1971

In The Matter of the Estate of Raymond Ii. Tillson And Edna R. Villson v. State Tax Commission Of Utah : Appellants' Brief

N THE SUPREME CO
OF THE STATE OF

In the Matter of the Estate of

AYMOND H. WILLSON

ONA R. WILLSON

TATE TAX COM
F UTAH,

APPE

District

BLAINE DAVIS
Assistant Attorney General
State Capitol Building
Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

STATUTES AND AUTHORITIES CITED

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of RAYMOND H. WILLSON, *Deceased,* EDNA R. WILLSON, Executrix, *Appellant.* STATE TAX COMMISSION OF UTAH, *Respondent.*	Case No. 12501

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This appeal involves a determination of the Utah inheritance tax upon the assets of the Estate of Raymond H. Willson, deceased.

DISPOSITION IN LOWER COURT

The matter of inheritance taxes was brought before the trial court pursuant to an Order to Show Cause is-

sued upon the petition of Edna R. Willson, Executrix of the Estate of Raymond H. Willson, deceased. The matter was heard upon stipulated facts. An Order favoring the State Tax Commission of Utah was made and entered on April 7, 1971.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Order favoring the State Tax Commission of Utah and a judicial declaration that the State Tax Commission of Utah approve of and consent to the State of Utah Inheritance Tax Return as filed by appellant, that the State Tax Commission of Utah approve the sum of $15,425.07 as the full amount of Utah inheritance tax upon the aforesaid estate, and that the State Tax Commission of Utah issue waivers of lien on all the assets of the estate of Raymond H. Willson, deceased.

STATEMENT OF FACTS

Raymond H. Willson died testate on the 23rd day of December, 1967, in Ogden, County of Weber, State of Utah (R. 1). The Last Will and Testament of Raymond H. Willson, deceased, was admitted to probate by Order of the District Court of the Second Judicial District in and for Weber County, dated March 18, 1968 (R. 9), and Edna R. Willson was issued Letters Testamentary in the matter of the Estate of Raymond H. Willson, deceased, on March 18, 1968 (R. 8).

Several years prior to his death decedent, Raymond H. Willson, and his wife, the executrix herein, owned land in South Ogden, Weber County, as tenants in common with equal undivided interests (R. 69 and 102). In October of 1961, Raymond H. Willson and Edna May Willson, as sellers, entered into an Agreement to sell the major portion of the lands involved (R. 69, 95 and 102). The Agreement contained most of the standard provisions of a typical Uniform Real Estate Contract (R. 69 and 102). No deeds were placed in escrow, nor were any deeds executed at the time of the Agreement (R. 69 and 102). Such documents were contemplated to be given at the time of the periodic releases after payments had been made during installment periods (R. 69 and 102).

Under the terms of the Agreement, the buyers took possession of the premises upon making the payment due on October 1, 1963 (R. 84 and 103). The buyers were to pay all property taxes on the property, as well as to make payments to the Weber Basin Water District (R. 84 and 103).

The Agreement was signed by the decedent and also the surviving widow, who signed as a seller (R. 101).

Another real estate contract, which was executed under similar circumstances, covered a much smaller tract of land in the South Ogden area of Weber County (R. 61).

In preparing the Inheritance Tax Return for the State of Utah, the executrix, as surviving widow, excluded one-third of the value of the unpaid portion due to her deceased husband as being a "legal or equitable estate in real property possessed by the husband at any time during the marriage, * * *" pursuant to the provisions of Section 74-4-3, Utah Code Annotated, 1953 (R. 69 and 102). The State Tax Commission of Utah disallowed the exclusion, claiming that by entering into the real estate contract, the decedent and his wife invoked the doctrine of equitable conversion so as to convert the real estate to personal property and thereby remove it from the application of the widow's statutory one-third interest (R. 69 and 102).

The agreed amount of inheritance tax at issue is $1,937.78 (R. 69 and 102).

ARGUMENT

POINT I. THE DOCTRINE OF "EQUITABLE CONVERSION" IS DESIGNED TO CARRY OUT THE "INTENT" OF PARTIES PRIVY TO THE TRANSACTION.

The inheritance tax laws of the State of Utah apply to both real and personal property; however, it is still necessary in this special case to determine whether the property is to be considered as real or personal for purposes of inheritance taxation. This is so because the

widow's statutory interest, as established by Utah Code Annotated, 1953, Section 74-4-3, applies only to "legal or equitable estates in real property," and because the Utah Supreme Court has held this interest to be exempt from inheritance tax. This statutory dower interest has been held to be exempt from inheritance tax by a line of cases beginning with ***In re Bullen's Estate***, 47 Utah 96, 151 P. 533 (1915), and continuing through ***In re Castles' Estate***, 23 Utah 2d 4, 455 P.2d 628 (1969).

The State Tax Commission of Utah claims that by entering into the real estate contract, the decedent and his wife invoked the doctrine of equitable conversion so as to convert the real property to personal property. The Utah State Tax Commission then reasons that the property, in its converted state, is not subject to the widow's statutory one-third interest and is therefore taxable in its entirety.

This reasoning of the State Tax Commission of Utah relies upon application of the doctrine of "equitable conversion." That doctrine is defined in 27 Am. Jur. 2d, *Equitable Conversion*, Section 1, as follows:

> "Equitable conversion is that constructive alteration in the nature and character of property whereby, in equity, real estate is for certain purposes considered as personalty, or whereby personalty, for similar considerations, is regarded as real estate, and in either instance, it is deemed to be transmissible and descendable in its converted form."

Sections 1 and 3 of 27 Am. Jur. 2d, *Equitable Conversion*, state the basis of the doctrine of equitable conversion and its limitations. Section 1 states that the doctrine *"was adopted for the purpose of giving effect to the intention of the testator, settlor, or contracting parties, * * *"* and Section 3 states that the *"application of the doctrine is always withheld where its effect would be contrary to the intention of the testator, settlor, or contracting parties."* (Emphasis added.)

This same basis for the doctrine of equitable conversion was recognized in the case of *Allred v. Allred*, 15 Utah 2d 396, P. 2d 791 (1964), which is the only case found where the doctrine of equitable conversion has been recognized in the State of Utah. The *Allred* case involved a real estate contract entered into between parents and child, and the litigation which ensued involved parties to that instrument and those claiming some right through other parties to that instrument. It is significant to note that there had been an actual delivery of executed deeds to an escrow holder and that this Court pointed out that it saw no good reason to withhold the application of the doctrine of equitable conversion. This Court specifically recognized that the doctrine of equitable conversion was applicable only to give effect to the intention of the testator. In relating the doctrine to the facts of that case, it was said that the application of the doctrine served to carry out the apparent intent of the vendors.

The doctrine of equitable conversion is not a fixed

rule of law, but proceeds on equitable principles which take into account the result to be accomplished. It is to be invoked only for certain purposes and when necessity and justice so require. The doctrine is a mere fiction and rests solely upon principles of equity. 27 Am. Jur. 2d, *Equitable Conversion*, Sections 1 and 3. Furthermore, equitable conversion of property is not favored in law. 27 Am. Jur. 2d, *Equitable Conversion*, Section 3; 18 C.J.S., *Conversion*, Section 7. Of equitable conversion, the last cited authority makes the following statement:

> "It has been said that the law does not favor conversion, and it has been said that there is a presumption against application of the doctrine."

These statements to the effect that the law does not favor application of the doctrine of equitable conversion should be contrasted with the statement found in *In re Madsen's Estate*, 123 Utah 327, 259 P. 2d 595, 602 (1953), a case relied upon by the State Tax Commission of Utah. In the *Madsen* case, this Court was called upon to determine whether a widow had released her statutory dower. In making its decision, this Court recognized that "the right of dower or its statutory equivalent has always been highly favored in the law."

One of the most significant limitations upon the application of the doctrine of equitable conversion is recognized by 27 Am. Jur. 2d, *Equitable Conversion*, Section 3, and 18 C.J.S., *Conversion*, Section 2. Those sections recognize that the doctrine of equitable conversion is not applied so as to affect the claims of persons who

are not parties to the instrument or who are not claiming through the instrument as privy to a party. These authorities respectfully state as follows:

> "Nor, it has been held, will the doctrine be extended so as to effect a conversion as to persons whose claims or rights to the property are purely incidental, and not at all connected with its devolution or transfer from the owner or through the instrument." 27 Am. Jur. 2d *Equitable Conversion*, Section 3.

> "Conversion does not take place as to persons whose claims or rights to the property are purely incidental and unconnected with its devolution or transfer from the author or through the instrument." 18 C. J. S., *Conversion*, Section 2.

The State Tax Commission of Utah was not a party to the instrument which is claimed to have effected a conversion. Similarly, the State Tax Commission of Utah is not claiming through the instrument which it relies upon. The claim of the State Tax Commission of Utah is purely incidental and is made irrespective of the parties to the Agreement.

The Utah cases relied upon by the State Tax Commission of Utah, *Allred v. Allred*, cited *supra*, and *In re Madsen's Estate*, cited *supra*, both involved litigation between parties claiming through the instrument. In the *Allred* case the doctrine of equitable conversion was applied in favor of the decedent's child and against the decedent's administrator. Both parties claimed through the instrument. In that case executed deeds had been de-

livered to an escrow holder under escrow instructions which were held to have created a joint tenancy. The child of the decedent, who was a party to the instruments, claimed that the instruments effected an equitable conversion and created a joint tenancy. The administrator of decendent's estate similarly claimed through the instruments under his own theory. In the *Madsen* case, the litigation was between the vendor's widow, who was a signer of the instrument, and the vendee. In the *Madsen* case, at page 604 of the Pacific Reporter, this court expressly recognized the privity of contract between the claimants.

The State Tax Commission of Utah has recognized that the doctrine of equitable conversion is applicable for only certain purposes (R. 90). However, the State Tax Commission of Utah has obstinately refused to make a careful analysis to determine what those limitations are. In truth, the State Tax Commission of Utah is merely giving lip service to the admitted limitations upon the doctrine of equitable conversion. Meanwhile, the State Tax Commission of Utah continues its callous attitude of applying the doctrine of equitable conversion indiscriminately.

POINT II.

THE DOCTRINE OF "EQUITABLE CONVERSION" DOES NOT APPLY IN THE AREA OF TAXATION ACCORDING TO THE GREAT WEIGHT OF AUTHORITY.

That the doctrine of equitable conversion should not be invoked to subject property to taxation is a corollary of the rule that the doctrine of equitable conversion depends on the circumstances under which it is invoked and is not a fixed rule of law. Similarly, taxing authorities are not in privity or standing with the parties to a real estate contract, and any claim by a taxing authority is merely incidental. Furthermore, it should not be assumed that a testator would intentionally subject his property to an increased tax. That the doctrine of equitable conversion should not be recognized in tax cases was stated as follows in 18 C.J.S., *Conversion*, Section 2:

> "This doctrine should not be invoked merely to subject property to taxation, especially where the jurisdiction of different states is involved."

Numerous cases support the statement above quoted from 18 C.J.S. That the doctrine of equitable conversion has no application to tax cases has been variously stated as follows:

> "The doctrine of equitable conversion has no application in the instant case. This well-established doctrine cannot be invoked to affect the liability of property to taxation by the State or by its political subdivisions." *Latta v. Jenkins*, 200 N. C. 255, 156 S. E. 857, 859 (1931).
>
> "The doctrine of equitable conversion may not be relied on to subject property to taxation or shift the lien of the tax from the real property transferable to the fund." *Heymann v. Diane*,

252 N. Y. 159, 166, 169 N. E. 124, 126 (1929).

> "Secondly, the law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question is one of jurisdiction between different states. * * *" *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881, 882 (1908).

In the case of *Laurel Hill Cemetery Association v. City and County of San Francisco*, 81 Cal. App. 2d 271, 184 P. 2d 160, 162 (Cal. Ct. App. 1947), the taxpayer sought to invoke the doctrine of equitable conversion in aid of an exemption from taxation. In denying the application of that doctrine, the court made the following general statement concerning the application of the doctrine of equitable conversion to the field of taxation:

> "The appellant cites no authority in this state where the doctrine of equitable conversion has been applied to the field of taxation and apparently none is to be found. * * *"

In the case of *New Jersey Highway Authority v. Henry A. Raensch Coal Company*, 40 N. J. Super. 355, 123 A. 2d 83 (Super. Ct. N. J. 1956), the taxing authority attempted to apply the doctrine of equitable conversion to enable the collection of a real property tax. There the town was attempting the conversion of a fund to real property. As to the doctrine of equitable conversion the New Jersey court said on page 86:

> "Nor can the town find support in the doctrine of equitable conversion which it also advances. That

concept was devised to assure justice between the parties to a real property transaction. It is a fiction of law and, as such, cannot be extended beyond the special purposes which it was created to serve. It does not transmute a fund into real estate so as to subject the fund to taxation as real property. The land remains land and the fund remains personal insofar as subsequent local taxation is concerned."

The most convincing case is *In re DeStuers' Estate*, 99 N. Y. S. 2d 739 (Surr. Ct. N. Y. 1950). In that case a non-resident alien owned an undivided interest in real property in the county where the lawsuit was commenced. Prior to his death he contracted to convey to his co-owner. After execution of the contract but prior to closing, the vendor died. Now York tax law imposed a death tax (transfer of estate) upon real property of a non-resident within the state. The respondent or representative of the decedent's estate urged the application of the doctrine of equitable conversion to show only personal property in New York at the time of death. This doctrine was accepted by the trial court but rejected upon appeal.

In a very thoughtful opinion the court compares the fiction of the doctrine of equitable conversion with the actual rights and privileges associated with ownership. On page 743, the court says:

"However, although a court of equity may thus treat a realty contract as already executed for certain purposes, it is clear that unless the rules of law based upon or growing out of an applica-

tion of that doctrine have the combined effect of substantially terminating the interest of the vendor in the property prior to conveyance and of converting his interest into a mere chose in action for the purchase money, such vendor must be regarded as the owner of the property until such conveyance is made and his estate must be taxed therefor. As ownership consists of the aggregate rights and privileges which are possessed with respect to specific property, the determination as to whether the vendor remains the owner of the property prior to the conveyance depends upon the substantiality of his interest in the land after the execution of the contract."

The court then discusses and cites authority for various rights and privileges associated with the vendor's interest under a real estate contract. A list of the major rights held by the vendor and referred to in that decision here follows:

1. Full legal title to the premises.
2. Vendor's lien.
3. Right to cancel the contract as a cloud on title after a default by vendee.
4. Right to hold property and sue for mere damages.
5. Vendor of an undivided fraction has right to partition the premises.
6. Right to convey complete ownership of the land to a bona fide purchaser who receives the property without notice of the contract.
7. The interest of the vendor is subject to levy under a judgment procured against him, and

the land may be sold upon execution, although the purchaser of the fee with notice of the contract takes subject thereto.

8. Vendor may maintain an action for waste against the vendee in possession.

In finally rejecting the doctrine of equitable conversion, the court quotes from an earlier New York case as follows:

> "The doctrine of equitable conversion, in its application to a decedent's estate, concerns only those who have come into relations of contract or privity with decedent or his estate. The fiction of conversion adjusts rights and imposes equities, but it cannot change facts and work inequity. In adopting it the law makes believe that the things which have arranged to be done have been done, but this amiable pretense must be confined by the impulses which inspire it to the persons in privity with the transaction. There is no equitable need for an extension to others. Strangers have nothing to do with the reason for its being and nothing to do with its operation. In the best defined case of equitable conversion the legal owner of the lands retains as to persons not in equitable relation to himself all the rights and duties which belong to his seisin."

In the instant case the State Tax Commission of Utah contends that the vendors, Edna May Willson and R. H. Willson, deceased, have no legal interest in the real estate. The State Tax Commission of Utah goes so far as to assert that the appellant does not claim any legal interest to the real estate against the purchaser (R. 89).

This concept of property asserted by the State Tax Commission is without support. The appellant in this case, in both her individual capacity and the capacity of executrix, most certainly does claim an interest in the real property. The estate of Raymond H. Willson, deceased, and the appellant in her individual capacity hold full legal title to the premises as stated in the *DeStuers* case. The vendees under the real estate contract have an equitable interest to the extent of the payments made; however, the vendors retain full legal title. Furthermore, the vendors in this case did retain, and do claim, those other rights and privileges enumerated in the *DeStuers* case. It is significant to note that no deeds were placed in escrow, nor any deeds executed at the time of the signing of the agreement (R. 69 and 102). It was contemplated by the parties that such documents would be executed and delivered at the time of the periodic releases (R. 69 and 102). In this case the vendors merely signed an un-recorded real estate contract as sellers of their respective common and undivided interests (R. 101).

The reasoning of the *DeStuers* case was earlier adopted in *In re Paul's Estate,* 303 Pa. 330, 154 Atl. 503 (1931), *cert. denied,* 284 U. S. 630 (1931). In that case, the decedent was a resident of Pennsylvania and had died owning real property in New Jersey and Missouri. During his lifetime the decedent had entered into written contracts for the sale of the New Jersey and Missouri lands. As in this case, the decedent had not executed deeds. The question posed was whether the

doctrine of equitable conversion would apply to subject the property to a transfer inheritance tax in the State of Pennsylvania. The Pennsylvania Supreme Court denied the application of the doctrine of equitable conversion and gave as its reason for so doing that the fee in the land was still in the vendor. This reasoning is explained in detail in the report found at 78 A.L.R. 779, 782:

> "* * * While an agreement for sale of land, which contains a promise to pay the purchase price agreed upon, is in one sense a chose in action it differs in essential respects from the ordinary chose. Aside from the agreement to sell, no such liability ever did exist. Its basic purpose, as a writing, is to fix the rights of the vendor and the vendee in the land; liability for the purchase price is but secondary and contingent. The fee in the land is still in the vendor, and it is the fee which is to be transferred upon payment of the balance of the purchase price. In case of default, neither the vendor nor those standing in his shoes are compelled to sue for that balance in order to be recompensed; they may elect to retain the land. In that event, though the written agreement is still in their possession, there would be no transfer of either land or chose in action, and hence there would be no transfer 'by will or by the intestate laws,' and the act of 1919 would have no relation to the situation then existing. The uncertainty referred to is conclusive, for to doubt the existence of an intention to impose a tax is to conclusively determine that it does not exist."

The question involved in this case, whether the doctrine of equitable conversion should be indiscriminately

applied, has significance far beyond the facts of this case. If the doctrine of equitable conversion is applied in this case, the chances of its being applied in other cases will be enhanced. Consequently, a review should be made of other cases or factual situations where the doctrine of equitable conversion has been asserted. The results obtained under other factual situations should be studied before the decision in this matter.

The first factual situation will be referred to as a hypothetical. Suppose that husband A and wife A sell Black-acre, worth $100,000.00, to husband B and wife B for a down payment of $10,000.00. Suppose next that husband A and husband B both die immediately after the down payment on the real estate contract. Since husband B has a paid in equity of only $10,000.00, husband B's widow will be entitled to a statutory dower interest only to the extent of one-third of $10,000.00, and this is the actual position of the Tax Commission. If the doctrine of equitable conversion is applied as requested by the State Tax Commission of Utah, wife A will receive no statutory dower interest in the balance. This result is grossly inequitable since only 10% of the real property is being subjected to a widow's statutory dower right.

Another factual situation would be similar to that presented in *In re Paul's Estate*, cited *supra*. Presenting the factual situation by way of hypothetical, let us assume that a Wyoming resident owned real property in Utah and that, prior to his death, he contracted to sell

that property. Assume further that the monthly payments on the real estate contract were being made directly to the seller in Wyoming and that no deed had been executed. The question as presented in *Paul's Estate* would be identical to the question posed by the hypothetical if the State of Wyoming attempted to levy an inheritance tax upon the real property, claiming that it had been converted to an intangible and was therefore subject to Wyoming inheritance tax in the state of the decedent's domicile. Since no deed had been executed and since the Utah real property was still held in the name of the Wyoming resident, an ancillary probate proceeding would be required in Utah. The question then arises as to whether Utah would recognize the real property as having been converted to an intangible and would therefore defer the levying of an inheritance tax. It is submitted that the reasonable and just result would be obtained only by subjecting the real property to taxation only in Utah. This result could be obtained only be declining to apply the doctrine of equitable conversion.

The Pennsylvania Supreme Court in *Paul's Estate* refused to apply the doctrine of equitable conversion and refused to subject real property in the foreign jurisdiction to inheritance tax on the theory that it had been converted to personal property. In so holding, the court made the following statement as found in 78 A.L.R. 779, 782:

> "We may say in the instant case that it would be unfortunate, perhaps amazing, that part of the

purchase money representing the value of, and arising out of, lands located in other states of which the decedent died seised, may be taxed in this state, when the lands themselves may not be, under the fiction that the lands have been converted into money; or that the money which the lands will ultimately produce can be, because a writing, intended eventually to bring about their conveyance, may be called a chose in action, when the same money, representing part of the value of the land, may be taxed in the other state. * * *"

The applicability of the doctrine of equitable conversion in determining jurisdiction in payment of succession taxes is also explained in 42 Am. Jur. 2d, *Inheritance, etc. Taxes,* Section 173. That section recognizes the weight of authority to be against the application of the doctrine of equitable conversion.

"While there is some authority to the effect that the state of the testator's domicile may assess a succession tax upon the value of the real estate located in another state, which by the will is converted into personalty for the purposes of distribution, the cases have generally denied the applicability of the doctrine of equitable conversion for such purposes. Indeed, it has been said that the courts have practically, if not entirely, abandoned the fiction of equitable conversion by the will of the deceased, of real property situated in another state, insofar as the imposition of a succession tax is concerned and instead look to the character of the property at the time of testator's death. * * *"

Another factual situation where the doctrine of equitable conversion has been asserted is represented by

the case of *First Security Bank of Idaho, National Association v. Rogers*, 429 P.2d 386 (Idaho 1967). In that case defendant Rogers entered into a contract for sale of real property in December of 1959. Payments were made by the purchaser to the escrow holder. In January of 1962 Nez Perze Roller Mills obtained a judgment against Rogers, which was filed in the appropriate county and became a lien on all real property owned by Rogers. Subsequently, Fireman's Fund Insurance Company and Credit Adjustment Agency obtained judgments against Rogers. These latter two judgment creditors then levied writs of garnishment against the escrow holder. The question then arose as to the priority of liens. Fireman's Fund Insurance Company and Credit Adjustment Bureau contended that the doctrine of equitable conversion applied so that, after the execution of the real estate contract, Roger's interest in the property was transformed from an interest in realty to an interest in personalty to which the judgment lien could not attach. Nez Perze Roller Mills contended that the doctrine of equitable conversion was inapplicable and that its judgment was a lien upon the interest of Rogers in the real property. Nez Perze Roller Mills did not contend that its lien was superior to the purchaser's interest, but recognized its lien to be limited to the extent of the seller's interest. In holding that the lien of Nez Perze Roller Mills had priority and that the doctrine of equitable conversion did not apply, the Idaho Supreme Court made the following statement on page 389:

> "The doctrine of equitable conversion generally does not apply to the facts of the instant case. The majority rule is that a judgment lien against the vendor after the making of a contract or sale, but prior to making and delivery of the deed, extends to all of the vendors interest remaining in the land and binds the land to the extent of the unpaid purchase price. (citing authority)"

The doctrine of equitable conversion was also unsuccessfully asserted in the case of *First National Bank of Highland Park v. Boston Insurance Company*, 17 Ill. 2d 147, 160 N. E. 2d 802 (1959). In that case the defendant insurance company was the insurer of certain improved real property under contracts aggregating $46, 750.00. A clause in the insurance contract limited coverage to the "interest of insured." Subsequently, the insured entered into a real estate contract to sell for $19,000.00, and the sum of $3,000.00 was paid at execution in May of 1952. The remainder of $16,000.00 was to be paid at closing in November of 1952. The building was totally destroyed by fire on September 25, 1952. The buyer had not taken possession but had started to redecorate. The real estate contract called for its voidance in case of destruction by fire. The insurer was willing to pay only $16,000.00 as the total interest of the insured. The insurer's argument was said to rest in part on the doctrine of equitable conversion. The Illinois Supreme Court held the doctrine of equitable conversion to be inapplicable in that the contract between the vendor and vendee was not a proper measure of value. As to the doc-

trine of equitable conversion, the court stated on page 804:

> "As we see it there are several difficulties with the position of the insurers. In the first place, it transplants the doctrine of equitable conversion into an area where it does not belong. That doctrine was evolved in order to carry out the intention of the parties to the contract. To that end it acts upon the rights of the parties to the contract and those who claim under them. But it has frequently been held and stated that it should have no effect upon the rights of others. Pomeroy states the limitation in these terms: 'The doctrine seems to be correctly formulated by saying that the effects extend only to those persons who claim or are entitled to the property under or through the instrument, or directly from or under the author of the instrument. Some of the cases definitely hold that a conversion takes place no further than is necessary for the purposes of the will or other instrument.' Pomeroy, Equity Jurisprudence, 5th Ed. Section 1166; * * *"

POINT III.

A WIFE'S SIGNATURE ON A REAL ESTATE CONTRACT AS SELLER OF REAL PROPERTY TO WHICH SHE IS THE OWNER OF AN UNDIVIDED ONE-HALF INTEREST AS TENANT IN COMMON IS NOT A RELINQUISHMENT TO THE STATE TAX COMMISSION OF UTAH OF HER RIGHTS UNDER SECTION 74-4-3, UTAH CODE ANNOTATED, 1953.

Although the basis for the denial of the widow's statutory dower interest was expressed in the trial court's memorandum decision (R. 102) to be that the doctrine of equitable conversion applies, and although the denial by the State Tax Commission of Utah of the widow's statutory dower interest in the subject contract was similarly based upon an attorney general's opinion, dated April 12, 1970, to the effect that the doctrine of equitable conversion did apply, it is felt that a brief reference should be made to the possibility of a relinquishment of statutory dower by signing the subject contract. It should be noted that the widow was the owner of a one-half undivided interest as tenant in common (R. 102), and that the widow signed the agreement as a seller (R. 84, 101 and 103).

Only passing mention should be made to the effect that the law has held a strong preference for widow's statutory rights in the real estate of their departed husbands, and the law uniformly recognizes that relinquishment of such rights must be clear and unequivocal. This observation was noted in the case of *In re Madsen's Estate*, cited *supra.*

Only in situations where a real estate contract has been coupled with an escrow agreement, where the wife has actually executed the deeds and placed them with the depository, is there an apparent split of authority as to whether her signature would constitute a relinquishment. See 25 Am. Jur. 2d, *Dower and Courtesy*, Section 63. That section states that some cases take the view that

final performance of the conditions relates back to the time of the deposit of the deed in escrow and cuts off the right of dower. However, it is also recognized that other cases do not apply this doctrine of relation back so as to cut off the right of dower. It should be noted that when this doctrine of relation back is applied, the relation back is to the point of time when the deed is deposited in escrow. In this case no deed was ever executed (R. 102), and no escrow was established (R. 102). In this case it was contemplated by the parties to the agreement that deeds would be executed and delivered periodically upon receipt of the installment payments (R. 102). It is true that the vendors, including the widow, signed an agreement to transfer their interests by warranty deed upon certain conditions. However, at the time of decedent's death, all of the right, title and interest of the vendors had not been deeded to the vendees. In fact, the vendors still held full *legal* title, subject to certain rights in the vendees.

It must further be recognized that any release of dower will operate only in favor of those persons privy to the instrument. The law in this respect is similar to that previously explained in connection with the doctrine of equitable conversion, and is explained in 28 C.J.S., *Dower*, Section 65 (a). This release of dower has been said to be based upon principles of estoppel, and it was so stated in the ***Madsen*** case. The limits of this estoppel by deed are stated in 25 Am. Jur. 2d, *Dower and Courtesy*, Section 133:

> "In accordance with the general rule the estoppel must be mutual, the wife's release of dower in connection with the husband's deed creates an estoppel only as to persons privy to the instrument; and a grantee who procures that deed to be set aside for fraudulent cannot claim the benefit of estoppel. Also, if the conveyance is later set aside as in fraud or creditors, she is not estopped from asserting her right against the creditors."

The case of *In re Madsen's Estate,* cited *supra,* upon which the Tax Commission relies, gives recognition to this requirement of privity, on page 604, by stating that "there definitely is a privity of contract between Madsonia Realty Company and the Petersons * * *." In its facts the *Madsen* case is totally different from the case here presented. In that case the contention that the widow's signing had effected a release of statutory dower was, unlike the State Tax Commission of Utah, claiming through the instrument. The *Madsen* case involved the possibility of double payment by the purchaser or unjust enrichment of the widow had not the release of statutory dower been found. The widow in the *Madsen* case was claiming a portion of the property or a portion of the proceeds even after full payment had actually been made to the husband and after the widow had received benefit from the payments. Under the circumstances, this court properly held the wife to be estopped from claiming a statutory dower interest.

CONCLUSION

The issue presented to this Court has a significance far beyond the facts of this case. The amount of money involved in this case is barely sufficient to warrant an appeal, but the application of the doctrine of equitable conversion will surely have a more drastic effect in subsequent cases. Wholesale adoption of the doctrine of equitable conversion, as requested by the State Tax Commission of Utah, will bring about distorted rulings in other cases where the difference between real and personal property is relevant.

It is submitted that this court should look to the actual nature of the property rights retained by the vendors and should not resort to a fiction of law as the basis for imposing a tax.

Respectfully submitted,

GLEN E. FULLER &
ORVAL C. HARRISON