

1940

## Stella Pelice Gigliotti v. Leopoldo Albergo : Abstract of Record

Utah Supreme Court

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Harley W. Gustin; Attorney for Plaintiff and Appellant;

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Case No. 6295

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# In the Supreme Court of the State of Utah

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STELLA FELICE GIGLIOTTI,

*Plaintiff and Appellant,*

VS.

LEOPOLDO ALBERGO,

*Defendant and Respondent.*

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APPEAL FROM THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT, IN AND FOR CARBON  
COUNTY, STATE OF UTAH.

HONORABLE GEORGE CHRISTENSEN, *Judge.*

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## ABSTRACT OF RECORD

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HARLEY W. GUSTIN,

*Attorney for Plaintiff  
and Appellant.*

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FILED  
SEP 10 1940

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# In the Supreme Court of the State of Utah

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STELLA FELICE GIGLIOTTI,

*Plaintiff and Appellant,*

vs.

LEOPOLDO ALBERGO,

*Defendant and Respondent.*

Case No. 6295

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## ABSTRACT OF RECORD

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TRANS. PAGE

1

COMPLAINT

Comes now the plaintiff above named and for cause of action against the defendants and each of them complains and alleges as follows:

1. That plaintiff is informed and believes and upon such information and belief alleges that the defendant, Leopoldo Albergo, is married but if the said defendant is married, plaintiff is not informed as to the full, true and correct name of his wife, and, therefore, alleges the name to be "Jane Doe Albergo" as above set forth.

2. That plaintiff is now the holder and owner in fee simple and in possession and entitled to the possession of that certain piece and parcel of real property lying and being situate in the County of Carbon, State of Utah and particularly described as follows, to-wit:

“Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

“Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the

- 2 point of beginning, containing eight-tenths of an acre, together with one acre of primary water right, and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights of whatever kind, nature and description and however evidenced, used upon the above mentioned and described parcels of land.”

3. That the defendants above named appear of record to have or to claim some right, title, estate or interest in or lien upon the real property above described or some part thereof adverse to plaintiff's ownership thereof or clouding plaintiff's title thereto, but that the said defendants do not have any right, title, estate, lien or interest whatsoever in or to the said above described real property or any part thereof adverse to plaintiff or at all.

WHEREFORE, plaintiff prays:

1. That the defendants be required to set forth the nature of their claims to said property and that such claims be determined by decree of this court.

2. That by said decree it be declared and adjudged that the defendants have no right, title, estate, lien or interest whatsoever in or to the said real property or any part thereof and that the title of the plaintiff is good and valid.

3. That the defendants be forever enjoined and debarred from asserting any claim whatsoever in or to the said property or any part thereof adverse to the plaintiff and for such other relief as to the court may seem meet and agreeable to equity and for her costs of suit.

HARLEY W. GUSTIN,  
*Attorney for Plaintiff.*

(Duly verified).

Filed Sept. 1, 1939.

*(Title of Court and Cause):*

### ANSWER AND COUNTERCLAIM

4 Comes now the defendant, Leopoldo Albergo, and in answer to plaintiff's complaint admits, denies and alleges:

1. Defendant denies paragraph 1.
2. Defendant denies paragraph 2.

In further answer to paragraph 2 the defendant alleges that the plaintiff has been living in and upon the property described in said paragraph only for the reason and by virtue of the fact that she is the wife of one Rosario Gigliotti, also known as Ross Gigliotti, and has been residing with him in and upon said property; that the only possible right the plaintiff could have in and to said property would be as the wife of the said

Rosario Gigliotti; that the above named Court in case No. 4553, to which reference is hereby made, has adjudged and decreed that any right of the said Rosario Gigliotti in and to said property is subordinate to the right of this defendant; that because of said case and the proceedings had thereunder to which reference is hereby made the said Rosario Gigliotti and the plaintiff are now without any right whatsoever in and to said property, either possessory or otherwise.

3. Defendant admits that he appears “of record to have or to claim some right, title, estate or interest in or lien upon the real property”  
 5 described in plaintiff’s complaint “adverse to plaintiff’s” alleged “ownership thereof”, but the defendant denies that he does not have any right, title, estate, lien or interest in and to said real property and on the contrary affirmatively alleges that he is the owner in fee simple of the same.

Defendant denies each and every allegation set forth in said paragraph 3, save and except that portion hereinabove specifically admitted.

4. Defendant denies each and every allegation set forth and alleged in said complaint except those portions hereinabove specifically admitted.

WHEREFORE, this defendant prays judgment as hereinafter set forth.

IN FURTHER ANSWER TO SAID COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, THIS DEFENDANT ALLEGES:

1. That the plaintiff, at all times herein mentioned has been, and still is, the wife of one Rosario Gigliotti, also sometimes known as Ross Gigliotti.

2. That on or about the 18th day of July, 1936, this defendant filed suit in the above named Court against the said Rosario Gigliotti, et al., and immediately thereafter, and on the 18th day of July, 1936, this defendant caused to be recorded a notice of the pendency of said action by having recorded a lis pendens dated July 18, 1936, in Book 3-R of Miscellaneous records, page 254, of the records of the County Recorder of Carbon County, Utah; that the said Rosario Gigliotti was thereafter duly served with summons and said cause was carried to its conclusion, and because of said proceedings the said Rosario Gigliotti now has no right, title or interest in and to said real property; that said action is civil case No. 4553 and reference is hereby made to the records and files of said cause.

3. That the plaintiff at all times from the commencement of said case No. 4553 knew of the pendency of said action; that thereafter and on the 7th day of February, 1939, the above named

6 Court made and entered its Order of Sale directing and requiring the Sheriff of Carbon County, Utah, to sell said real property at public auction; that a copy of said Order of Sale is marked Exhibit A. hereto attached and hereby made a part hereof; that notice of said sale was duly given by the Sheriff of Carbon County, Utah, in all particulars as provided by law that said property would "be sold at Sheriff's sale, on the 4th day of March, A. D. 1939, at 10 o'clock a. m., on the steps of the Carbon County Court House, at Price, Carbon County, Utah"; that a copy of said Notice of Sale is marked Exhibit B hereto attached and hereby made a part hereof; that the plaintiff in this action well knew of said sale and that said sale of said property was to be free and clear of all encumbrances and claim of every nature except taxes becoming due after the commencement of said action; that said property at said time of sheriff's sale was duly and regularly sold to this defendant.

4. That the plaintiff sat idly by from the time of the commencement of case No. 4553 until the commencement of the present action and made no claim of any kind whatsoever in and to said property.

5. That because of said facts hereinabove stated this plaintiff is now estopped from claim-

ing any interest whatsoever in and to said real property.

WHEREFORE, this defendant prays judgment as hereinafter set forth.

IN FURTHER ANSWER TO SAID COMPLAINT AND AS A COUNTERCLAIM THERETO, THIS DEFENDANT ALLEGES:

1. That the defendant is the owner in fee simple of the following described real property in Carbon County, State of Utah:

All of that certain lot or parcel of land, situate, lying and being in Carbon County, State of Utah, particularly described as follows, to-wit:

Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 33 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto

belonging or thereunto in anywise appertaining.

7

Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the mortgagors of whatever nature, kind and description and however evidenced, used upon the above mentioned and described parcels of land.

2. That the plaintiff, Stella Felice Gigliotti, wrongfully claims some estate or interest in said real property adverse to this defendant, and that the said plaintiff is in actual possession of said real property and wrongfully withholds the same from this defendant.

WHEREFORE, this defendant prays judgment as hereinafter set forth:

WHEREFORE, this defendant prays judgment:

1. That the plaintiff take nothing because of her said complaint;

2. That the Court adjudge that the plaintiff is estopped from setting up or claiming any interest in and to said real property for the reasons set forth in this defendant's affirmative defense hereinabove set forth;

3. That this defendant's title to said real property be adjudged valid, that he has an estate in fee simple in and to said lands and that the plaintiff has no lawful estate or interest in said real property or any part of it; that the defendant have a writ for the possession of said premises;

4. For this defendant's costs herein incurred;

5. For such other and further relief as to the Court may seem just and proper in the premises.

MARL D. GIBSON,

*Attorney for Defendant.*

(Duly verified).

Filed Oct. 7, 1939.

*(Title of Court and Cause):*

# ORDER OF SALE EXHIBIT A

(Attached to Answer and Counterclaim)

10 *The People of the State of Utah, To S. M. Bliss,  
Sheriff of Carbon County, Greetings:*

WHEREAS, Leopoldo Albergo, the plaintiff in the above entitled action, on the 1st day of Sep-

tember, 1937, recovered a judgment, in an action wherein the said Leopoldo Albergo, was plaintiff, and the said above named defendants, were defendants, which said judgment is recorded in Judgment Docket No. 3, at page 10, which is in words and figures following, to-wit:

“This cause came on regularly for hearing on the 9th day of March, A. D., 1937, before the Court sitting without a jury; B. W. Dalton and Marl D. Gibson appearing as attorneys for plaintiff, and Harley W. Gustin appearing as attorney for the defendants Felice W. Gigliotti and Maria Gigliotti, husband and wife, and Rosario Gigliotti, also known as Ross Gigliotti; and the defendant Frank Marelli and W. H. Bintz Company failing to appear and answer within the time allowed by law their defaults were duly entered in open Court; and the defendant Shell Oil Company having an understanding with the plaintiff in regard to the removal of certain personal property belonging to the said Shell Oil Company; and evidence both oral and documentary having been introduced, and it appearing to the satisfaction of the Court that notice of the pendency of this action, containing the names of the parties to and object of the action and a description of the property affected thereby was filed and recorded at the time of filing said complaint in the office of the County Recorder of Carbon County, Utah, where said property is situated; and the Court having heretofore rendered and caused to be filed herein its Findings of Fact and Conclusions of Law, now, on motion and application of Marl D. Gibson, one of the attorneys of record for the plaintiff:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that plaintiff recover judgment against the defendants Felice W. Gigliotti and Maria Gigliotti in the principal sum of \$5685.45, interest in the

11 sum of \$1032.42, up to and including July 18th, 1936, together with interest at the rate of 8 per cent per annum from July 18th, 1936, to and including the 1st day of September, A. D., 1937, in the sum of \$510.91, and together with interest on the principal sum at the rate of 8 per cent per annum from the 1st day of September, A. D., 1937, until paid in full, \$750.00 attorney's fees, \$78.75 costs of court, and charges of sale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that all and singular the mortgaged premises mentioned in the said complaint, or so much thereof as may be sufficient to pay the amount due to the plaintiff for the principal and interest and costs in the suit and counsel fees, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the sheriff of Carbon County, Utah, and that the said sheriff give public notice of the time and place of said sale, according to the course and practice of the court and the law relative to the sale of real estate under execution; and that said sheriff after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale.

And the said Sheriff out of the proceeds of said sale retain his fees, disbursements and commissions on said sale and pay to the plaintiff or his attorneys out of said proceeds, the amounts so found due as aforesaid, together with interest at the rate of eight per cent per annum from September 1st, 1937, until paid in full; or so much thereof as the proceeds of sale will pay of the same.

And that the said sheriff take receipt for the amount so paid and return the same to this court, with his report of sale, and that he bring the

surplus money arising from said sale, if any there be, into court within five (5) days after such surplus shall have been received and shall be ascertained to abide the further order of this court.

That the defendants and all persons claiming or to claim from or under them, and all persons having liens, subsequent to said mortgage by judgment or decree upon the lands, described in said mortgage, and their personal representatives, and all persons having any liens or claims by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises and every part and parcel thereof, from and after delivery of the said sheriff's deed.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action, who may be in possession of said premises, or any part thereof, and persons, who, since the commencement of this action, have come into possession under them, or any of them, deliver possession thereof to such purchaser or purchasers on the production of the deed for such premises or any part thereof.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that if the money arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff as above stated, with the interest, costs, counsel fees and expenses of sale, as aforesaid, the sheriff shall specify the

12 amount of such deficiency and balance due to the plaintiff in his return of sale and that on the coming in of said return, a judgment of court shall be docketed for such balance against the defendants Felice W. Gigliotti and Maria Gigliotti, who are liable for the payment of the debt secured by the said mortgage to pay the plaintiff the amount of such deficiency and judgment with interest thereon as set forth above and that the plaintiff have execution therefor.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that S. M. Bliss, as Sheriff of Carbon County, Utah, sell said property.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the purchaser or purchasers at said sale be let into possession of the land and premises so sold hereunder, after the expiration of the redemption period; and that a writ of assistance issue therefor, if necessary without notice.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, are as follows, to-wit:

All of the following described real estate situate and being in Carbon County, State of Utah, to-wit:

Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acre

in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the mortgagors of whatever nature, kind and description and however evidenced, used upon the above mentioned and described parcels of land.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant Rosario Gigliotti, also known as Ross Gigliotti, is not entitled to take anything because of his said amended answer, counterclaim and cross-complaint.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that when the defendants Felice W. Gigliotti and Maria Gigliotti, husband and wife, and Rosario Gigliotti, also known as Ross Gigliotti, paid to Carbon County the sum of \$522.54, they did no more than pay to said Carbon County the general taxes due upon said real property and did not because of the fact that they acquired a deed, or otherwise, in any manner change the legal liability between the plaintiff and the defendants, Felice W. Gigliotti and Maria Gigliotti, husband

- 13 and wife, and Rosario Gigliotti, also known as Ross Gigliotti, or plaintiff's mortgage upon said real property.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant Rosario Gigliotti, also known as Ross Gigliotti, is estopped from denying or defeating plaintiff's mortgage lien.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that by reason of said quit-claim deed from Carbon County, or otherwise, the defendants Felice W. Gigliotti, Maria Gigliotti, and Rosario Gigliotti, also known as Ross Gigliotti, obtained and acquired no title at all to said property which is superior to the mortgage of plaintiff, and that the payment of the sum of \$522.54 to Carbon County as a consideration for said deed was doing no more than the defendants Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, also known as Ross Gigliotti, were required to do under the said mortgage of Felice W. Gigliotti and Maria Gigliotti to the plaintiff, and the release and contract between Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, also known as Ross Gigliotti, and that the said deed from Carbon County to the defendants, Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, and any rights acquired thereby by the said defendants, Felice W. Gigliotti, Maria Gigliotti, and Rosario Gigliotti, are subsequent, inferior and subordinate to the lien of the plaintiff's said mortgage.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the liens or claims, if any there be, of Rosario Gigliotti, Shell Oil Company, and W. H. Bintz Company, in and to the real estate described in said mortgage, are declared and decreed to be subordinate, secondary and inferior to the lien of plaintiff under his said mortgage.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Shell Oil Company is entitled to remove its personal property from said premises.

WHEREAS, you the said S. M. Bliss, Sheriff of Carbon County, Utah, were by said judgment ordered to sell the encumbered property in said judgment described:

Now, THEREFORE, you, the said S. M. Bliss, Sheriff of Carbon County, Utah, are hereby commanded and required to proceed to notice for sale, and to sell, the premises hereinbefore described, for lawful money of the United States, and to apply the proceeds of such sale to the satisfaction of said judgment, with interest thereon, and costs, together with your fees, and to make and file your report of such sale according to the terms and requirements of the said judgment, and the provisions of the statute in such case made and provided.

WITNESS, the Honorable George Christensen, Judge of the District Court of the Seventh Judicial District in and for Carbon County, Utah, and the seal of said Court, this 7th day of February, A. D., 1939.

B. H. YOUNG, *Clerk*

By DONALD HACKING,  
*Deputy.*

(Seal).

*(Title of Court and Cause):*

## NOTICE OF SALE EXHIBIT B

(Attached to Answer and Counterclaim)

14 To be sold at Sheriff's sale, on the 4th day of March, A. D., 1939, at 10 o'clock a. m., on the

steps of the Carbon County Court House, at Price, Carbon County, Utah, the following described property:

All of that certain lot or parcel of land, situate, lying and being in Carbon County, State of Utah, particularly described as follows, to-wit:

Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the mortgagors of whatever nature, kind and description

and however evidenced, used upon the above mentioned and described parcels of land.

Purchase price payable in lawful money of the United States.

S. M. BLISS,

*Sheriff, Carbon County,  
Utah.*

*(Title of Court and Cause):*

### DEMURRER TO ANSWER AND COUNTERCLAIM

15 Comes now the plaintiff above named and demurs to the answer and counterclaim heretofore filed herein and for grounds of demurrer alleges as follows, to-wit:

1. That the answer does not state facts sufficient to constitute a defense.

2. That the answer is uncertain in the following particulars:

(a) That it cannot be ascertained with sufficient certainty from the allegations thereof how or in what manner the fact that the plaintiff was the wife of one who is also known as Ross Gigliotti has anything to do with the issues represented by the pleading herein.

(b) That it cannot be ascertained with sufficient certainty from the allegations thereof how or in what manner the case referred to as No.

4553 has anything to do with the issues in this cause.

(c) That it cannot be ascertained with sufficient certainty from the allegations thereof how or in what manner the plaintiff sat idly by from the commencement of the said case No. 4553 or how or in what manner she is prevented from laches, idleness or other lack of affirmative action prevented from the action now taken.

16        3. That the answer is unintelligible for the reasons stated in paragraph 2 above.

4. That the answer is ambiguous for the reasons stated in paragraph 2 above.

5. That the defendant's answer is barred by Section 104-2-21 of the Revised Statutes of Utah, 1933.

6. That the defendant's answer is barred by Section 104-2-22 of the Revised Statutes of Utah, 1933.

In addition to the foregoing and adopting the same, plaintiff further demurs to the answer and counterclaim of defendant heretofore filed herein and particularly to the counterclaim upon the grounds and for the reasons as follows, to-wit:

1. That said counterclaim does not state facts sufficient to constitute a cause of action.

2. That the same is barred by Section 104-2-21 of the Revised Statutes of Utah, 1933.

3. That the same is barred by Section 104-2-22 of the Revised Statutes of Utah, 1933.

4. That the cause of action stated, if one is stated, is not pleadable as a counterclaim to the action.

5. That said counterclaim is ambiguous, unintelligible and uncertain, all for the reasons stated hereinabove.

WHEREFORE, plaintiff prays that the answer and counterclaim of the defendant be taken for naught and that she may have the relief prayed for in her complaint heretofore filed herein, it appearing that the defendant, Leopoldo Albergo, denies that he has a wife and this demurrer of necessity being merely to said Leopoldo Albergo's answer and so-called counterclaim.

HARLEY W. GUSTIN,  
*Attorney for Plaintiff.*

Filed Oct. 18, 1939.

*(Title of Court and Cause):*

REPLY TO ANSWER AND COUNTERCLAIM

20 Comes now the plaintiff above named and for reply to the answer and counterclaim of the defendant, Leopoldo Albergo, heretofore filed

herein admits, denies and alleges as follows, to-wit:

1. Plaintiff admits that she is the wife of one Rosario Gigliotti, also known as Ross Gigliotti, the latter being a defendant in Case No. 4553, and that she was married to the said Rosario Gigliotti long prior to the commencement of said action and at said time was and ever since has been and for a long time prior thereto had been in possession of the property described in her complaint on file herein.

2. Plaintiff further alleges that even though the answering defendant knew that she was in possession of said premises at the time of the commencement of the suit hereinabove and in said answer mentioned and knew that she was the wife of the said Rosario Gigliotti, he failed and neglected to make her a party to said suit and admits that she claims an interest in said property as the wife of said Rosario Gigliotti.

21 3. Plaintiff further alleges that she was married to the Rosario Gigliotti above mentioned on June 1, 1929 and immediately thereafter plaintiff and her said husband moved into possession of the real property in her complaint and in the answer and counterclaim described and ever since said time has made said property her home; that there has been born to plaintiff and her said husband as the issue of said marriage two children,

to-wit, Eunetta, a daughter now of the age of nine years, and Shirley, a daughter now of the age of eight years and that said children and plaintiff's husband reside with plaintiff on said property and that plaintiff's husband has never declared a homestead exemption thereon and that said children are under the care and maintenance of plaintiff; that in addition to the claim asserted in the paragraph next above, plaintiff claims, selects and declares the property in said complaint and in said answer and counterclaim described as a homestead to the full extent prescribed by law and in this connection plaintiff is informed and believes and upon such information and belief alleges that the cash value of said real estate, appurtenances and improvements thereon does not exceed in value the sum of Twenty-five Hundred (\$2500.00) Dollars; that the homestead so declared and claimed together with the appurtenances and improvements on said real property is for the sum of Two Thousand (\$2,000) Dollars to plaintiff as the head of the family, the further sum of Seven Hundred Fifty (\$750.00) Dollars for plaintiff's spouse and the sum of Six Hundred (\$600.00) Dollars for the two minor children above mentioned.

4. That said counterclaim and affirmative allegations contained in said answer are barred by the provisions of sub-division (2), Section 104-2-22 of the Revised Statutes of Utah, 1933.

5. That said counterclaim and affirmative allegations contained in said answer are barred by the provisions of Section 104-2-23 of the Revised Statutes of Utah, 1933.

22        6. Plaintiff denies generally and specifically each and every allegation contained in said counterclaim and each and every affirmative allegation contained in said answer not herein specifically admitted, modified or denied.

WHEREFORE, plaintiff prays that the answer and counterclaim of defendant, Leopoldo Albergo, be taken for naught and that she may have the relief prayed for in her complaint on file herein.

HARLEY W. GUSTIN,  
*Attorney for Plaintiff.*

(Duly verified).

Filed Nov. 7, 1939.

*(Title of Court and Cause):*

#### AMENDMENT TO PLAINTIFF'S REPLY

23        The Reply filed herein was amended by adding thereto the following:

“That on or about the 17th day of July, 1936, Rosario Gigliotti and Felice Gigliotti and Maria Gigliotti conveyed the property in question, by quit-claim deed, to the plaintiff, Stella Felice

Gigliotti, as shown by the Defendant's Exhibit No. 1 heretofore offered and received in evidence in this case."

Filed Feb. 6, 1940.

*(Title of Court and Cause):*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

25       The above entitled cause came on regularly for trial on the 6th day of February, A. D., 1940, the plaintiff appearing in person and by her attorney, Harley W. Gustin, and the defendant, Leopoldo Albergo, appearing in person and by his attorney, Marl D. Gibson, and evidence both oral and documentary having been introduced, and the case having been fully and finally submitted upon written briefs to the court for its decision, and the court being fully advised now makes its Findings of Fact as follows:

## FINDINGS OF FACT

1. That the defendant, Leopoldo Albergo, is the owner in fee simple and entitled to the immediate and exclusive possession of the following described real property in Carbon County, State of Utah:

Commencing at a point 74 feet East of  
the Northeast corner of the Northwest

quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the mortgagors of whatever nature, kind and description and however evidenced, used upon the above mentioned and described parcels of land.

2. That the plaintiff is not the owner in fee simple of said property or any part thereof and she is not entitled to the possession of said property or any part thereof.

3. That prior to the month of August, 1927, one Felice W. Gigliotti and one Maria Gigliotti, husband and wife, became the owners in fee simple of the above described property and took possession thereof.

4. That thereafter the said Felice W. Gigliotti and Maria Gigliotti, his wife, made, executed and delivered to the defendant herein, Leopoldo Albergo, their mortgage upon all of the above described property, which said mortgage was dated August 22, 1927, and was recorded on August 25, 1927, in Book 4-N of Mortgages, page 245 of the records of the county recorder of Carbon County, Utah.

27 5. That on or about the 1st day of June, 1929, the plaintiff herein married one Rosario Gigliotti, who is also sometimes known as Ross Gigliotti; that the said Rosario Gigliotti is the son of the said Felice W. Gigliotti and the said Maria Gigliotti, husband and wife hereinabove mentioned; that about the time of the marriage of the plaintiff herein to the said Rosario Gigliotti, the plaintiff commenced to live upon the above described real property with the said Rosario Gigliotti as his wife and with his parents above

named; that there have been two children born as the issue of the marriage between the plaintiff herein and the said Rosario Gigliotti and both of said children are minors; that all of said persons—Gigliotti—have continued to reside upon the above described premises to date.

6. That on or about the 31st day of August, 1931, the said Felice W. Gigliotti and the said Maria Gigliotti entered into a certain "Release and Contract of Sale" with the said Rosario Gigliotti, under the terms of which the said Felice W. Gigliotti and Maria Gigliotti agreed to sell to and their said son Rosario Gigliotti agreed to buy, the following portion of the above described real property:

Beginning at a point which is 1226 feet East of the Northwest corner of Section 13, Township 13 South, Range 9 East of the Salt Lake Base and Meridian, running thence South 157 feet, thence North 79 degrees 10 minutes East a distance of 270 feet, more or less, to the county road right-of-way; thence Northwesterly along the road right-of-way to the North line of said Section 13; thence West to the place of beginning together with a perpetual easement of right-of-way for egress and ingress in, over and upon a strip of ground 10 feet wide South of and adjacent to the said premises, extending from the said County Road right-of-way Westerly along the South boundary of said premises a distance of 170 feet measured along the

South boundary of the premises hereinabove described, reserving, however, unto the parties of the first part a perpetual easement of right-of-way for ingress and egress, in, over and upon a strip of land 10 feet wide, extending along the South side of said property, and running from the said county road right-of-way a distance of 170 feet, measured on the South boundary thereof.

- 28        7. That under the terms of said "Release and Contract of Sale", and as part of the consideration therefor, the said Rosario Gigliotti agreed "to pay and be liable for that certain mortgage executed by the parties of the first part" (Felice W. Gigliotti and Maria Gigliotti, husband and wife) to the defendant herein, Leopoldo Albergo, "which said mortgage has been given and is now recorded in the public records of Carbon County, said mortgage covering all of the property of the parties of the first part" to said Release and Contract of Sale; that the said Rosario Gigliotti under the terms and conditions of said "Release and Contract of Sale" agreed to pay to the said Leopoldo Albergo the amount due to him under the terms and conditions of said mortgage and the note secured thereby "to be paid in accordance with the terms of that certain mortgage between the parties of the first part" and the said Leopoldo Albergo.

8. That under the terms and conditions of said mortgage to the said Leopoldo Albergo the

makers thereof agreed to pay all taxes and assessments levied against said property; that the said Rosario Gigliotti under the terms and conditions of said "Release and Contract of Sale" heretofore mentioned, assumed and became liable for the terms and conditions of Leopoldo Albergo's said note and mortgage.

29 9. That in the month of May, 1936, the property described in paragraph 1 above was to be sold at the May sale because of delinquent taxes that the said Rosario Gigliotti and his parents, Felice W. Gigliotti and Maria Gigliotti, had not paid in spite of the fact that they had agreed to pay them; that the said Leopoldo Albergo learning that said taxes had not been paid inquired of the said Rosario Gigliotti concerning them, who thereupon stated to the said Leopoldo Albergo that he need not worry about said taxes because he, the said Rosario Gigliotti, would surely pay them in full prior to the 29th day of May, 1936; that the said Leopoldo Albergo relied upon said representation, did not himself pay said taxes to Carbon County and returned to his home in Salt Lake City; that thereafter between the 9th day of May, 1936, and the 29th day of May, 1936, the said Rosario Gigliotti stated to Leopoldo Albergo that he, the said Rosario Gigliotti, had paid said taxes in full; that said Rosario Gigliotti made said statements to the said Leopoldo Albergo knowing that they

were false and with the intention that the said Leopoldo Albergo would rely upon said statements and not make the payment of taxes to the said Carbon County, so that the property would go to the said Carbon County for the non-payment of general taxes; that the said Leopoldo Albergo relied upon said representations so made and did not investigate as to the truth or falsity of said statements.

10. That the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti in the month of May, 1936, conspired together and agreed not to pay the general taxes hereinabove described for the purpose of having said property sold to Carbon County for non-payment of general taxes in an attempt to cheat and defraud the said Leopoldo Albergo of his security and mortgage lien upon the real property mortgaged to the said Leopoldo Albergo as above described.

11. That the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti in violation of Leopoldo's mortgage and in violation of the said "Release and Contract of Sale" did not pay said taxes for the purpose that the said real property so mortgaged as aforesaid, would be sold to Carbon County for non-payment of taxes, in an attempt to cheat and defraud the said Leopoldo Albergo of his security and mortgage lien upon said property.

12. That in the months of May, June and July, 1936, the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, in furtherance of said conspiracy to cheat and defraud Leopoldo Albergo attempted to induce Carbon County, a political subdivision of the State of Utah to quit-claim to Rosario Gigliotti only, the property so mortgaged to the said Leopoldo Albergo, in an attempt to defeat Leopoldo Albergo's mortgage lien upon said real property.

13. That on or about the 11th day of July, 1936, in furtherance of said conspiracy to cheat and defraud Leopoldo Albergo, Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti did induce Carbon County, a political subdivision of the State of Utah, to quit-claim said real property so mortgaged to the said Leopoldo Albergo to Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, in an attempt to defeat Leopoldo Albergo's mortgage lien upon said mortgaged property.

14. That on the 18th day of July, 1936, Leopoldo Albergo, brought an action to foreclose said mortgage against Felice W. Gigliotti, Maria Gigliotti, Rosario Gigliotti, et al.; that Stella Felice Giliotti, the plaintiff in the present action, was not made a party defendant in said case; that lis pendens giving notice of the pendency of said action and properly describing the property in question was recorded on July 18, 1936,

in Book 3-R of Miscellaneous, page 254, of the records of the county recorder of Carbon County, Utah.

15. That the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, prior to the 11th day of July, 1936, and with knowledge and consent of the said Stella Felice Gigliotti all repudiated and abandoned said "Release and Contract of Sale" and released one another from liability under it; that at the time of the repudiation and abandonment of said Release and Contract of Sale by the parties thereto, which was with the consent of the said Stella Felice Gigliotti, the mortgage indebtedness to Leopoldo Albergo had not been paid, which payment of said mortgage indebtedness was the main part of the consideration for said Release and Contract of Sale; that said repudiation and abandonment of said Release and Contract of Sale and the releasing of the parties obligated thereunder by each other was done in furtherance of the design to cheat and defraud the said Leopoldo Albergo of his mortgage indebtedness. That the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti claimed to be the owners of said property under a new title initiated by the said quit-claim deed above described from Carbon County to the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti; that the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, with the knowl-

31

edge and consent of the said Stella Felice Gigliotti, contended and claimed that said real property because of said quit-claim deed from Carbon County to them was free and clear of any lien of the mortgage to the said Leopoldo Albergo.

16. That immediately upon the bringing of the said foreclosure action by the said Leopoldo Albergo as hereinabove stated the said Rosario Gigliotti and his wife, Stella Felice Gigliotti, consulted with their attorney, Harley W. Gustin, as to the defense of said action; that the said Stella Felice Gigliotti, thereafter, and with her husband and in furtherance of his design and his parents design, to cheat and defraud the said Leopoldo Albergo, conferred with said attorney to defend said foreclosure action so commenced as above stated.

17. That after the commencement of said foreclosure action and after the recording of the lis pendens giving the notice of the pendency of said action, the said Maria Gigliotti and Felice W. Gigliotti made, executed and delivered to Rosario Gigliotti and Stella Felice Gigliotti, a quit-claim deed purporting to convey to the grantees the property "acquired by them by and through that certain deed from Carbon County, State of Utah, dated the 11th day of July, 1936, and recorded in the office of the county recorder of Carbon County, Utah, on the 16th day of July,

1936, in Book 3-R, page 245; that the property described in said quit-claim deed is as follows:

- 32           Beginning 973 feet East of the Northwest corner of the Northwest quarter of Section 13, Township 13 South, Range 9 East of the Salt Lake Meridian, thence South 333 feet, thence North 85 degrees 20 minutes East 455 feet, thence North 86 degrees 50 minutes East 220 feet to the county road, thence Northwesterly along the county road, to the North boundary line of the Northwest quarter of Section, thence West 316 feet to the place of beginning.

18. That the said Rosario Gigliotti defended said foreclosure action and claimed to be the sole owner of said property because of said quit-claim deed from Carbon County to himself and his parents dated July 11, 1936; that at said trial and in his pleadings he made no claim to any title or interest in and to said property because of said Release and Contract of Sale and claimed solely because of the deeds hereinabove set forth; that said Rosario Gigliotti made said claims, representations, and defended said action in said manner with the full knowledge and consent of the said Stella Felice Gigliotti.

19. That the court after hearing all of the evidence presented by both sides in said foreclosure action found in favor of the plaintiff and adjudged said quit-claim deed from Carbon County to Maria Gigliotti, Felice W. Gigliotti and

Rosario Gigliotti as absolutely void and of no force and effect.

20. That the court rendered judgment and decree of foreclosure that there was due to the said Leopoldo Albergo under the terms of said note and mortgage the sum of \$5685.45, interest in the sum of \$1032.42 up to and including July 18, 1936, together with interest at the rate of 8 per cent per annum from July 18, 1936, to and including the 1st day of September, A. D., 1937, in the sum of \$510.91, and together with interest on the principal sum, to-wit, \$5685.45, at the rate of 8 per cent per annum from the 1st day of September, A. D., 1937, until paid in full, \$750.00 attorney's fees, \$21.10 costs in court, and charges of sale; which said sums of principal and interest payments to Leopoldo Albergo were the main part of the consideration, which the said Rosario Gigliotti agreed to pay for said property under the terms and conditions of said "Release and Contract of Sale". That said Judgment and decree of foreclosure is dated September 1, 1937, and was filed September 2, 1937.

21. That thereafter, the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti appealed said case to the Supreme Court of the State of Utah, which said Supreme Court affirmed said decision, except a portion upon which the said Leopoldo Albergo had cross-appealed, and

which said portion has no bearing upon the matters now involved.

22. That shortly after the Supreme Court of the State of Utah had affirmed the decision against the said Gigliotti's, a certain quit-claim deed to the property in question was recorded in the office of the county recorder of Carbon County, Utah, on February 18, 1939; that said quit-claim deed bore the date of July 17, 1936, which is one day before the recording date of the lis pendens above described; that Rosario Gigliotti, Felice W. Gigliotti and Maria Gigliotti are grantors therein and Stella Felice Gigliotti is grantee therein; that said deed is recorded in Book 3-T of Miscellaneous, page 353, of the records of the county recorder of Carbon County, Utah.

23. That the foreclosure action above described is Case No. 4553 and the file thereof is part of the records of the District Court Clerk in and for Carbon County, Utah.

24. That on the 7th day of February, 1939, the court in said Case No. 4553 made and entered its order of sale directing and requiring the Sheriff of Carbon County to sell said real property described in paragraph 1 above at public auction; that notice of sale was duly given by the Sheriff of Carbon County in all particulars as provided by law that said property would "be

34 sold at sheriff's sale on the 4th day of March, 1939, at 10 o'clock a. m., on the steps of the Carbon County Court House, at Price, Carbon County, Utah''; that the said Stella Felice Gigliotti knew of said sale and that said sale of said property was to be free and clear of all encumbrances, claims and rights, of every name and nature, including any encumbrances, claims or rights that she had or claims to have in and to said property; that said property at said time of sale was duly and regularly sold to Leopoldo Albergo; that said property so sold was never redeemed and after the redemption period had expired sheriff's deed was duly made, executed and delivered to the said Leopoldo Albergo conveying to him all of the property described in paragraph 1 above.

25. That the said Stella Felice Gigliotti knew at all times during the pendency of Case No. 4553 and thereafter, that the said Rosario Gigliotti claimed to be the owner of said real property under and by virtue of a new title initiated from Carbon County and not under said "Release and Contract of Sale"; that she, at no time from the time of the commencement of said Case No. 4553 until after the Supreme Court of the State of Utah had decided against her husband, made any claim of any kind or nature in and to said real property or any part thereof but on the contrary assisted her said husband in his attempt to cheat

and defraud the said Leopoldo Albergo as above described: that prior to the sheriff's sale up to September, 1939, the said Stella Felice Gigliotti made no claim of any kind or nature in and to said property except by the recording of the quit-claim deed claimed to be dated July 17, 1936, and which was recorded on February 18, 1939, in Book 3-T of Miscellaneous, page 353, of the records of Carbon County, Utah.

26. That the said Stella Felice Gigliotti now makes no claim in and to said real property in question because of any deed hereinabove described, as testified to by her in said case, and claims only "as the wife" of the said Rosario Gigliotti.

From the foregoing Findings of Fact the court now makes and renders its Conclusions of Law:

### CONCLUSIONS OF LAW

- 35        1. That the defendant, Leopoldo Albergo, is the owner in fee simple and is entitled to the immediate possession of all of the following described property in Carbon County, State of Utah:

Commencing at a point 74 feet East of the Northwest corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence

West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

Also beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the mortgagors of whatever nature, kind and description and however evidenced, used upon the above mentioned and described parcels of land.

2. That the plaintiff or any one holding by, through or under her does not have any right,

title or interest, possessory or otherwise, in and to said property or any part thereof.

36 3. That the defendant, Leopoldo Albergo, is entitled to a decree quieting his title to said property and each and every part thereof against the plaintiff and any and all persons claiming or holding possession thereof, by, through or under her.

4. That the plaintiff is estopped to assert her alleged claim in and to said property against the defendant, Leopoldo Albergo.

5. That the defendant, Leopoldo Albergo, is entitled to have issued immediately a writ requiring the officer to place him in possession of said property and to dispossess the plaintiff and any person or persons holding by, through or under her.

6. That the plaintiff and all persons claiming by, through or under, her, should be forever restrained and enjoined from in any manner interfering with the title and possession of the defendant, Leopoldo Albergo, and any one holding, by, through or under him.

7. That the defendant, Leopoldo Albergo, is entitled to a judgment for costs, to be taxed herein against the plaintiff.

8. Judgment and decree is hereby ordered to be entered according to the foregoing.

GEORGE CHRISTENSEN,  
*District Judge.*

Filed April 23, 1940.

*(Title of Court and Cause):*

JUDGMENT AND DECREE.

37       The above-entitled cause came on regularly for trial on the 6th day of February, A. D., 1940, before the court, without a jury, the plaintiff appearing in person and by her attorney, Harley W. Gustin, and the defendant, Leopoldo Albergo, appearing in person and by his attorney, Marl D. Gibson, and evidence both oral and documentary having been introduced and the case submitted for decision, and the court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised:

WHEREFORE, by reason of the law and the Findings of Fact aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the defendant, Leopoldo Albergo, is the owner in fee simple and is entitled to the immediate possession of all of the following de-

scribed property in Carbon County, State of Utah:

38

Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the mortgagors of whatever

nature, kind and description and however evidenced, used upon the above mentioned and described parcels of land.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff, or any one holding by, through or under her, does not have any right, title or interest, possessory or otherwise, in and to said property or any part thereof.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the title to the above described property and each and every part thereof is quieted in Leopoldo Albergo as against the plaintiff and any and all persons claiming or holding possession thereof by, through or under her.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff is estopped to assert her alleged claim in and to said property against the defendant, Leopoldo Albergo.

39 IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that a writ immediately issue requiring the officer to whom it is directed to place the defendant, Leopoldo Albergo, in possession of said property and each and every part thereof and to dispossess the plaintiff and any person or persons holding by, through or under her.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff and all persons holding by, through or under her, be, and they are hereby restrained and enjoined from in any manner

interfering with the title and possession of the defendant, Leopoldo Albergo, and any one holding, by, through or under him.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the defendant, Leopoldo Albergo, is entitled to, and he is hereby awarded his costs to be taxed herein against the plaintiff.

GEORGE CHRISTENSEN,  
*District Judge.*

Filed April 23, 1940.

*(Title of Court and Cause):*

43 ORDER EXTENDING TIME FOR FILING  
BILL OF EXCEPTIONS.

On May 18, 1940, the court made and entered its order giving the plaintiff to and including the 15th day of June, 1940 within which to prepare and file herein her bill of exceptions.

*(Title of Court and Cause):*

44 NOTICE OF APPEAL

*To Leopoldo Albergo, Defendant Above Named,  
and to Marl D. Gibson, His Attorney:*

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the plaintiff in the above entitled cause hereby appeals to the Supreme Court of the State of Utah from the judgment and decree made and entered in the above entitled action by

the trial court on or about the 23rd day of April, 1940 in favor of the defendant and against the plaintiff above named and from the whole of said judgment and decree.

HARLEY W. GUSTIN,  
*Attorney for Plaintiff.*

Served July 18, 1940.

Filed July 19, 1940.

*(Title of Court and Cause):*

MINUTE ENTRY OVERRULING  
DEMURRER.

46        October 23, 1939. Minute Book 8 at Page 481. Plaintiff's demurrer to Answer and Counterclaim of defendants is argued this day by Marl D. Gibson, attorney for defendants and the Court being advised, it is ordered that said demurrer be overruled and plaintiff given 15 days to answer and reply.

(Duly verified).

*(Title of Court and Cause):*

CLERK'S CERTIFICATE.

48    STATE OF UTAH        }  
      COUNTY OF CARBON    } ss.

I, B. H. YOUNG, County Clerk and Ex-Officio Clerk of the District Court of the Seventh Judi-

cial District of the State of Utah, in and for Carbon County, do hereby certify that the foregoing and hereto attached papers and file constitute all of the original papers filed in the above entitled Court and Cause, including Notice of Appeal but excepting Undertaking for Costs on Appeal, which Undertaking has been duly filed in the sum of \$300.00, and which attached papers constitute the Judgment Roll and other papers filed in the above entitled Action.

I further certify that said Judgment Roll and other papers, together with all exhibits offered at the trial of said action, is by me transmitted to the Supreme Court of the State of Utah, pursuant of said Notice of Appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said District Court at my office in Price, Carbon County, State of Utah, this 23rd day of July, A. D., 1940.

B. H. YOUNG, *Clerk.*

By DONALD HACKING, *Deputy.*

(SEAL).

## BILL OF EXCEPTIONS.

49-1      Be it remembered that the above entitled cause came on regularly for hearing before the Honorable George Christensen, one of the judges of the above entitled court, sitting without a jury,

on the 6th day of February, 1940 at Price in the County of Carbon, State of Utah, Harley W. Gustin, appearing for the plaintiff, and Marl D. Gibson, appearing for the defendants; and thereupon the following proceedings were had in substance:

DONALD HACKING was called as a witness on behalf of the plaintiff and testified substantially as follows:

3 DIRECT EXAMINATION.

(By Mr. Gustin).

4 I am deputy county clerk in charge of the District Court clerk's work and have been for five years. On July 18, 1936, a complaint was filed in this court entitled "Leopoldo Albergo, plaintiff, vs. Felice W. Gigliotti and Maria Gigliotti, husband and wife, and Rosario Gigliotti, Ross Gigliotti, Frank Marelli, Shell Oil Company, a corporation, and W. H. Bintz Company, a corporation, defendants, and known as Case No. 4553." I have the file in my possession. The file was marked as plaintiff's Exhibit "A" and offered and received in evidence without objection.

5 STELLA FELICE GIGLIOTTI, the plaintiff, was called as a witness in her own behalf and testified substantially as follows:

## DIRECT EXAMINATION.

(By Mr. Gustin).

- 6 I am the plaintiff in this action. I was mar-  
7 ried in Farmington, Davis County, Utah, on June  
1, 1929. My home is in Helper, Carbon County.  
15 After June 1, 1929, we came down to Helper and  
moved into the property that we are in now.  
I have the marriage certificate at my home in  
Helper and I can produce it this afternoon.
- 16 The place that we moved into and where I  
now reside is named "The Balanced Rock Service  
Station." (It was stipulated that The Balanced  
Rock Service Station is on the property that is  
17 described in plaintiff's complaint). I have lived  
there almost eleven years. I was living there in  
April of 1936 and I think that I lived there four  
18 years prior to that time. At the present time,  
I reside on the property with Rosario Gigliotti,  
also known as Ross Gigliotti, and have resided  
with him on the property since the event that  
I mentioned as having occurred in Farmington,  
Davis County, State of Utah. I have two children  
and Ross Gigliotti is the father of those children.  
19 I am also claiming a homestead on the property;  
20 that is, the property that I now occupy. I was  
never served with a summons in the case involv-  
ing a foreclosure of a mortgage on the property  
that I now occupy.

21 I know Leopoldo Albergo. I knew him prior  
to 1936 and I have seen him on the property prior  
22 to the month of April, 1936. My oldest child is  
nine years of age.

Q. Do you have any opinion—or, during the  
time that you have been in the occupation of  
23 what is known, generally known, as the Balanced  
Rock Service Station—Do you have or have you  
formed any opinion as to the value of that prop-  
erty and the improvements thereon?

MR. GIBSON: I object to that, if the Court  
please, on the ground that no proper foundation  
has been laid for her to give an opinion as to the  
value of the property in question; and the further  
objection that is incompetent, irrelevant and im-  
material.

26 THE COURT: The objection will be sus-  
tained.

27 CROSS EXAMINATION.

(By Mr. Gibson).

28 I knew Ross Gigliotti before I married him  
but I had never visited him at his home. I knew  
that he was living with his mother and I believe  
that his mother and father lived on the property  
29 before I married him. My parents lived a little  
way from there between there and Helper and  
they were practically neighbors of the Gigliotti  
family for some years prior to June 1929.

Q. And you knew that Ross Gigliotti's father and mother were the reputed owners of that property, didn't you?

MR. GUSTIN: If the Court please, we object to that on the ground that it is not proper cross-examination. It hasn't anything to do with the issues in this case, and it is assuming a fact that hasn't been proven in the record.

THE COURT: The witness may answer.

I did not know who owned the property. I did not know anything about it. We just got  
30 married and the week after that we moved into an apartment there on the property. I do not remember when Albergo first called at the Balanced Rock Service Station, but I have seen him there before 1936 and I talked to him a few  
31 times. I do not know what Albergo was there for. I was not present at any of the conversations. Albergo was at the service station. He said "Hello", that's all I remember of him talking to me. I was helping Ross at the service  
33 station. I do not remember when the foreclosure action was started but I did not receive a summons. I wasn't included in anything. I mean  
34 that I was not served with summons in the foreclosure action; that is, the action between Ross's  
35 folks and Mr. Albergo. I do not remember how long I have had in mind the fact that I was not served with a summons in the foreclosure suit

36 or made a party to it. I knew about it before  
the present case was started but I do not know  
37 how long before that time or whether it was a  
year or two years or how long. I don't remem-  
ber the date that the foreclosure suit was tried.  
I can't remember whether I knew about it in  
July of 1936.

I do not remember accepting any deeds to  
40 the property at any time. I do not remember a  
deed signed by Maria Gigliotti and Felice Gig-  
liotti to Rosario Gigliotti and Stella Felice Gig-  
41 liotti dated the 28th day of July, 1936. I have  
never made a check of the record to see when  
the first case was filed. I claim a homestead  
exemption because I have a right to and because  
I am married.

44 (Defendant's Exhibit 1, a quit claim deed,  
was marked as such for identification).

I have seen defendant's Exhibit 1 before but  
45 I do not remember where I first saw it. I believe  
I had the deed recorded, but I do not remember  
where I was when I first saw the deed. I think  
I got the deed in July of 1936.

46. Q. Why didn't you record it then?

MR. GUSTIN: I object to that as being  
argumentative, and not proper cross-examination.

47 THE COURT: If the witness has a reason,  
she may give it.

A. I have no reason.

I think the deed was delivered to me in July, 1936 but I do not remember where. I think it was  
 48 Ross that delivered it to me at my home. I do not remember who was present.

49 Q. We will offer Defendant's Exhibit 1, if the Court please, in connection with the cross-examination matter, to explain the cross-examination.

MR. GUSTIN: Our objection is that the exhibit isn't proper cross-examination.

50 THE COURT: I think this may be received for such connection that it may show, if any.

Defendant's Exhibit 1 is substantially as follows:

### QUIT-CLAIM DEED

ROSARIO GIGLIOTTI and FELICE W. GIGLIOTTI and MARIA GIGLIOTTI grantors of Helper, County of Carbon, State of Utah, hereby QUIT CLAIM to STELLA FELICE GIGLIOTTI grantee of Helper, County of Carbon, State of Utah for the sum of One and No/100ths DOLLARS and other good and valuable considerations the following described tracts of land in Carbon County, State of Utah:

Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; and running thence West 436 feet; thence South 333 feet; thence North 85 degrees 20 minutes East along line of fence 455 feet; thence North 3 degrees 20 minutes West 296 feet, to the

place of beginning, being two and three-fifths acres of land in the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian, and three-fifths acres in the Northeast quarter of the Northwest quarter of Section 13, together with and including all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining.

Also, beginning at a point which is 74 feet East and 46 feet South 3 degrees 20 minutes East of the Northeast corner of the Northwest quarter of the Northwest quarter of Section 13, Township 13 South, Range 9 East, Salt Lake Meridian; thence South 3 degrees 20 minutes East 250 feet; thence North 86 degrees 50 minutes East 242.2 feet; thence Northwesterly on a curved line along old fence to the point of beginning, containing eight-tenths of an acre, together with one acre of primary water right and also all improvements thereon and all rights and appurtenances thereunto belonging or thereunto in anywise appertaining; also, all water rights owned by the grantors of whatever nature, kind and description and however evidenced, used upon the above mentioned and described parcels of land.

WITNESS the hand of said grantors, this the Seventeenth day of July, A. D. one thousand nine hundred and thirty-six.

Signed in the Presence of

A. J. KIRKHAM.

MARIA GIGLIOTTI,  
FELICE W. GIGLIOTTI,  
ROSARIO GIGLIOTTI.

STATE OF UTAH }  
COUNTY OF } ss.

On the Seventeenth day of July A. D. one thousand nine hundred and thirty-six personally appeared before me ROSARIO GIGLIOTTI and FELICE W. GIGLIOTTI and MARIA GIGLIOTTI the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

A. J. KIRKHAM, *Notary Public.*

Address: Helper, Utah.

My commission expires: May 23, 1939.  
(SEAL).

53 I do not remember seeing the quit claim deed, which is dated the 28th day of July, 1936 wherein the grantors are Maria Gigliotti and Felice W. Gigliotti and the grantees are Rosario Gigliotti and myself and which is found in plaintiff's Exhibit A, (the court file introduced in evidence.) I may have seen the deed before, but I cannot remember. I do not recall a conversation with Ross Gigliotti at the time I had Exhibit No. 1 recorded.

Q. Do you know whether or not the deed dated the 28th day of July, 1936, was produced by Ross Gigliotti in court as a claimed one of the sources of title in him at that time?

MR. GUSTIN: That calls for a conclusion. It is wholly immaterial, and it isn't proper cross-examination.

THE COURT: You may answer.

A. I don't know.

55

REDIRECT EXAMINATION.

(By Mr. Gustin).

Defendant's Exhibit 1 was turned over to Mr. Gustin as a part of the files and papers delivered to him in connection with this case and it was through his office that the deed was recorded.

RECROSS EXAMINATION.

56

(By Mr. Gibson).

I do not remember the exact date that I delivered the deed to Mr. Gustin but I delivered it to Mr. Gustin at his office. When I went to Salt Lake to see Mr. Gustin, Ross Gigliotti took me in and he was present during the entire transaction.

57

REDIRECT EXAMINATION.

(By Mr. Gustin).

What has been marked for identification as plaintiff's Exhibit B is the certificate that I received at the time of my marriage to Rosario or Ross Gigliotti.

Plaintiff's Exhibit "B" was offered and received in evidence without objection and is substantially as follows:

**"CERTIFICATE OF MARRIAGE**  
**STATE OF UTAH                      COUNTY OF DAVIS**

THIS CERTIFIES that Mr. Ross Gigliotti of Helper in the State of Utah and Miss Stella Felice of Helper in the State of Utah were by me joined together in HOLY MATRIMONY according to the Ordinance of God and the Laws of the State of Utah at Farmington in said County, on the 1st day of June, in the year of our Lord One Thousand Nine Hundred and 29.

In the presence of

STEVE GIGLIOTTI  
 ROSE GIGLIOTTI

Witness.

THOMAS BRIMLEY,  
*Justice of the Peace.*

License issued by Clerk of Davis County  
 June 1st, 1929."

61                      **RECROSS EXAMINATION.**

(By Mr. Gibson).

63                      Ross Gigliotti is thirty-four years old. My  
 husband was born in Italy, I believe.

64                      FLORA TOLMAN, called as a witness on  
 behalf of the plaintiff, testified substantially as  
 follows:

## DIRECT EXAMINATION.

(By Mr. Gustin).

I reside in Salt Lake City and I am employed in the office of Mr. Gustin as secretary and will have been so employed for four years on April 3rd of this year. At the time of my employment  
65 in his office, there was another stenographer or secretary thereby the name of Agnes Lilya. I have seen defendant's Exhibit 1 before. Exhibit  
66 1 was forwarded to Mr. Ross Gigliotti with instructions for him to record the same with the county recorder. I had seen the instrument in  
67 the office before it was sent to Mr. Gigliotti with instructions to have it recorded.

## CROSS EXAMINATION.

(By Mr. Gibson).

I wrote a letter sending the deed, defendant's  
68 Exhibit 1, down to Helper. I am positive that Ross Gigliotti is the same Ross Gigliotti that Mrs. Gigliotti has testified to as being her husband. I was in Mr. Gustin's office during the other court proceeding here and at that time William H. Folland was a judge on the Supreme Bench. He was one of the men that wrote the opinion in the former case. I am not sure whether he wrote the opinion or whether he just concurred or dissented, but I know that he was on the Su-

preme Bench at the time as Chief Justice. I have  
 69 never looked at the records in the county recorder's office but we got the deed back showing that it was recorded. It is my best recollection that Ross Gigliotti recorded it at the request of the office in which I work.

### REDIRECT EXAMINATION.

(By Mr. Gustin).

70 The deed wasn't returned to our office directly by the county recorder. It was returned to either Mr. or Mrs. Gigliotti and they in turn returned it to us and we have had it in our files. It has been in our files for sometime.

### RECROSS EXAMINATION.

(By Mr. Gibson).

I do not remember when we got the deed. I remember when it was recorded but I do not remember when we got it, because Miss Lilya was in the office then and she was taking care of most of Mr. Gustin's work. After she left, I took charge of his files. I have been there four years and during that time Mr. E. F. Richards was also in the office and I was working for him too. The deed first came to my attention at least  
 71 other suit was being tried. It had been in the

office for sometime before I sent it to be recorded. The reason why it hadn't been recorded previously is because Mr. Gustin hadn't made up his mind that it should be recorded or not. I know that the deed had been there for considerable time before it was recorded and I am sure that it could have been there as long as a year and it might have been there two years, but I cannot say positively. I remember Mrs. Gigliotti being in the office in July after the suit was started. I don't remember seeing her in the office as far back as the time when I first saw the deed but she may have been in. I know she was in the office several times. The suit that I refer to is the foreclosure suit.

73       MR. GUSTIN: Comes now the plaintiff, and with consent of the defendant so far as the time limit is concerned, moves to amend the Reply filed herein by adding thereto and as a further reply to the answer filed herein, by addition thereto:

74       “That on or about the 17th day of July, 1936 Rosario Gigliotti and Felice Gigliotti and Maria Gigliotti conveyed the property in question by quit-claim deed, to the plaintiff, Stella Felice Gigliotti, as shown by the Defendant's Exhibit No. 1 heretofore offered and received in evidence in this case.”

We will make that motion as a further statement in regard to our reply as to plaintiff's title. And may the record show, if the Court please, that our amendment is made to conform with the proof?

81        **THE COURT:** The motion will be granted, and the amendment as set out in the motion may be added to the Reply.

Thereupon the plaintiff rested.

82        It was stipulated that in connection with the foreclosure case and the file introduced in evidence, file No. 4553 that a lis pendens was recorded on behalf of the plaintiff, Albergo, on July 18, 1936 in Book 3-R of Miscellaneous records, page 254 and which lis pendens names the  
83        parties to the suit and indicates that a foreclosure suit was commenced involving the property now  
85        involved. The stipulation with respect to the lis pendens was made subject to the objection that lis pendens in the foreclosure suit, and in which action the plaintiff in the present action was not named as a party defendant, would be immaterial in the case at bar and thereupon the court overruled the objection as to the materiality of the lis pendens and the same was to be known as Defendant's Exhibit 2 with a copy to be supplied by defendant's counsel.

86        **MR. GIBSON:** You will also stipulate, will you not, that pursuant to the order of sale, which

is included in your Exhibit A, that the sheriff of Carbon County, Utah, properly noticed the property for sale, and it was sold at auction—public auction, public sheriff's sale—to Mr. Albergo?

MR. GUSTIN: Well, except as to materiality. We will not take any position that the transaction involving the sale resulting from the Court's order of foreclosure was not regular in all particulars, so far as it pertained to that case. However, we urge the objection that any reference to that matter would be immaterial.

87 THE COURT: It may be received, over your objection rather.

MR. GIBSON: I will offer Defendant's Exhibit 3, which is the original Sheriff's Deed from the sheriff of Carbon County, Utah, to Leopoldo Albergo, describing the property involved in this suit, and also the property described in Case No. 4553, for the purpose of showing that Mr. Albergo is the owner of the property, and received it under and by virtue of foreclosure in this court, and as appealed to the Supreme Court and its decision in case No. 4553.

MR. GUSTIN: If the Court please, we have no objection to urge as to the authenticity of the document, Defendant's Exhibit 3; but we do say, and we do urge, the objection that the same is immaterial and irrelevant in this case.

88       The objection is overruled. Exhibit 3 may be received.

MR. GIBSON: Now, you also admit, do you not, Mr. Gustin, that the proceedings from the time of the holding of the sheriff's sale to the giving of the deed were—that is, there is nothing  
89 irregular or illegal about them, except that you claim they are immaterial and irrelevant to the issues in this case. I would like to have a stipulation that they were.

MR. GUSTIN: Well, there isn't any dispute about that.

It was stipulated that on August 27, 1927, the date that the note and mortgage described in plaintiff's Exhibit "A", was given by Felice W. Gigliotti and Maria Gigliotti, husband and wife, to Leopoldo Albergo that Felice W. Gigliotti and Maria Gigliotti were the owners of the property at that time.

91       MR. GIBSON: It is hereby stipulated, by and between the parties to this case, that Mr. J. Bracken Lee, if called to the witness stand, would testify that the fair and reasonable market value as of now of the property involved in this case is the sum of \$5,600.00.

MR. GUSTIN: We agree with the stipulation as stated except that we object, and we do object, and would object, to such testimony on the ground that it is irrelevant and immaterial.

THE COURT: It appears to the Court that, as the case now stands, that the testimony as to value would be material. The objection, is, overruled.

92 MR. GUSTIN: Now, is it understood by counsel, and by the Court, that we don't say that that is the value—we merely say that Mr. Lee would so testify?

THE COURT: Oh, yes.

94 The defendant, LEOPOLDO ALBERGO, was called in rebuttal as a witness on his own behalf and testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr. Gibson).

95 I know Stella Felice Gigliotti and have known her for some years. I knew her before the foreclosure case was started. At no time did she ever tell me that she claimed an interest in the property.

#### CROSS EXAMINATION.

(By Mr. Gustin).

I have known Mrs. Gigliotti since about the time she was married.

Q. Now, prior to the foreclosure suit that counsel has referred to, and which is indicated

by Exhibit A, the file, did you ever see Mrs. Gigliotti—Stella Felice Gigliotti—on the premises and property that is involved in the present action?

MR. GIBSON: Object to the question as not proper cross-examination.

96 THE COURT: I don't think it is cross-examination. The objection will be sustained.

When I say that I had known Mrs. Gigliotti since here marriage, I mean her marriage to Rosaria Gigliotti, known as Ross Gigliotti, and the property that I referred to is the property that she is now on, The Balanced Rock Service Station, in Helper.

Q. And Mrs. Gigliotti has been there ever since, ever since you have known her? Is that right?

97 MR. GIBSON: I object to that as improper cross-examination. The Court has already ruled he can't ask that question, on the ground that it isn't proper cross-examination. Your Honor ruled that not two minutes ago.

THE COURT: The objection is sustained.

99 It was stipulated, subject to the objection by plaintiff that the same was irrelevant and immaterial, that prior to the 1st day of September, 1939, the sheriff was not notified by Mrs. Gigliotti or anyone acting for her that she claimed an interest in the property and the objection to

100 such evidence on the grounds stated was by the  
 courts overruled.

It was thereupon stipulated that the sheriff  
 did receive notice of the claim on behalf of Mrs.  
 Gigliotti, through the medium of Mr. Gigliotti,  
 the day before the writ of assistance was served  
 101 which was after the issuance and recording of  
 the sheriff's deed.

It was stipulated that the service of the writ  
 of assistance on the 11th day of September, 1939.

102 Whereupon, the parties rested.

### TENDER OF BILL OF EXCEPTIONS

On the 7th day of May, 1940 comes Stella  
 Felice Gigliotti, the plaintiff above named and  
 serves upon Marl D. Gibson, the attorney for the  
 defendant above named, the foregoing Bill of  
 Exceptions for use on appeal herein, consisting  
 of one volume of 107 pages numbered from 1 to  
 107. The same is hereby tendered to and served  
 upon counsel for the defendant as aforesaid that  
 he may examine the same and propose any  
 amendments thereto which he shall be advised  
 ought to be made in order that the said Bill of  
 Exceptions be settled and allowed as a full, true  
 and correct Bill of Exceptions.

HARLEY W. GUSTIN,  
*Attorney for Plaintiff.*

Service of the foregoing proposed Bill of Exceptions acknowledged this 22nd day of May, 1940.

MARL D. GIBSON,  
*Attorney for Defendant.*

### STIPULATION TO SETTLE BILL OF EXCEPTIONS

The undersigned, counsel for the defendant, Leopoldo Albergo, hereby stipulates and agrees that he has examined the foregoing Bill of Exceptions in the above entitled action; that he has no amendments to propose thereto and that the same may now be presented to the Court and signed, settled and allowed by the Judge who tried said cause, without notice and in his absence, as the full, true and correct Bill of Exceptions in said cause.

Dated this 24th day of May, 1940.

MARL D. GIBSON,  
*Attorney for Defendant,*  
*Leopoldo Albergo.*

### CERTIFICATE OF JUDGE SETTLING BILL OF EXCEPTIONS

I, George Christensen, the District Judge who tried the foregoing cause, do hereby certify that the above and foregoing Bill of Exceptions con-

sisting of 107 pages numbered from 1 to 107, inclusive, contains all of the testimony and evidence offered, admitted or adduced upon the trial of said cause together with all objections and exceptions taken and motions made and all proceedings had on the trial, before and after judgment, in said cause and not otherwise of record; and contains sufficient reference to all exhibits therein referred to to identify the same. There being no amendments thereto, said Bill of Exceptions is hereby approved, settled, signed and allowed within time as the full, true and correct Bill of Exceptions in the foregoing cause of Stella Felice Gigliotti, plaintiff, versus Leopoldo Albergo and Jane Doe Albergo, his wife, whose other and true name is unknown, defendants, and the clerk is hereby ordered to file the same.

Dated this 24th day of May, 1940.

GEORGE CHRISTENSEN,  
*District Judge.*

Bill of Exceptions filed May 24, 1940.

*(Title of Court and Cause):*

### ASSIGNMENTS OF ERROR

Comes now Stella Felice Gigliotti, the appellant above named, and assigns the following errors occurring in the trial of this cause before the Honorable George Christensen, one of the

judges of the District Court of the Seventh Judicial District, in and for Carbon County, State of Utah, and upon which she relies for a reversal of the judgment in this case.

1. That the court erred in overruling plaintiff's demurrer to the answer and counterclaim of defendant, Leopoldo Albergo. (Tr. p. 15; Abs. p. 17)

2. That the court erred in sustaining defendant's objection to the question propounded the plaintiff on direct examination:

“Q. Now, what is your opinion in that regard?” (Tr. pp. 49-23; 49-26; Abs. p. 44)

3. That the court erred in sustaining defendant's objection to the question propounded the defendant, Leopoldo Albergo, on cross examination:

“Q. Now, prior to the foreclosure suit that counsel has referred to, and which is indicated by Exhibit A, the file, did you ever see Mrs. Gigliotti — Stella Felice Gigliotti—on the premises and property that is involved in the present action?”

(Tr. pp. 49-93; Abs. p. 56)

4. That the court erred in sustaining defendant's objection to the question propounded the defendant, Leopoldo Albergo, on cross examination:

“Q. And Mrs. Gigliotti has been there ever since, ever since you have known her? Is that right?”

(Tr. pp. 49-96; Abs. p. 57)

5. That the court erred in its Finding of Fact No. 1 because the same is not supported by, but is contrary to, the evidence. (Tr. p. 25; Abs. p. 22)

6. That the court erred in its Finding of Fact No. 2 because the same is not supported by, but is contrary to, the evidence. (Tr. p. 26; Abs. p. 24)

7. That the court erred in its Finding of Fact No. 4 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 26; Abs. p. 24)

8. That the court erred in its Finding of Fact No. 6 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 27; Abs. p. 25)

9. That the court erred in its Finding of Fact No. 7 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 28; Abs. p. 26)

10. That the court erred in its Finding of Fact No. 8 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 28; Abs. p. 26)

11. That the court erred in its Finding of Fact No. 9 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 29; Abs. p. 27)

12. That the court erred in its Finding of Fact No. 10 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 29; Abs. p. 28)

13. That the court erred in its Finding of Fact No. 11 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 29; Abs. p. 28)

14. That the court erred in its Finding of Fact No. 12 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 29; Abs. p. 28)

15. That the court erred in its Finding of Fact No. 13 because the same is immaterial and irrelevant and because the same is not supported

by, but is contrary to, the evidence. (Tr. p. 30; Abs. p. 28)

16. That the court erred in its Finding of Fact No. 15 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 30; Abs. p. 29)

17. That the court erred in its Finding of Fact No. 15 and particularly that portion of said finding which reads as follows:

“which was with the consent of the said Stella Felice Gigliotti, \* \* \* with the knowledge and consent of the said Stella Felice Gigliotti,”

because the same is not supported by, but is contrary to, the evidence. (Tr. pp. 30-31; Abs. p. 29)

18. That the court erred in its Finding of Fact No. 16 because the same is not supported by, but is contrary to, the evidence. (Tr. p. 31; Abs. p. 30)

19. That the court erred in its Finding of Fact No. 16 and particularly that portion of said finding which reads as follows:

“that the Stella Felice Gigliotti, thereafter, and with her husband and in furtherance of his design and his parents design, to cheat and defraud the said Leopoldo Albergo, conferred with said attorney to defend said foreclosure action so commenced as above stated,”

because the same is not supported by, but is contrary to, the evidence. (Tr. p. 31; Abs. p. 30)

20. That the court erred in its Finding of Fact No. 17 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 31; Abs. p. 31)

21. That the court erred in its Finding of Fact No. 18 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 32; Abs. p. 31)

22. That the court erred in its Finding of Fact No. 18 and particularly that portion of said finding which reads as follows:

“with the full knowledge and consent of the said Stella Felice Gigliotti,”

because the same is not supported by, but is contrary to, the evidence. (Tr. p. 32; Abs. p. 31)

23. That the court erred in its Finding of Fact No. 19 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 32; Abs. p. 32)

24. That the court erred in its Finding of Fact No. 20 because the same is immaterial and irrelevant and because the same is not supported

by, but is contrary to, the evidence. (Tr. p. 32; Abs. p. 32)

25. That the court erred in its Finding of Fact No. 21 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 33; Abs. p. 33)

26. That the court erred in its Finding of Fact No. 24 because the same is immaterial and irrelevant and because the same is not supported by, but is contrary to, the evidence. (Tr. p. 33; Abs. p. 33)

27. That the court erred in its Finding of Fact No. 25 because the same is not supported by, but is contrary to, the evidence. (Tr. p. 34; Abs. p. 34)

28. That the court erred in its Finding of Fact No. 25 and particularly that portion of said finding which reads as follows:

“That the said Stella Felice Gigliotti, knew at all times during the pendency of Case No. 4553 and thereafter, that the said Rosario Gigliotti claimed to be the owner of said real property under and by virtue of a new title initiated from Carbon County and not under said ‘Release and Contract of Sale’; that she, at no time from the time of the commencement of said Case No. 4553 until after the Supreme Court of the State of Utah had decided against her

husband, made any claim of any kind or nature in and to said real property or any part thereof but on the contrary assisted her said husband in his attempt to cheat and defraud the said Leopoldo Albergo as above described;"

because the same is not supported by, but is contrary to, the evidence. (Tr. p. 34; Abs. p. 34)

29. That the court erred in its Finding of Fact No. 26 because the same is not supported by, but is contrary to, the evidence. (Tr. p. 34; Abs. p. 35)

30. That the court erred in its first conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 35; Abs. p. 35)

31. That the court erred in its second conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 35; Abs. p. 36)

32. That the court erred in its third conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 35; Abs. p. 36)

33. That the court erred in its fourth conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs. p. 37)

34. That the court erred in its fifth conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs. p. 37)

35. That the court erred in its sixth conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs. p. 37)

36. That the court erred in its seventh conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs. p. 37)

37. That the court erred in making and entering its judgment and decree (Tr. pp. 37-39; Abs. pp. 37-40) because said judgment and decree is contrary to the law and because the evidence is insufficient to sustain or justify the same in the following particulars, to-wit:

(a) That the evidence conclusively and without contradiction shows that the plaintiff was in possession under claim of title (defendant's Exhibit 1) in and to the real property herein involved on and for some time prior to the 18th day of July, 1936, on which date the defendant brought an action to foreclose a purported mortgage against said property, the action being known as Case No. 4553 in the District Court of the Seventh Judicial District, in and for Carbon County, State of Utah, and that defendant had

actual or constructive notice of the claims, rights and demands of plaintiff and failed, neglected and omitted to make her a party to said foreclosure suit or to otherwise determine or fix any equity of redemption that she might have had in the premises.

(b) That the evidence conclusively and without contradiction shows that any lien, claim, right or pretention that defendant might have or might have had by reason of any alleged mortgage against the property herein involved as against the plaintiff is barred by the provisions of subdivision 2 of Section 104-2-22, Revised Statutes of Utah, 1933.

(c) That the evidence conclusively and without contradiction shows that any lien, claim, right or pretention that defendant might have or might have had by reason of any alleged mortgage against the property herein involved as against the plaintiff is barred by the provisions of subdivision 2 of Section 104-2-23, Revised Statutes of Utah, 1933.

(d) That the evidence conclusively and without contradiction shows that the plaintiff has a homestead interest in the real property herein involved in an amount of not less than \$3,350.00.

(e) That the evidence conclusively and without contradiction shows that the plaintiff has

34. That the court erred in its fifth conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs. p. 37)

35. That the court erred in its sixth conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs. p. 37)

36. That the court erred in its seventh conclusion of law because said conclusion was contrary to the facts and to the law. (Tr. p. 36; Abs p. 37)

37. That the court erred in making and entering its judgment and decree (Tr. pp. 37-39; Abs. pp. 37-40) because said judgment and decree is contrary to the law and because the evidence is insufficient to sustain or justify the same in the following particulars, to-wit:

(a) That the evidence conclusively and without contradiction shows that the plaintiff was in possession under claim of title (defendant's Exhibit 1) in and to the real property herein involved on and for some time prior to the 18th day of July, 1936, on which date the defendant brought an action to foreclose a purported mortgage against said property, the action being known as Case No. 4553 in the District Court of the Seventh Judicial District, in and for Carbon County, State of Utah, and that defendant had

actual or constructive notice of the claims, rights and demands of plaintiff and failed, neglected and omitted to make her a party to said foreclosure suit or to otherwise determine or fix any equity of redemption that she might have had in the premises.

(b) That the evidence conclusively and without contradiction shows that any lien, claim, right or pretention that defendant might have or might have had by reason of any alleged mortgage against the property herein involved as against the plaintiff is barred by the provisions of subdivision 2 of Section 104-2-22, Revised Statutes of Utah, 1933.

(c) That the evidence conclusively and without contradiction shows that any lien, claim, right or pretention that defendant might have or might have had by reason of any alleged mortgage against the property herein involved as against the plaintiff is barred by the provisions of subdivision 2 of Section 104-2-23, Revised Statutes of Utah, 1933.

(d) That the evidence conclusively and without contradiction shows that the plaintiff has a homestead interest in the real property herein involved in an amount of not less than \$3,350.00.

(e) That the evidence conclusively and without contradiction shows that the plaintiff has

an inchoate interest in the real property herein involved in an amount of not less than one-third of the value thereof.

(f) That the evidence conclusively and without contradiction shows that the plaintiff has the whole interest in the real property herein involved by reason of a deed (defendant's Exhibit 1) and her possessory right pursuant thereto at the time of the foreclosure action known as Case No. 4553 and mentioned above.

(g) That the trial court has failed to find or conclude upon all of the material issues in said cause and particularly those issues pertaining to the statute of limitations, the effect of the deed (defendant's Exhibit 1), plaintiff's possessory rights at the time of the foreclosure action, her omission as a party defendant in said foreclosure action, her inchoate rights as the wife of Rosario, also known as Ross, Gigliotti, and her rights to claim a homestead exemption and the value or amount thereof.

(h) That the evidence conclusively and without contradiction shows that the plaintiff has some right, title or interest in and to the real property herein involved and which interest the court failed to fix or define.

(i) That the evidence conclusively and without contradiction shows that the plaintiff is

not estopped from claiming an interest in the property nor that any fraud, deceit, or collusion was practiced by her upon the defendant and that all of the claims, pretensions and demands of the plaintiff were known to the defendant at all times since and for some time prior to the commencement of his foreclosure action or upon due inquiry could have been ascertained.

WHEREFORE, appellant prays that the foregoing may be considered by this Court as her Assignments of Error and that the judgment appealed from be reversed and remanded, or that a judgment be entered according to law and equity and the views of this Court.

HARLEY W. GUSTIN,  
*Attorney for Plaintiff  
and Appellant.*

Duly Served September 10, 1940.