, 1935.} ~~June 1, 1936.~~ The account was meticulously kept as appears in Exh. F. and as will be more fully shown in this brief under Point No. 6.

No contention is made that in 1937 \$10,680.00 was not a fair and adequate price. It further appears "that during the time of their marriage R. W. Madsen transferred to LaReta C. Madsen gifts, money and property (in addition to all living expenses) of not less than \$49,000.00" (R. 73, Finding No. 8). These were the values at the time the gifts were made, not present values.

The court found, and there is no dispute on the matter, that LaReta C. Madsen signed the contract of June 6, 1946, voluntarily as the wife of Richard W. Madsen, and there were no misrepresentations by R. W. Madsen or any other person as an inducement to sign. She signed the contract for the purpose of releasing her rights to dower

under Section 101-4-3, Utah Code Annotated 1943 and there was no promise to pay her any part of the purchase price (R. 73, Finding No. 7).

Another matter of interest and importance to this litigation is the fact that the original answer and counterclaim of LaReta C. Madsen pleaded that R. W. Madsen and Madsonia Realty Company were one and the same, the corporation merely being the alter ego of R. W. Madsen. The pleading with regard to this is as follows:

“F. That the Madsonia Realty Company is making claim to the property described in Paragraph ‘B’ hereof, as appears from their petition, and LaReta C. Madsen alleges the fact to be that Madsonia Realty Company, during the lifetime of R. W. Madsen, was his alter ego and had no separate entity whatsoever and that any purported transfer of R. W. Madsen to the Madsonia Realty Company is a nullity and in truth and effect was an attempt to transfer the property to himself.”
(R. 22)

On the morning of the trial LaReta C. Madsen filed an amended answer and counterclaim, dropping the claim of alter ego. The amended answer and counterclaim was permitted to be filed by the court at such time with the understanding that all material allegations of the answer and counterclaim be deemed denied. The only objection raised by Madsonia to the amendment was the elimination from the pleading of the allegations having to do with the disregard of the corporate entity, this objection being upon the ground that such matter was necessarily a part of the case and the case could not be

decided favorably to the Madsonia Realty Company without holding that such corporation was not the alter ego of R. W. Madsen and that it was, in fact, a separate entity. The record with regard to this is as follows:

“MR. CANNON: If the Court please, we would like the record to show that we have objected to the filing of the amended answer and counterclaim, which withdraws the issue as to the corporate alter ego or the disregard of the corporate entity. We think that that is necessarily involved in this case and consequently object to it being withdrawn.

“THE COURT: But you don’t ask for any time to meet any issues that may be framed here?

“MR. CANNON: No, we do not.

“THE COURT: All right. The objection is overruled.” (R. 97).

The foregoing facts, it seems to us, should be sufficient to decide this case without the necessity of argument. There is no dispute that R. W. Madsen sold the property, received the purchase price, his estate was increased to the extent of the purchase price, his wife released her dower by signing the contract when the property was sold to the Petersons and the parties treated the transaction as closed. All payments by the Petersons were turned over to Madsonia. Madsonia Realty Company had possession of the property for 11 years prior to the death of R. W. Madsen, collected all rents, paid all taxes, made all repairs and paid an income tax on capital gain of \$9,428.49. LaReta made no claim on the proceeds

while her husband lived. Under these circumstances equity and justice require that the executor and the widow of the deceased do whatever is necessary to clear the title to the property. However, since appellants have presented a 60 page brief and will undoubtedly file a reply brief respondent feels it must answer their arguments but will present the position of Madsonia Realty Company as concisely as possible.

STATEMENT OF POINTS
RELIED UPON

POINT NO. 1

RESPONDENT IS ENTITLED TO A DEED FROM THE EXECUTOR.

POINT NO. 2

SHOULD IT BE HELD THAT PLAINTIFF IS NOT ENTITLED TO A DEED FROM THE EXECUTOR, IT IS CLEARLY ENTITLED TO A DECREE QUIETING TITLE AGAINST THE EXECUTOR.

POINT NO. 3

THE RIGHT OF THE PLAINTIFF IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

POINT NO. 4

LARETA C. MADSEN, THE WIDOW, HAS RELEASED HER STATUTORY DOWER.

POINT NO. 5

PLAINTIFF IS ENTITLED TO AN ORDER REQUIRING THE WIDOW TO DEED THE PROPERTY TO MADSONIA REALTY COMPANY.

POINT NO. 6

THE RELEASE OF DOWER WAS NOT SECURED BY FRAUD.

POINT NO. 7

LARETA C. MADSEN IS ESTOPPED, BY CLAIMING THE BENEFITS OF THE WILL, FROM ASSERTING ANY DOWER RIGHT IN THIS PARTICULAR PIECE OF REALTY.

POINTS numbered 2, 5 and 7 above are in effect points on which we cross appeal. A decree quieting title under Point No. 2 is, however, unnecessary so long as the order of the trial court requiring the executor to execute a deed stands. Point No. 5 is urged by ^{respondent} ~~appellee~~ in any event so as to preclude any possible further litigation. Point No. 7 is an additional reason why LaReta C. Madsen should not profit by her claims.

ARGUMENT

POINT NO. 1

RESPONDENT IS ENTITLED TO A DEED FROM THE EXECUTOR.

The argument hereunder includes our answer to appellants' Point No. II. Appellants claim as a defense that we have "proved no compliance with the statute of

frauds." We do not claim that there is any instrument in writing signed by the vendor R. W. Madsen which satisfies the statute of frauds. We claim, however, that there is sufficient performance of the contract to circumvent the necessity of a signed agreement, and the title to the property is now held in trust for the plaintiff. Our statutes recognize that our courts can enforce a trust in a proper case without a signed written agreement and also that specific performance of a contract may be had even though there is no signed written agreement. Section 33-5-2 U. C. A. 1943 provides:

"Wills and Implied Trusts Excepted.

The next preceding section shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament; *nor to prevent any trust from arising or being extinguished by implication or operation of law.*"

Section 33-5-8 U. C. A. 1943 provides:

"Right to Specific Performance not Affected.

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof."

Each case having to do with specific performance of a contract where there has been no compliance with the statute of frauds is necessarily different. We must apply general principles to the facts of each case as they arise. The general rule is set forth in the case of *Besse vs. McHenry*, (Mont. 1931) 300 Pac. 199, at page 202 as follows:

“The part performance of an oral contract which will avoid the statute of frauds may consist of any act which puts the party performing in such a situation that nonperformance by the other would be a fraud upon the person executing his part of the agreement according to its terms. *Eccles v. Kendrick*, 80 Mont. 120, 259 P. 609; *Shaw v. McNamara & Marlaw*, 85 Mont. 389, 278 P. 836; 27 C. J. pp. 343, 344.”

This case was expressly approved by the Supreme Court of Utah in the case of *Utah Mercur Gold Mining Company v. Herschel Gold Mining Company*, 103 Utah 249, 134 Pac. 2d 1094. This court stated:

“We are therefore finally thrown back on the inquiry as to whether the complaint, revealing that the contract for an extension of the written lease for five years was oral, also alleged facts sufficient to take it out of the statute. The acts which are alleged to constitute part performance must be in pursuance of the oral contract which it is claimed said performance saves from the death sentence of the statute. In *Besse v. McHenry*, 89 Mont. 520, 300 P. 199 it was stated:

“‘Part performance which will avoid statue of frauds may consist of any act which puts party performing in such position that nonperformance by other would constitute fraud.’ ”

The question of particular acts which constitute part performance so as to take the case out of the statute of frauds is discussed in 49 *Am. Juris.*, at page 742. Under Section 459 at page 766 the question discussed is whether the payment of the consideration or a part thereof is

sufficient to take the case out of the statute of frauds. It is pointed out that there are some authorities which so hold. It appears clear, however, that the payment of the full purchase price, accompanied by other acts, and particularly the delivery of possession, are sufficient. See Section 461 at page 770. The rule is there set forth as follows:

“* * * Stated concisely, the performance of the consideration and a change of possession under the contract constitute a sufficient part performance. In such a case it is said that the payment of the consideration strengthens the equitable claim of the plaintiff arising from delivery of possession, and that the vendor having accepted performance by the purchaser and having placed the latter in possession should not be allowed to perpetrate a fraud by repudiating the contract. * * *”

The question of part performance and the statute of frauds is thoroughly annotated in 101 A. L. R. at page 923. At page 1053 the rule with regard to possession plus the payment of consideration is stated as follows:

“Possession of land by the vendee and the payment of the purchase price under and in reliance on a parol contract for the purchase of the land have been held in numerous cases to constitute a sufficient part performance to warrant the specific enforcement of the contract.”

Citing cases from 29 states and territories including federal cases.

It should be borne in mind that in addition to the payment of consideration and delivery of possession, Madsonia Realty Company collected all of the rents, paid all of the taxes, made all repairs and paid an income tax on a profit in excess of \$9,000.00. In the cases where payment of the consideration is held insufficient to grant specific performance it is upon the ground that the purchase price may be recovered back. However, it is clear that Madsonia Realty Company could not now recover the purchase price as 11 years elapsed between the time of the payment and the death of R. W. Madsen and it would be the duty of the executor to plead the statute of limitations in an action for the recovery of this money.

There are a number of other Utah cases which have under quite similar situations imposed a trust on the holder of the legal title.

In the case of *Chadwick v. Arnold*, 34 Utah 48, 95 P. 527, the defendant had promised plaintiff that he would bid property at sheriff's sale for the plaintiff, in reliance upon which the plaintiff did not attend the sale. The court found that the defendant held the property in trust for the plaintiff. The ruling of the court is stated as follows in paragraph 6 of the syllabus:

“A trust ex maleficio arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own.”

In the case of *Van Natta v. Heywood*, 57 Utah 376, 195 P. 192, the plaintiff sued an executor upon an agreement to make a will in consideration of the plaintiff living with the deceased and performing services for him. The case held that the facts justified a recovery by the plaintiff. The rule with regard to such oral agreements is set forth as follows:

“* * * As contended by defendants’ counsel, this class of cases should be scrutinized with particular care; and unless under the circumstances the proof is positive, clear, and convincing, the relief sought should, and will, be denied. (Citing cases) But, nevertheless, where the contract to make testamentary disposition of property is clear, definite, and free from doubt, such a contract will be, in effect, enforced; in other words, equity will decree that to be done which the parties mutually intended to be done. (Citing cases).”

“Nor do we think that, under the undisputed facts and circumstances as shown by the record, this is a case coming within the statute of frauds (Comp. Laws Utah 1917, tit. 103, Sections 5811, 5813, 5817), pleaded as an affirmative defense by the defendants.

“The contract between the deceased and the plaintiff, although an oral one, was taken out of the statute of frauds by reason of part performance by the plaintiff. The evidence very clearly shows that the plaintiff remained with the deceased, rendering such services unto him as he was called upon to perform under the contract up to the time of the death of the deceased, and

during said time was in possession of the property by arrangement made by deceased. Section 5824, tit. 103. supra, expressly provides:

“‘Nothing in this title contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.’ (Citing cases).”

“This case, as a whole, presents, under the facts and circumstances, no difficulties in carrying out the mutual understandings of the deceased and the plaintiff.”

In the case of *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767, the plaintiff failed to recover for the reason that the proof was not sufficiently clear and definite (the case being one of an oral gift). However, the general rule with regard to part performance was laid down as follows:

“3. It of course is readily conceded that a verbal gift or parol agreement to convey land is within the statute of frauds, and at law a nullity. (Comp. Laws 1888, section 2831 and section 3918, subd. 5; Rev. St. 1898, Section 1974.) However, the doctrine has long been established that a verbal agreement, if part performed, can, notwithstanding the requirements of the statute, be enforced by a court of equity. But the foundation of the doctrine is fraud inhering in the consequence of setting up the statute. The rule is well stated by Pomeroy in his work on Specific Performance of Contracts (page 144):

“ ‘When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relation of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract, and thus to secure for himself all the benefit of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for his failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity ~~inter~~poses under these circumstances, and compels an entire completion of the contract by decreeing its specific execution.’ ”

Haight v. Pearson, 11 Utah 51, 39 Pac. 479. Here the court held that a constructive trust arose “by operation of law” when the defendant purchased an interest in property belonging to an estate with the understanding that it would be for the benefit of the plaintiff. See also *Barrett v. Vickers*, 100 Utah 534, 116 Pac. 2d 772, *Anderson v. Cercone*, 54 Utah 345, 180 Pac. 586, and *Wheelright v. Roman*, 50 Utah 10, 165 Pac. 513.

On page 13 appellants state:

“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.”

We shall point out wherein it is clear that the sale in 1937 by R. W. Madsen to Madsonia Realty Company was of the entire fee simple title to the property.

Exhibit U. is the federal income tax return of Madsonia Realty Company for the year 1946. It is signed by R. W. Madsen as president of the company. It was stipulated that the return bears his signature (R. 163). There is no doubt that the sale of the property to the Petersons included the inchoate dower right of Mrs. Madsen, as she signed the contract. Page 3 of the exhibit attached to Exhibit U. (the income tax return) gives the detail of the capital gain by Madsonia on the sale to the Petersons. The cost of the real estate to Madsonia is listed as real estate—\$4,120, building—\$6,560, or a total of \$10,680. The income tax return shows the purchase and sale of the same interest; otherwise, it would be an incorrect return. The same figures are in the ledger of the company. See Exhibit E. We submit that from the facts shown there can be no question but that the agreement between R. W. Madsen and Madsonia Realty Company was to sell the entire fee simple interest in 667 East First South Street, Salt Lake City, Utah.

(There may be some question in the mind of the court because the plaintiff alleges and the defendants admit that the sale to the Petersons was for the price of

\$16,500 and the income tax return shows a sale for \$15,500. The purchase price named in the contract, Exhibit A., is \$16,500, but this included \$1,000 of "personal furniture" which necessarily does not appear on the income tax return as there was no profit made on that part of the transaction. The \$1,000 item of furniture appears on Exhibit E).

POINT NO. 2

SHOULD IT BE HELD THAT PLAINTIFF IS NOT ENTITLED TO A DEED FROM THE EXECUTOR, IT IS CLEARLY ENTITLED TO A DECREE QUIETING TITLE AGAINST THE EXECUTOR.

The court found and it is undisputed that from January 1, 1937 to June, 1946, when the property was sold to the Petersons, that Madsonia Realty Company, through its tenants, had possession of the property, collected all of the rent, paid all of the taxes and also paid the cost of repairs. The property was improved and enclosed (R. 175-176). This in and of itself is sufficient to acquire title by adverse possession as against R. W. Madsen and his estate. There is no reason why Madsonia Realty Company should not have a decree quieting title as against the executor and estate except that, having found under Point No. 1 above that the executor should execute and deliver a deed to the Madsonia Realty Company, there was no purpose or reason for quieting title against the executor. Should, however, this court for any reason reverse the trial court on its order requir-

ing the executor to execute a deed there is no reason why it should not then order the district court to enter a decree quieting title against the executor and the estate.

POINT NO. 3

THE RIGHT OF THE PLAINTIFF IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The right of Madsonia Realty Company as set forth under our Point No. 1 is an equitable right. The court in permitting the plaintiff to recover the legal title from the executor is, in effect, holding that R. W. Madsen and his estate are trustees of the legal title for the benefit of Madsonia Realty Company. The statute of limitations does not begin to run on such a right until there has been a demand and refusal to make the conveyance. In other words there is no breach of the trust until the rights of the beneficiary have been repudiated by the trustee. This is recognized in the case of *Hatch v. Hatch*, 46 Utah 116, 148 Pac. 1096 in syllabus 3 as follows:

“Where an administrator of a wife sued the executors of her husband to recover property alleged to be her separate estate, and the allegations of the complaint, while showing lapse of time in excess of the statute of limitations, set up no demand and refusal, ouster, hostile assertion, or holding on the part of the husband against the wife, while asserting cotenancy, the married relation, and other trust or fiduciary relations against which the limitations do not run until demand and refusal, ouster, or open repudiation, the complaint was not demurrable.” (page 129).

The statute of limitations can never run against a person who is in possession of the land. This is for the reason that the person in possession has no reason to presume that the trustee will not fulfill his obligation. In *34 Am. Jur.*, page 296, Section 381, the rule is stated as follows:

“§ 381. Persons in Possession of Land.—As noted above, a statute cannot be sustained as one of limitation where it requires one in possession of property to bring an action within a given time or forfeit it, and it is laid down in a number of cases that as a general rule, the statute of limitations does not run against one in possession of land. Thus, the statute does not run against a mortgagee in possession, because he is in the actual possession of all the law gives him and the possession itself is prima facie evidence that the money is not paid. For a similar reason, it has been asserted that the statute does not begin to run against a cestui que trust in possession until the date of his ouster, no matter what the nature of the trust may be, * * * *”

It is further stated in *55 Am. Jur.*, pages 784-785, Section 357, as follows:

“§ 357. Effect of Performance by Purchaser.—According to the rule that a deed is ordinarily necessary to pass strict legal title, the payment of the entire purchase money does not itself vest the legal title in the purchaser, and his remedy where the vendor refuses to convey is in equity to compel specific performance. * * * After the purchaser has fully performed, he is, in equity, regarded as the absolute owner of an indefeasible estate, and the vendor is a naked trust-

tee having no interest but charged with the simple duty to convey to the purchaser upon demand. When the payments are fully made, the entire equitable title is in the vendee and the vendor retains the naked legal title in trust for him. When the contract price is fully paid, the entire title is equitably vested in the vendee, and he may compel a conveyance of the legal title by the vendor, his heirs or his assigns. *His equitable estate cannot be lost by laches or the statute of limitations so long as he is in the possession and enjoyment of his estate according to his rights.*”

The foregoing authorities dispose of any doubt of the plaintiff's right to a deed by reason of the bar of the statute of limitations. However, we again point out that if the plaintiff is not entitled to a deed from the executor the plaintiff nevertheless is entitled to a decree quieting title based upon adverse possession and it is the statute of limitations itself which gives the plaintiff such right and therefore, any benefit of limitations is entirely in favor of the plaintiff and does not benefit the defendants.

POINT NO. 4

LARETA C. MADSEN, THE WIDOW, HAS RELEASED HER STATUTORY DOWER.

Respondent's argument under this heading is in support of the court's finding:

“That LaReta C. Madsen signed said contract for the purpose of and did release her statutory dower right in said property pursuant to

Section 101-4-3, Utah Code Annotated, 1943.”
(R. 73, Finding No. 7)

It is also in answer to appellants’ Point No. **III** and argument in support thereof found on pages 18 to 46 of their brief.

Appellants’ argument is divided into four headings designated (a), (b), (c), and (d). We will consider each of these arguments separately, but first point out that appellants seem to rely upon a fifth point not related the the points specifically mentioned. This is found on page 20 where appellants state:

“The law is settled that unless a woman receives consideration she cannot release or convey her inchoate dower interest in land.”

Appellants cite no authority, and their statement is contrary to the authorities on the subject. The following statement is taken from 28 C. J. S. 138-139:

“The wife’s release of dower is valid and effectual without consideration inuring to herself, if supported by an adequate consideration moving to her husband, althought she may take a consideration inuring to herself as a condition of releasing dower.”

In view of the complete misstatement of the law and absence of any authority cited by appellants, we do not deem it necessary to argue this point at length. However, we cite the following cases which hold that by joining in a contract with her husband the wife releases her dower rights and is entitled to no portion of the proceeds. See *Brumer v. Brumer*, 228 N.Y.S. 63; *In Re*

McBride's Estate, 235 N.W. 166; *Marshall v. Reed*, 211 N. W. 637; and *In Re Brown's Estate*, 14 Pacific 2nd 1107.

We proceed now to discuss the arguments of appellants under the four separate headings.

On page 19 appellants state:

“(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.”

It seems that appellants are attempting to make the fine distinction that because LeReta C. Madsen signed a contract in which her husband was in fact acting as a trustee, her signature to the contract is ineffectual for the purpose of releasing her dower. If this court should so hold then she could use the same argument against the Petersons, the purchasers under the contract, as well as in this action. Actually, the trial court has gone no farther than to hold that as the situation now stands LaReta C. Madsen has released her dower in the property in question. The court refused to order her to execute a deed to Madsonia Realty Company, because, as it reasoned, she had not contracted to do so. We will discuss this phase of the case under our Point No. 5. However, coming back to appellants' argument, they cite no case which holds that the release of dower is ineffectual simply because the husband was acting as trustee or was

performing his duty to a third person who had paid him in full for the property. All of appellants' authorities may be distinguished by the fact that she did actually join with her husband in the same instrument.

In the quotation from *Scribner on Dower*, 2nd Edition, Volume 2, page 313, found on page 21 of their brief, it is stated:

“Hence if the conveyance of the husband be inoperative, or if it be set aside, or avoided, the right of dower remains unimpaired.”

We have no such situation here and will admit that if Mr. Madsen had lived and the Peterson contract had been rescinded for any reason or forfeited, LaReta C. Madsen would then have been restored to her dower rights the same as if he had taken title to real estate in the first instance.

In the case of *Robinson v. Bates*, 3 Met. (Mass. 1841) cited by appellants at page 22, it was simply held that where a creditor had set aside a deed which had been given by a husband and wife such deed could no longer be used as a release of dower. The quotation from *Tiffany on Real Property*, 3rd Edition, Volume 2, at pages 22 and 23 of appellants' brief, indicates that in some states the wife's dower may be released only in the same instrument as is signed by the husband. In addition to the fact that the husband did sign this instrument, we believe that the rule as pointed out by Tiffany as the law of some states is not now the law in Utah. Utah does not have common law dower. Common law dower and

curtesy were abolished as provided in Section 101-4-9, Utah Code Annotated, 1943. The substitute for common law dower is provided for in Section 101-4-3. The section provides:

“One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage *to which the wife has made no relinquishment of her right* shall be set apart as her property in fee simple if she survives him * * *”

This statute was copied from the Iowa Code. The Supreme Court of Iowa has held that the common law rule that the wife is required to join in the same instrument with her husband is not the law under the substituted statutory dower and under the emancipation statutes now existing.

In the case of *Fowler v. Chadima*, 111 N.W. 808 (Iowa 1907), the plaintiff was the widow of David H. Fowler who in his lifetime had given a deed without his wife's signature but the plaintiff as his wife had subsequently deeded the property to his grantee in a separate instrument for the purpose of releasing her dower. The court held the separate deed effective to release the dower under the modern statutes. The court said:

“The one question thus presented is whether husband and wife must unite in the same deed in order to effect a release of the latter's contingent right of dower. In a brief showing much industry and research, counsel for appellant has arrayed a large number of authorities for our consideration, many of which may fairly be cited in support of

his proposition that at common law a joinder of husband and wife in the same deed was necessary to an effectual release of the wife's right of dower; but modern innovations by statute and otherwise, upon common-law rules affecting the property rights of married women, have been so great and are of such radical character that the earlier precedents upon the subject are of but little value, save as matters of history. According to the ancient theory, the individuality and independence of the wife were so merged (or submerged, rather) in the person and authority of her husband that, generally speaking, she was held incompetent to transact any business, great or small, with reference to her own estate, or with reference to her interest in the estate of her husband, unless he united with her; and, while the husband could not by the conveyance of his real estate defeat the wife's contingent interest therein, yet, even after an absolute conveyance by him of his own estate or interest in each property, his wife was disqualified to release the possibility of a right in her part, which could not ripen into enjoyment except by his death, until he was willing to unite with her in executing the necessary writing for that purpose. If there was ever any good reason for this rule, it has ceased to exist. In many, if not all, of all the later cases cited by the counsel for appellant, the decision has been reached, not so much because of reliance upon the common law rule, as because the terms of the statute of the particular state seem to require the deed or release to be executed by both husband and wife. Our own statute does not attempt to prescribe the manner or form in which dower may be released. It does provide (Code, Sec. 2919) that a married woman may convey or encumber real estate or any interest therein belong-

ing to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons. Technically speaking, dower, in the common-law sense of the term, has long been abolished in this state, and the wife's interest in her deceased husband's lands is a distributive share of one-third in fee of all the real property possessed by him during his marriage, which has not been sold on judicial sale, 'and to which the wife has made no relinquishment of her right.' Now, although a contingent dower right may not be an estate, it certainly does constitute an interest in land which is recognized by the statute as being the subject of relinquishment by her in the life of her husband. Such being the case, it would seem that, under the general terms of Code, Sec. 2919, cited, its relinquishment may be accomplished by her 'in the same manner' as other persons not laboring under the disabilities of coverture would relinquish a contingent or remote interest in like property. So long as the husband retains his title to the land, there is good reason for saying the wife should not be empowered to convey or transfer her dower right to a stranger. There is also obviously good reason for saying that, when a husband has by his separate deed conveyed the fee to a third person, it should not be competent for his wife to convey or transfer her contingent interest to a stranger to the title, and the statute has wisely provided that a wife's contingent interest in her husband's property shall not be subject of contract or traffic between them; but, when the husband has once conveyed the fee, why should the wife not be at liberty to relinquish her dower interest to the purchaser with or without her husband's consent?

“The wife’s deed, under such circumstances is not a grant or conveyance, in the legal sense of the term, though we frequently use those terms as applicable to her act. She has no estate in the land which she can grant or convey to another. She has at most a contingent interest, a possibility of an estate which may accrue to her in the event that she outlives her husband, and, while she cannot sell or convey it to another, she can release or relinquish it in favor of the owner of the fee, save only where the owner of the fee is her husband. Her relinquishment adds nothing to the quality of the estate of the fee owner, but it removes a burden or incumbrance therefrom. By enabling a married woman to engage in business in her own name, and to buy, sell, own, and control property as freely and effectively as her husband can do, our statute necessarily subjects her to the ordinary rules of the law of estoppel, and when upon a sufficient consideration moving directly to her, or upon a consideration moving to her husband in the sale of the fee of his land, she by deed or by formal release, relinquishes her dower right, she should be held estopped to say that, notwithstanding such conveyance or relinquishment, she still demands an admeasurement of dower upon the husband’s death. Indeed, it was the general rule, even at common law, that the wife’s release of dower was held operative as an estoppel, rather than as a contract. *Gillilan v. Swift*, 14 Hun. (N.Y.) 574; *Reiff v. Horst*, 55 Md. 42. And decisions holding her estopped by her separate deed were not unknown before the modern statutes emancipating women from most of the disabilities of coverture. *Shepherd v. Howard*, 2 N.H. 507; *Fowler v.*

Shearer, 7 Mass. 14; Irving v. Campbell, (Super. Ct.) 4 N. Y. Supp. 103; Nelson v. Holly, 50 Ala. 3."

The cases cited by appellants which require the release of dower to be by instrument joined in by the husband are not the law in Iowa, from which state we adopted our statute. However, were these cases the law of Utah, we again point out that LaReta C. Madsen did sign with her husband to release her dower.

At page 26 appellants state:

"(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 burden of appellants' argument under this point seems to be that there is no privity between the Madsonia Realty Company and the Petersons with whom the contract signed by LaReta C. Madsen was made. Certainly if the argument under (a) of appellants' Point No. III is based upon the fact that R. W. Madsen was acting as trustee for Madsonia Realty Company, then Madsonia Realty Company is in equity and is actually the seller of the property, and there is privity of contract between Madsonia and the Petersons. We not only do not admit that there is no privity between Madsonia Realty Company and the Petersons, but our very claim is that Madsonia Realty Company sold the property to the Petersons, collected all of the money so far paid and Madsonia is obligated to deliver title. So far as we are concerned, we are willing to consider that the contract is the same as if it had been signed by Madsonia Realty Company and

LaReta C. Madsen as the sellers. We claim, therefore, the same relationship between Madsonia Realty Company and the Petersons as if Madsonia Realty Company were actually named as the vendor. Cases wherein the dower right has been released to a third person whose title never materializes are not in point. It is such situations that are discussed in *Scribner on Dower*, Volume 2, page 307, quoted at page 27 of appellants' brief and in the case of *Pixley v. Bennett*, 11 Mass. 298, and *Kitzmiller v. Van Rensselaer*, 10 Ohio State 63, cited at page 30 of their brief.

Appellants cite the case of *Gee, et al. v. Baum, et al.*, 58 Utah 445, 199 Pacific 680 (see page 31). The question in this case was whether or not a deed which had been signed by a husband and wife but which had never been delivered could constitute a release of the widow's dower. Of course, it was held that it did not, and we admit that any instrument signed by a wife which never becomes effective because of non-delivery cannot operate as a release of dower.

In the case of *In Re Reynolds' Estate*, 62 Pacific (2d) 270, 90 Utah 415 (cited by appellants at page 32), it was held that the giving of a mortgage by a husband and wife in the lifetime of the husband did not constitute a release of dower by the widow so far as it affected the amount of property which she could claim after the death of her husband as against other heirs, creditors of the deceased, or amount owing for inheritance taxes. The mortgage had not been foreclosed. The court points

out that a mortgagee receives no equitable or legal title, nothing is transferred to the mortgagee and the only effect of signing by the wife is to release her dower in the event the mortgage is foreclosed.

In the case of *Free v. Little*, 31 Utah 449, 88 Pacific 407 (cited at page 33 of appellants' brief), there was an attempt to specifically enforce a contract of sale, purely executory except as to the payment of \$60 (the contract being for \$12,000). The wife had never signed the contract and it was necessarily held that specific performance would not be granted. There is no analogy to the present situation.

Appellants' third argument under Point No. III is as follows:

“(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.”

Here the burden of appellants' argument seems to be that because after signing a contract a husband has some interest until he is paid, the wife's dower attaches to such interest. The argument is even made that because a wife's dower does not attach to the buyer's interest, it must attach to the seller's interest. The wife has only one dower right in one piece of property. If she signs away that right or releases that right, certainly she does not have another dower interest, whatever rights the vendor still may have. Appellants are trying to give her a second dower interest. We submit that if she has re-

leased her dower in a specific piece of property by the signing of a contract, that ends the matter, and there is no use of further discussion as to what interest the vendor still may have. We have already pointed out that the signing of the contract by a wife gives her no interest in the proceeds. We have hesitated to conclude that appellants' argument under this portion of the brief is simply that the widow has a dower interest in what is left in her husband after she has released her dower by signing the contract, but we can make nothing else of the argument. On page 44 appellants conclude this phase of the argument by the statement:

“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.”

The same statement is in substance found on page 41 as follows:

“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.”

We have set forth the two foregoing quotations from appellants' brief as showing that their position is simply an attempt to claim dower in what is left in the real estate contract after the wife has signed the contract

for the express purpose of releasing her dower. To so hold would mean that a complete release could never be secured as the husband as vendor has some interest until the contract is paid and a conveyance made. But this interest is not subject to dower when the wife has signed the contract to sell.

Appellants cite the case of *Tyler v. Tyler*, 50 Mont. 65, 144 Pacific 1090 (page 42 of their brief) for the proposition that "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." The case simply holds that where a wife has signed an option to sell, which option has not been exercised at the date of death of her husband, the property is not then "converted" to personalty and the widow still has a dower interest in the land. This is for the reason that there is, at the time of death, no contract of sale. The court recognized that if there were a contract to sell the opposite result must necessarily follow. The court said (page 1091 of 144 Pacific):

"The distinction between such a transaction (an option) and an agreement to sell was clearly pointed out in *Ide v. Leiser*, 10 Montana 5, 24 Pacific 695, 24 Am. St. Rep. 17. The one is the sale of an option—an executed contract—which has not become an agreement to sell until the election has been exercised. The other is an executory agreement which either party may require the other to perform according to its terms."

In this case it is the appellant, LaReta C. Madsen, who is trying to seize upon a technicality to secure her

dower. This will be pointed out hereafter under Point No. 7. It is clear that R. W. Madsen intended that his two sons should receive the stock in Madsonia Realty Company which necessarily includes all of its assets. LaReta C. Madsen is trying to secure for herself more than was intended by the will even though it has given her more than one-third of all of her husband's estate.

Under (d) appellants state:

“The execution of a contract to sell land does not extinguish the sellers' interest in the land.”

This argument is nothing more than a repetition of (c). The argument which follows, for what purpose we do not know, tries to draw an analogy between the wife's dower interest and tenants in common. It is argued that because a purchaser from tenants in common would have to pay both of the tenants, the Petersons as purchasers from R. W. Madsen must also pay part of the purchase price to LaReta C. Madsen. We have answered this argument under Point No. 4, page 21, *supra*. While we feel that there is nothing further to be said on this subject, we point out that the tenancy in common argument is contrary to all of the appellants' statements that the wife's interest is merely a contingent expectancy. There are no rules which can be followed to determine the amount which should be paid to a wife under these circumstances even if it were held that she is entitled to any of the proceeds of the sale.

POINT NO. 5

PLAINTIFF IS ENTITLED TO AN ORDER REQUIRING THE WIDOW TO DEED THE PROPERTY TO MADSONIA REALTY COMPANY.

The trial court denied plaintiff's right to a deed from LaReta C. Madsen. On this point we cross-appeal. Madsonia Realty Company in its original petition in probate had asked nothing from LaReta C. Madsen. When she intervened and asked for an adjudication of her rights Madsonia then asked affirmative relief against her by reply. While the ultimate result may be the same whether she is compelled to give a deed to Madsonia now or to give a deed to the Petersons or their successors in interest when the contract is fully paid, Madsonia Realty Company is nevertheless entitled at this time to a deed from her for the following reasons :

The trial court in refusing to order her to give a deed reasoned that her agreement under the contract was only to give a deed to the vendees when payment was completed, and an order now would be premature. If the contract should be forfeited she would never be called upon to deed the property to the Petersons. We may concede that this would be true if R. W. Madsen were now living. But the rule is not the same if the forfeiture occurs after the death of the vendor.

Whether property is realty or personalty for the purpose of dower and distribution to heirs must be decided once and for all as of the date of death of the

owner. The law of inheritance or right to statutory dower cannot be altered by an event occurring subsequent to death.

Suppose this were a case where only the widow and heirs were now involved and it becomes time for distribution. Without question the proceeds from the sale received subsequent to the death of R. W. Madsen would be distributed as personalty and LaReta C. Madsen would be given no one-third dower interest in what has been paid pending probate. The unpaid portion of the purchase price would also be distributed as personalty. Could the Decree of Distribution be changed by a forfeiture of the contract after distribution? If it could, the result would be hopeless confusion and uncertainty. For the same reason and upon the same legal theory, the change from personalty to realty cannot be made by forfeiture after death. The decedent is not seized of the realty at the time of death under a contract of sale. The forfeiture after death does not vest a deceased with the title to real estate in his lifetime. The statute gives dower only to property owned during marriage, and this does not mean property coming back by forfeiture after death. This is supported by authorities.

The following statement is taken from 55 *Am. Jur.*, pages 785 and 786, Section 359:

“The equitable principle that the interest of the vendor under an executory land contract is to be regarded as personalty has been frequently applied in the distribution of a deceased vendor’s estate; accordingly, it is held that the vendor’s

interest in the land which he has contracted to sell, passes to his personal representative as personalty, together with the right to the unpaid purchase money and securities therefore."

The same rule is laid down in the case of *Bowne v. Ide*, 109 Conn. 307, 147 Atlantic 4, 66 A.L.R. 1036 at page 1041 as follows:

"The estate of an owner of real estate under contract of sale, under the doctrine of equitable conversion, becomes in equity an estate in personalty, and in case of his death before his contract is performed, or fully performed, the contract and the proceeds thereof are personal property or assets in the hands of his administrator or personal representative, to be administered as the rest of his personal assets are administered. *Emery v. Cooley*, 83 Conn. 235, 76 Atl. 529; note in *Ann. Cas.* 1914D, page 419."

The following statement is taken from 19 *Am. Jur.*, pages 15 and 16:

"On the other hand, the vendor's interest under a contract for the sale of land constitutes personalty and on his death is distributable as such, together with the unpaid purchase money and securities therefore. *Even where the land is recovered back by the widow and heirs of the owner after his death, under a clause of forfeiture in the contract of sale, its status is not changed and it is distributed to the heirs of the deceased owner as personal property.*"

LaReta C. Madsen should be required to deed the property to Madsonia subject to the Peterson contract to avoid future litigation. It is the general rule that a

court of equity will make final disposition of litigation. While it will be clear that upon the payment of the purchase price by the Petersons, or their successors in interest, that they can compel LaReta C. Madsen, by reason of having signed the contract, to convey the property, she may refuse to do so, which will require another law suit. She has chosen to litigate her rights to the real estate and the proceeds thereof in this action. She should, therefore, be precluded from further raising the question. A forfeiture now will not restore her dower. A deed from her to Madsonia Realty Company will finally dispose of the matter. The equity rule referred to is clearly set forth in 19 *Am. Jur.*, 281 (Equity 409) as follows:

“§ 409. Disposal of Litigation.—It is a fundamental principle of chancery courts finally to dispose of litigation, making as complete a decision on all the points embraced in a cause as the nature of the case will admit, so as to preclude not only all further litigation between the same parties, but also the possibility that the parties may at any future period be disturbed or harrassed by the claim of any other person, as well as the possibility of any danger or injustice being done to other persons who are not before the court in the present proceedings. Acting pursuant to this principle, courts of equity require not only that the pleadings shall so present all the matters in controversy that they may be properly adjudicated, but also that, so far as practicable, all persons having any interest in the subject matter of the controversy be made parties, to the end that their rights may be ascertained, their claims

adjudged, or their titles bound. The extent of the relief that the court will grant is therefore commensurate with the rights, duties, claims, and titles of all the parties to the suit, so far as those rights, duties, claims, and titles appear in the pleadings and are established by the proof.

“The decree should be adapted to the circumstances and necessities of each case and should be so designed as to put an end to the litigation, and not to foster it. A final decree which undertakes to dispose of the whole cause should include a disposition of issues which are raised by a cross bill and answer as well as those which are presented by the pleadings in chief.

“Where several parties, being all those interested in a legal controversy, are before the court asking that their respective rights be determined, and such rights are capable of ascertainment, a decree, based upon indefinite findings, which does not determine the essential rights of all the parties and leaves a material part of the controversy undetermined, is insufficient and will not be upheld on appeal.”

POINT NO. 6

THE RELEASE OF DOWER WAS NOT SECURED BY FRAUD.

This subdivision of our brief is in direct answer to Point No. IV of appellants' brief which is argued at pages 46 to 59. Nowhere is it claimed by LaReta C. Madsen that any affirmative misrepresentations were made as an inducement to sign the contract. This is particularly interesting in view of the allegations in her

pleading. The following is her claim as set forth in paragraph 4 of her amended counterclaim (R. 55, 56):

“* * * That at the time of entering into the said contract said R. W. Madsen and Madsonia Realty Company through its agents and servants advised LaReta C. Madsen that said Mr. and Mrs. Madsen would have no further use for the said property inasmuch as R. W. Madsen and LaReta C. Madsen had their homes at the Hotel Utah and in Cottonwood; *that said property was that of said R. W. Madsen, and that it would be to their best interest to sell the same to said Petersons and to realize the value thereof*; * * * that at the time of the execution of the said contract to James O. Peterson and C. Amelia Peterson, *LaReta C. Madsen believed and was led to believe by the words and acts of the said Richard W. Madsen for himself or on behalf of Madsonia Realty Company that said property was the property of R. W. Madsen only.*”

She completely failed to support the allegation of misrepresentation. In fact, she made no attempt to do so. The only testimony in regard to the matter was given by Mrs. Madsen on direct examinations as follows:

“Q. Mrs. Madsen, did you at any time prior to the death of R. W. Madsen know that anyone had any interest in 667 East First South other than R. W. Madsen and the Petersons?

A. No.

Q. I will show you now what has been marked Exhibit A, a uniform real estate contract,

and call your attention to a signature on the back, LaReta C. Madsen. Is that your signature?

A. Yes.

Q. Had you ever discussed this contract with anyone other than R. W. Madsen?

A. No.

Q. Where was the contract signed?

A. As I recollect, it was — Mr. Madsen brought it to our home, and I signed it.” (R. 191-192)

The strength of Mrs. Madsen’s position can, we believe, be well estimated by the difference in her pleading and proof. She did not hesitate to plead fraudulent misrepresentations by her deceased husband, but did not have the courage to go through with the accusation.

There were no affirmative misrepresentations and she relies solely upon failure to disclose. No authority is cited which requires as a condition to the validity of a transaction that all possible matters motivating the transaction or things which can be considered as background be affirmatively stated. She did not testify that she would not have signed the contract if she knew that her husband had already sold the property to Madsonia Realty Company. She personally was promised nothing in any event and it made no difference to her personally whether the property had already been sold or not. Undoubtedly if she had had the temerity to ask her husband that she be paid a part of the purchase price or be paid for the release of her dower, he would have paid her. We assert, however, that it made no difference to LaReta C. Madsen personally whether the property had already been sold or not, but if it was a material matter

to her she could very well have asked with regard to the disposition of the purchase price. Her husband was under the legal duty of doing whatever was necessary to consummate the sale which he had made on behalf of Madsonia Realty Company, and she should have asked her price at the time she signed the contract or been satisfied with the legal effect thereof.

We wish here to point out that it is not disputed that R. W. Madsen received cash for the property in 1937 and that a part of the purchase price actually was turned over to his wife, LaReta C. Madsen. We have heretofore mentioned the account which R. W. Madsen carried with the Madsonia Realty Company in which he was given credit for the purchase price of \$10,680 on January 1, 1937. This account is shown in the ledger and was introduced in evidence as Exhibit F. The following are the complete debit and credit entries from Oct. 10, 1935 to April 5, 1937, the account having been balanced prior to Oct. 10, 1935, and again on the last date given:

CREDITS			
<i>Date</i>	<i>Items</i>	<i>Fol.</i>	<i>Credits</i>
	By Transfer—		
June 1, 1936	W. L. & Blg. Co.		\$1,307.63
Aug. 13, 1936	By Cash	285	740.27
Feb. 8, 1937	By Cash	309	301.62
Feb. 20, 1937	By Cash	310	140.00
Mar. 1, 1937	By Cash	312	100.00
Mar. 14, 1937	By Cash	314	300.00
Jan. 1, 1937	By R. E. 667 E. 1st So.	304	10,680.00
May 24, 1937	By Cash	322	664.22
TOTAL CREDITS			<u>\$14,233.74</u>

DEBITS

<i>Date</i>	<i>Items</i>	<i>Fol.</i>	<i>Debits</i>
Oct. 10, 1935	To Bank Loan	250	1,000.00
Oct. 18, 1935	To Bank Loan	251	42.00
Oct. 18, 1935	To Bank Z.C.M.I.	251	395.68
Dec. 4, 1935	To Bank	258	456.00
Dec. 21, 1935	To Bank	259	1,250.00
Dec. 30, 1935	To Bank	259	201.28
Dec. 31, 1935	To Bank	259	155.04
April 8, 1936	<i>LaReta C. Madsen</i>	271	205.00
April 20, 1936	<i>LaReta C. Madsen</i>	272	175.00
June 8, 1936	<i>LaReta C. Madsen</i>	280	1,220.00
June 22, 1936	<i>LaReta C. Madsen</i>	280	780.00
July 15, 1936	Int. Silver Co.	281	867.90
July 29, 1936	Cash	283	300.00
Jan. 5, 1937	1 Share Hotel Utah	305	57.50
Jan. 8, 1937	Money going East	305	300.00
Jan. 8, 1937	Rwy. Ticket	305	258.95
Jan. 30, 1937	Z.C.M.I.	307	706.02
Feb. 13, 1937	Loan	310	100.00
Feb. 17, 1937	R. W. Madsen Jr.	310	140.00
Feb. 17, 1937	Adams L.D.S. Church	310	300.00
Mar. 8, 1937	Loan	313	568.55
Mar. 29, 1937	<i>Mrs. L. C. Madsen</i>		1,187.50
Mar. 29, 1937	Utah State Nat'l Bank	315	2,500.00
Mar. 29, 1937	Utah State Nat'l Bank	315	10.42
Mar. 31, 1937	Standard Furn. Co.		
	<i>Wife</i>	315	196.90
Apr. 5, 1937	4 Shares Utah S. Nat'l	316	860.00
TOTAL DEBITS			\$14,233.74

It will be noticed that during this period LaReta received credits totalling \$3,567.50 (R. 73, Finding No. 8), \$1,187.50 of which was after the sale of the home. (Ex. F., R. 190.)

In regard to the credit to the account of LeReta C. Madsen which showed that she received a total of \$3,567.50 from the account of R. W. Madsen, it is interesting to note that during the trial when all parties had rested the trial court pointed out the facts with regard to such credits to LaReta C. Madsen (R. 193-195) and stated its intention to rule against her on this ground (R. 190). Thereupon her attorney asked leave to reopen (R. 190). She, in the face of the book entries, denied receipt of any money from Madsonia. The following is her testimony which is anything but convincing. Note that she denies receipt of any money from Madsonia, except money which she borrowed, when the books positively show that she received money through Madsonia, not as a loan, but which had been credited to her account from the account of R. W. Madsen.

“Q. Mrs. Madsen, did you ever have an account with the Madsonia Realty Company?

A. Yes, sir.

Q. Do you know how long you had an account with that company?

A. I can't recollect.

Q. Do you have a recollection within any particular period at all whether or not you had an account with that company?

A. I used to borrow money and pay it back to the company. Mr. Madsen let me do that.

Q. Was that the only transaction you had with Madsonia, was as to money which you borrowed from that company?

A. As far as I remember, it is the only —

THE COURT: I didn't hear you.

A. As far as I remember, it is the only ones.

Q. Did Mr. Madsen ever put any money in that account for you?

A. I don't understand your question.

Q. Well, I think it is plain. Would you read it, please, Reporter, and see if you can't understand it.

A. What account?

Q. Well, the account that we have been speaking of here between you and the Madsonia, your account and the Madsonia Realty Company.

A. I borrowed money from the Madsonia Realty Company and paid it back. Mr. Madsen never paid any of the account back.

Q. You don't know of any time when Mr. Madsen put any money in that account for you?

A. Not that I know of.

Q. And the only transactions that you recall are transactions wherein you borrowed money and paid it back?

A. That's all I can recollect.

Q. Mrs. Madsen, I show you a sheet from the ledger of what has been testified as the Madsonia Realty Company and ask you to look at the third item on the right-hand side of that sheet, this item here (indicating). First, I will ask you, Mrs. Madsen, this sheet has your name, LaReta C. Madsen, at the top, does it not?

A. Yes.

Q. Would you look at the third item on the right-hand side and see if that refreshes your recollection with regard to the matters that I have been asking you about?

A. No, this does not. I do not know about this, as far as I can recollect.

Q. Do you know what that entry in the book shows, Mrs. Madsen, from the point of view of bookkeeping?

A. I haven't seen this before, and I don't understand it as far as I can recollect at all.

Q. Do you understand the purpose of keeping an account between you and the Madsonia Realty Company?

MR. BURTON: If the Court please, that is immaterial. She's answered she doesn't have any understanding.

THE COURT: Let's tell her that that represents on the books that the Madsonia was giving her credit for whatever that item shows.

MR. BURTON: I don't know that that shows that, Judge.

THE COURT: Well, if it is in the right-hand side, I will tell you that it does; help your education in accounting matters. That is what it is if it is on the right side. Would that help you now, Mrs. Madsen, if you knew that item represented some credit to your account, either where you or someone else

had paid or some credit had been given for some loan like that? Would that help you to remember?

A. I can't recall this.

THE COURT: All right." (R. 193-195)
At page 47 of appellants' brief it is stated:

"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 consideration last spoken of is the money paid by the Petersons. It is immaterial that she knew or did not know what became of this money as Madsonia Realty Company had bought and paid for the property and in turn sold the property to Mr. and Mrs. Peterson. However, she obviously did not expect any of the purchase price, as the down-payment of \$4,000 and monthly payments for a period of two years all went to the corporation before her husband's death. There is no suggestion that she ever questioned any of such payments or made inquiry with regard thereto in the lifetime of R. W. Madsen.

While it is likewise immaterial, there is affirmative evidence which indicates Mrs. Madsen may have known of the 1937 transaction: We call attention to the entries on the ledger sheet of R. W. Madsen with the Madsonia Realty Company wherein LaReta C. Madsen received certain specific money. One item of \$1,187.50 dated

March 29, 1937, is a part of the proceeds of the sale. Her testimony that she received nothing from Madsonia Realty Company except that she "borrowed" money is completely contradicted by the record. (See Exhibit F. set forth at P.P. 42-43, supra.)

Appellants state at page 48:

"The record indicates that Mrs. Madsen believed all of the money from the sale of the home at 667 East 1st South went into the joint bank account that she and her husband had at the Utah State National Bank (R. 202-203)."

This statement is directly in conflict with the record. The testimony is as follows:

"Q. Mrs. Madsen, do you recall that on an examination where you were the witness in this court, another division of this court, that we discussed the joint bank account between you and your husband in what was the Utah State National Bank of approximately \$21,000.00, that you stated that your recollection was that part of the money from the sale of the Madsen home at 667 East First South went into that account?

MR. BURTON: We object to that as not being the statement that was made.

THE COURT: The objection is overruled. You may answer if you made that statement.

A. I did not make that statement as far as I remember.

Q. Well, how well do you remember, Mrs. Madsen? Do you want to say that you did not make that statement?

A. I am quite positive I did not make that statement." (R. 202)

It was our intention to recall to Mrs. Madsen's memory a statement that she had made to the effect that a part of the \$21,000 in a joint bank account (which she has withdrawn for herself) was made up in part from the proceeds of the sale of this particular property. Instead of testifying that she thought the money went into the joint bank account, she stated, "I am quite positive I did not make that statement." Such answer certainly does not show that she thought the money from the home went into the joint bank account. While the record is clear that the money from the sale to Petersons in 1946 went to Madsonia Realty Company, the money on the sale in 1937 to Madsonia Realty Company went to the account of R. W. Madsen, and part of it went through his account to the account of Mrs. Madsen.

None of the authorities cited by appellants with regard to the claim of fraud are in point. In the case of *Nissen vs. Nissen Trampoline Co.*, 39 N.W. 2nd 92, cited at page 50, the husband affirmatively represented the documents to be deeds of the corporation when they were in fact conveyances to the corporation. As appears by appellants' own statement, the case of *Kratli vs. Booth*, 191 N.E. 180, 99 Ind. App. 178, was one of affirma-

tive fraudulent representations. The same is true of the case of *Stokes vs. Stokes*, 196 N.Y.S. 184, 119 N.Y. Misc. 168, cited at page 56.

At page 58 appellants further state:

“She expected that *he* was going to get the money under the Peterson contract.”

We ask appellants to point out in the record where there is anything to support such a statement. She and her counsel seem to be considerably confused as to whether it was *he* or *she* that was to be paid. At page 47 they state:

“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*.”

We submit that as in the case of sales generally by a husband of lands owned by him, Mrs. Madsen simply signed the contract at the request of her husband, asking nothing and expecting nothing, well knowing that her husband had and would amply provide for her.

POINT NO. 7

LARETA C. MADSEN IS ESTOPPED, BY CLAIMING THE BENEFITS OF THE WILL, FROM ASSERTING ANY DOWER RIGHT IN THIS PARTICULAR PIECE OF REALTY.

The will of R. W. Madsen and the codicil thereto is attached to plaintiff's reply (R. 28 to 33, inclusive). This will and codicil was admitted in evidence (R. 161). In paragraph 4 of the will it is recited that the shares

of stock in Madsonia were given by the testator to his two sons on the 1st day of July 1931. The testator then bequeathed the specific stock to his sons in the event that such gift should be held invalid. The will provides:

“Irrespective of the foregoing and to the end my sons shall have and own all of the shares of said Madsonia Realty Company, I hereby devise and bequeath to them equally all shares which I may own or have any interest in in said company at the time of my death.”

The testator further provides that his wife shall take one-third of his real estate by operation of law and that the remaining two-thirds shall go to his sons in equal shares (Para. 5, R. 29). All of the personal property is given two-thirds to his sons, Richard W. Madsen, Jr., and Francis A. Madsen, and the remaining one-third to his wife, LaReta C. Madsen (Para. 7, R. 30). By his codicil the testator subsequently gave his Cottonwood home, together with all furnishings, and certain specific furnishings at the Hotel Utah to his wife (see codicil, R. 32 and 33). His widow, therefore, receives more than one-third of his estate, which estate is approximately a half million dollars (R. 204). Nevertheless, the will is clear that the deceased intended his sons to have Madsonia, as he bequeathed them the stock in the event the gift should be held incomplete. The testator's intention necessarily includes all of the assets which he personally had entered on the books of the corporation. It is clear, therefore, that the decedent intended that the Peterson property or the proceeds from the sale

of the Peterson property would belong to his sons. LaReta C. Madsen has irrevocably accepted the benefits of the will. See the pre-trial statement (R. 37, 101). Should LaReta C. Madsen succeed in any of her contentions that she is entitled to a one-third interest in the Peterson property or any portion of the purchase price, then to that extent she defeats the clear intent of the testator as expressed in the will, the benefits of which she has accepted.

CONCLUSION

We submit that the trial court did not err in its holding that Madsonia Realty Company is entitled to a deed from the executor; that the right of the plaintiff to such deed is not barred by the statute of limitations; that LaReta C. Madsen, the widow, has released her statutory dower interest in the property; that such release was not procured by fraud, and that LaReta C. Madsen is further estopped from claiming dower in this particular property because she has accepted the benefits of the will.

We further submit that the trial court should have ordered and this court should now require the trial court to order that LaReta C. Madsen execute a deed conveying the Peterson property to Madsonia Realty Company, this for the purpose of preventing any possible future litigation upon matters which have been adjudicated

herein. We also suggest that should this court reverse the trial court in its order that the executor execute a deed to Madsonia Realty Company, that as an alternative it order the trial court to enter a decree quieting title against said executor and the estate of Richard W. Madsen, deceased (see our Point No. 2).

Respectfully submitted,

CHENEY, MARR, WILKINS &
CANNON,

Attorneys for Respondent