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Stella Pelice Gigliotti v. Leopoldo Albergo : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

STELLA FELICE GIGLIOTTI,
Plaintiff and Appellant,

VS.

LEOPOLDO ALBERGO,
Defendant and Respondent.

APPELLANT'S BRIEF

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

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In the Supreme Court of the State of Utah

STELLA FELICE GIGLIOTTI,

Plaintiff and Appellant,

vs.

LEOPOLDO ALBERGO,

Defendant and Respondent.

Case No. 6295

APPELLANT'S BRIEF

This action should be considered, at least in part, with the case of *Albergo vs. Gigliotti, et al.*, decided by this Court on December 12, 1938, Utah, 85 P. (2d) 107. This case was one involving the foreclosure of a purported mortgage on the property in favor of Albergo and in which foreclosure proceeding, he neglected to make Stella Felice Gigliotti, the present appellant, one of the parties defendant. It is claimed that appellant was in possession of the real property at the time of the foreclosure suit and the wife of Ross Gigliotti, who was made a party to the Albergo suit. It is also claimed that appellant was the owner of the property by reason of the unrecorded deed. In the main, this Court is called upon to determine the rights of a wife of a party defendant to a foreclosure suit omitted there-

from as a party defendant and regardless of her deed, had an inchoate interest in the property sought to be foreclosed.

STATEMENT OF CASE.

It might be convenient to briefly review the undisputed facts as shown from the testimony adduced and from the various exhibits in the case. We summarize the salient points as follows:

1. On August 22, 1927 Felice W. and Maria Gigliotti (not the plaintiff), husband and wife, mortgaged the property to the respondent, Albergo. The mortgage was filed for record and recorded in the office of the County Recorder of Carbon County on August 28, 1927. (Exhibit "A").

Note: Exhibit "A" referred to throughout this brief consists of the file involving the foreclosure action entitled in this court as Case No. 4553, wherein Leopoldo Albergo, the present defendant, was plaintiff and Felice W. Gigliotti and Maria Gigliotti, husband and wife, and Rosario Gigliotti, Ross Gigliotti, Shell Oil Company, a corporation, and W. H. Bintz Company, a corporation, were defendants and in which case a decree of foreclosure was entered in favor of Albergo and against the named defendants and which decree was affirmed with some modification by this Court on December 12, 1938 (*Albergo v. Gigliotti, et al.*, 85 Pac. (2d) 107). This decision holds that Rosario or Ross Gigliotti, one and the

same person, had an interest in the property by reason of an existing contract of purchase thereto and which interest and contract prevented him from setting up adversely to the interest of the mortgagee a tax deed acquired from Carbon County.

2. On August 31, 1931, Felice W. Gigliotti and Maria Gigliotti, husband and wife, as vendors entered into a contract of sale with Rosario or Ross Gigliotti as purchaser whereby the vendors agreed to sell and the purchaser agreed to buy for the consideration therein named the property involved in this controversy and which contract was recorded in the year 1931 in the office of the County Recorder of Carbon County in Book 30, page 270. (Exhibit "A")

3. The appellant in this action, Stella Felice Gigliotti, was married to the Rosario or Ross Gigliotti mentioned above on June 1, 1929 at Davis County, State of Utah (Exhibit "B") and immediately thereafter moved into the property in question where she lived with her husband continuously up to the present time. (Tr. pp. 26-27; Abs. p. 27)

4. The mortgage foreclosure action was commenced on July 18, 1936. A lis pendens was recorded in the office of the County Recorder on the same day. (Exhibit "A")

5. The appellant in the present action, the wife of Rosario or Ross Gigliotti, since June 1, 1929 has been

residing on the property and was not made a party defendant to the foreclosure suit. (Exhibit "A")

6. On July 17, 1936, the day before the commencement of the foreclosure suit, there was made, executed and delivered to the appellant a quit claim deed to the property from Felice W. Gigliotti, Maria Gigliotti and Rosario or Ross Gigliotti as grantors. (Defendant's Exhibit 1, p. 53)

7. The note secured by the mortgage subsequently foreclosed and given by appellant's father-in-law and mother-in-law, Felice W. and Maria Gigliotti, to the respondent, Albergo, was dated August 22, 1927, and due five years after the date or August 22, 1932. (Exhibit "A")

8. The present action was commenced by the filing of a complaint on the 1st day of September, 1939 or more than six years after the note secured by the mortgage in favor of Albergo became due and more than six years after the last payment of either principal or interest thereon. As against the appellant the note and mortgage is barred by the statute of limitations.

9. The respondent, Albergo, has known the appellant, Stella Felice Gigliotti, "since about the time she has been married" to Rosario or Ross Gigliotti. (Tr. pp. 49-95; Abs. p. 64)

Note: As stated above, the evidence shows that the appellant was married to Ross Gigliotti on June 1, 1929 and immediately thereafter moved into possession of the

property involved with her husband where she has remained ever since.

10. The appellant is the mother of two minor children and the "head of the family" as contemplated by the homestead law of this state.

This action is one to quiet title and the complaint (Tr. p. 1; Abs. pp. 1-4) is in the ordinary form for such action and in the main prays that appellant's interest in the property be determined by a decree of Court. By answer and counterclaim (Tr. p. 4; Abs. pp. 4-10) the respondent sets up that he is the owner of the property by reason of the foreclosure proceedings above referred to and the subsequent sale of the property to him by reason thereof and by reason of the fact that the plaintiff, while not made a party to the foreclosure suit, allegedly sat idly by from the time of the commencement of that action until the filing of the present suit without asserting her rights and by reason thereof is estopped from claiming any interest in the property. By way of reply (Tr. p. 20; Abs. pp. 21-25) appellant pleaded the fact that she was not made a party to the foreclosure suit; that she had an interest in the property as the wife of Ross Gigliotti; that she claimed a homestead exemption and that Albergo's present claim, if any, by reason of the note and mortgage in his favor was barred by the statute of limitations.

STATEMENT OF ERRORS RELIED UPON.

1. The first assignment of error challenges the sufficiency of respondent's answer and counterclaim as a proper pleading. The gist of appellant's action is that her equity of redemption was not cut off by the foreclosure suit and the answer and counterclaim of the respondent admits that appellant was not made a party defendant to the foreclosure suit and does not affirmatively state any fact that would estop her from now asserting her right or interest to the property involved.

2. Assignments of errors 5 to 16, both inclusive, and assignments 18, 20, 21, inclusive, and assignments 23 to 27, both inclusive all pertain to the theory or subject matter as stated above in paragraph 1. Assignments 2, 3, and 4 are directed to the propriety of rulings of the Court on the introduction of evidence and particularly to the Court's exclusion of testimony which might have developed the fact that Albergo in fact knew that appellant was in possession of the real property and was the wife of Ross Gigliotti before the commencement of his foreclosure proceedings.

3. Assignments 17, 19, 22 and 28 are all directed to specific portions of the Findings of Fact that are claimed not to be supported by, but are contrary to the evidence, and without such findings Albergo would not be entitled to prevail either on his answer or counterclaim.

4. Assignment of error 37, in addition to what has been heretofore stated, points out that appellant is

not only the record owner of the property involved, but that she has an interest therein by reason of her marital status and her claim of homestead exemption; that she did not practice any fraud or deceit or collusion; and that any claim that respondent might have by way of his alleged mortgage is barred by the statute of limitations. Furthermore, and by assignment of error 37, it is pointed out that the Court failed to determine or otherwise fix or define the equity or right of redemption that appellant might have in the real property involved herein.

QUESTIONS INVOLVED.

1. It being conceded that a married man has an interest in real property inferior to the rights of a mortgagee, what effect does a foreclosure have upon the rights of the wife in possession of the property at the time of the foreclosure?
2. Does a wife have the right to assert and have determined in her behalf a homestead exemption without her interest in real property having been previously terminated by contract or foreclosure?
3. Is not Albergo, the respondent, bound by the evidence produced by him on cross examination of appellant to the effect that prior to the foreclosure suit she was occupying the property under claim of title?
4. In an action to quiet title, should not all interests be determined, even though such interests might be less than that of a fee simple title holder?

5. Whether or not the appellant is estopped as claimed by the respondent from asserting any interest in the property in question.

6. Whether or not the appellant has any interest in the property, assuming that she is not estopped to assert the same.

7. Whether or not, assuming the appellant to have an interest in the property, she was a necessary party to the foreclosure suit.

ARGUMENT.

The ultimate question to be determined in the case at bar is the interest, if any, of the appellant in and to the real property described in her complaint on file herein. The complaint is in the ordinary form pertaining to actions to quiet title to real property as contemplated by Title 104, Chapter 57, Revised Statutes of Utah, 1933. This chapter enlarges the ancient jurisdiction of courts of equity with respect to suits to quiet title and to determine adverse claims. The first section reads:

“An action may be brought by *any person* against another who claims an estate or interest in real property adverse to *him for the purpose of determining such adverse claim.*” (Italics ours)

Any interest in property and even possession alone is sufficient to maintain the action. See *Wey v. Salt Lake City*, 35 Utah 504, 101 Pac. 381; *Columbia Trust Co.*

v. Nielson, 76 Utah 129, 287 Pac. 926; and *Robins v. Roberts*, 80 Utah 409, 15 Pac. (2d) 340.

The respondent in this action was the purchaser at a sheriff sale on foreclosure of a real estate mortgage of the property involved. It makes no difference in this action that the purchaser was the original mortgagee in the foreclosure proceedings, those proceedings having been introduced in evidence as appellant's Exhibit "A", and in which action the appellant was omitted as a party defendant. It is a fundamental principle of law and one that does not need citation of authorities to the effect that a purchaser at a sheriff's sale on foreclosure is not an innocent purchaser for value, but takes title subject to all apparent rights of parties in possession and the rights of others not made parties to the foreclosure suit who have of record an equity of redemption. In using the term "of record," we mean actual notice of a claimant subsequent to the original mortgagor and also constructive notice of a claim such as is imparted under our law by recording or actual possession under claim of title, either subsequent or prior to the execution of the mortgage.

The general rule with respect to the lack of necessity of intervention is stated in 19 R. C. L. 557, Section 363, in the following language:

"And a wife is not estopped by her mere silence from afterwards asserting her rights, where land in fact belonging to her, but supposed to belong to her husband, is sold under decree

of foreclosure, the wife not having been served in the suit; nor is she to be regarded as having ratified the proceedings by the acceptance of a part of the purchase money of the sale, but in such case must be taken to have acted as the agent of and subject to the control of her husband."

The case cited by the text is that of *Fahie v. Pressey*, 2 Ore. 23, 80 Am. Dec. 401. In this case the holder of the mortgage obtained his decree of foreclosure against the husband only and then after the sale discovered that the title to the property was in the name of the wife, who thereafter set up a claim to the property. The complainant bought the premises at the sale and then filed a bill in equity to foreclose the wife's interest in the property alleging that her interest was merely nominal; that she had full knowledge of all the proceedings and the fact that the property was advertised as that of her husband; that she suffered it to be sold as such and with full knowledge that the property had been so sold received a part of the proceeds of the sale and ratified the same. In this case the complainant, Fahie, was in the same position that the defendant, Albergo, is in in the case at bar. The complainant took the position that equity should relieve him of the consequences of his mistake in not making the wife a party to the foreclosure suit. To this argument the court said:

"A large proportion of the misfortunes of life are not so much attributable to the superior sagacity or overreaching unscrupulousness of one class as to the blind folly and negligence of another. Litigation would never end were courts to

undertake to restore the equilibrium of right between all such parties. To entitle a party to relief in such cases, the facts must not only be material, but must be such that he could not with reasonable diligence have obtained knowledge of them. Where there is neither accident nor mistake, fraud nor misrepresentation, equity affords no relief to a party on the ground that he has lost his remedy at law through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry: Willard's Eq. Jur. 70."

As to the contention that Mrs. Pressey was estopped, the court cited the Tenn. case of *Crenshaw v. Anthony*, Mart. & Y. 110, and the case of *Bank of United States v. Lee*, 13 Pet. 107, and the court said:

"In both of these cases, the obligation of the wife to disclose her interest in the property being dealt with by the husband as his own, came directly under review and in both her silence was approved on the express ground of her marital relation; and that she had done no affirmative act to mislead or draw in a creditor to trust her husband. But it is said that Penna Pressey, having notice of all these proceedings, by receiving a part of the proceeds of the sale, ratified it, and it would be a fraud on her part now to gainsay it. It might be answered to this—if it were in connection with other than a legal proceeding—that she must be presumed to have acted as the agent of and subject to the control of her husband. We are of the opinion that she, having no legal notice, had no notice at all, and as to any interest, nominal or real, of hers, the proceedings of the court and the sale under the decree were a nullity. There is no attempt to show that, at the time the deed was made to the wife, the

husband was in debt, and the deed in fraud of creditors; and if he were not, he might well procure a conveyance to her for her separate use, and the law will uphold it until fraud is shown."

As to the necessity of joining the wife in the foreclosure action, the court stated:

"The most important and decisive question remains to be considered. The bill expressly states that, after the sale, the title to the premises sold was found to be in the name of Penna Pressey, who was made a party to the original suit. Was she rightfully joined? If so, then service upon her was a necessity to confer any power on the court to deal with her interest in the controversy. If she were not a necessary party to the suit, and had no interest to bind, although more a party to the bill, the service might be omitted. But it is stated that the legal title was in his wife; nor does it change the result to say that her interest is merely nominal. She being the legal owner of the estate, which by law she might be, the legal title could be divested out of her only in two ways: by her own act and by act of law; that is, the proceeding of a court having competent jurisdiction of the subject of the suit. She, being the legal owner of the property, before any proceeding could affect her interests, nominal or real, must have been made a party to the bill, have been duly served with process, and thus given the opportunity, by legal forms, of showing her rights, whatever they were. Not having been served in the foreclosure suit, the proceedings as to her were a nullity."

In the case at bar Mrs. Gigliotti did nothing affirmatively that would constitute an estoppel on her part. The most that can be said is that knowing of the foreclosure

proceeding she remained silent as to her interest in the property. The Pressey case and the case of *Bank of United States v. Lee*, cited by the Pressey case, states the general rule to the effect that although the wife is silent, her mere silence does not estop her from later disclosing her interest in the property.

17 Am. Jur., Section 80 on the subject of dower does not support the theory that the appellant is estopped at this time to claim any interest in the property. The text clearly states the general law to the effect that no estoppel may be predicted on the mere silence of a widow or a wife.

There is nothing in the record to indicate that Mrs. Gigliotti attempted to deceive or defraud the respondent in any particular. The respondent knew of the marital status between Ross Gigliotti and the appellant in this action. He also knew that the appellant was residing on the property at the time of his foreclosure suit. Mere possession under the circumstances would put the respondent on notice of any claims that Mrs. Gigliotti had in or to the property. He made no inquiry as to her rights in the premises and yet he had constructive notice of them. It would be anomalous indeed if under the circumstances the rule of estoppel would apply. That such a rule does not apply is clearly shown by the authorities indicated above.

The appellant has three separate claims to the property:

First: The appellant is the head of a family, contemplated by Title 28, Revised Statutes of Utah, 1933, dealing with homesteads. Her reply in the case indicates the claim of homestead upon her part and which claim can be raised at any time. The claim of homestead goes to the right, title and interest of the husband, Ross Gigliotti, in the contract of sale entered into with his parents as sellers and himself as purchaser on the 31st day of August, 1931 and which contract was recorded the same year and long prior to the foreclosure proceeding. The Supreme Court in the case of *Albergo v. Gigliotti, et al.*, supra, held that this contract was a valid and subsisting contract between the parties, with an over-abundance of vitality—so much so that Ross Gigliotti was precluded from claiming the property by reason of a tax deed, which the court will recall was one of the issues raised in the foreclosure suit.

Second: The appellant has an inchoate statutory interest in the property and in the equity represented by the contract of sale above mentioned.

Third: The appellant is the fee simple owner of the property by reason of the quit claim deed executed on the 17th day of July, 1937 from her mother-in-law, father-in-law and husband. This deed was introduced in evidence in the trial of this case by the defendant on cross examination of the plaintiff and its authenticity was never attacked or questioned.

On the last two propositions the following authorities are, we believe, in point:

Wiltsie on Mortgage Foreclosure, Third Edition, Vol. 1. Quoting Section 155, p. 228:

“It has become a settled rule of law in all states where the common-law doctrine of dower remains unchanged, and in many states where statutes have prescribed a wife’s rights in the real estate of her husband, that the inchoate *right of dower of a wife in the lands of her husband is a real and existing interest*, and as much entitled to protection as the vested rights of a widow; *and that neither can be impaired by any judicial proceeding to which the wife or widow is not made a party*. As such rights constitute an interest in real estate, it is plain that a wife or widow must be made a party to a foreclosure suit where she has signed the mortgage, released her rights otherwise, *or acquired those rights subsequent to the execution of the mortgage*. *The right of a wife to be endowed of an equity of redemption has long been put at rest. She is an absolutely necessary party to an action in order to produce such a title as a purchaser at the sale will be compelled to accept.* * * * In those states where the statutes provide for homesteads for the heads of families the wife of the mortgagor of land occupied and claimed by him as a homestead is a necessary party to the foreclosure of the mortgage and to an action of ejectment by the purchaser at the sale thereunder, although the mortgage is given for purchase money. And in those cases where a married man has filed a declaration of homestead on his mortgaged premises, his wife is a necessary party defendant in foreclosure; and if she is not made a party, the purchaser at the foreclosure sale is not entitled to a writ of assistance against her husband.” (Italics ours).

Sloane v. Lucas, et al., 79 Pac. 949, (Wash.)

“Subsequently to the execution of the mortgage, and prior to the bringing of the foreclosure suit, the mortgagors conveyed the mortgaged land to James F. Sloane, who, by the terms of the conveyance, assumed the payment of the mortgage. The said James F. Sloane was at the time the husband of Ida H. Sloane, and the two were husband and wife when the foreclosure suit was brought. Ida H. Sloane was not made a party defendant in the foreclosure suit. Decree of foreclosure was rendered, and the land was sold thereunder to one Henry C. Townsend, who was then the holder of the mortgage. * * *

“The said foreclosure sale was void, within the rule declared by former decisions of this court, for failure to make party defendant the wife who was a member of the community holding the legal title to the land.”

Northwestern Trust Co. v. Ryan,
132 N. W. 202, (Minn.)—Quoting from
p. 203:

“The first contention of the plaintiff is without merit. It is the established law of this state that a wife may redeem the lands of her husband from a foreclosure sale. Such redemption is permitted for the protection of her right, inchoate though it may be, in the land. A redemption by her in effect annuls the sale, leaving the property in the same condition as if the mortgage never had been made. On principle this rule is not affected by the fact that the husband acquires the fee of land subject to a purchase-money mortgage. In such case the wife has her inchoate dower right in the land. Such right may be lost by foreclosure of the mortgage. If a foreclosure sale is made, she may preserve her right by redeeming from the sale.

“The wife not having been made a party to the suit, her equity of redemption is not limited or determined by the decree.”

Kursheedt, et al., v. Union Dime Savings Inst., 23 N. E. 473, (New York)—Quoting from p. 474:

“The grantee, Sandford, in the conveyance made by Clark, was served, and so far as he was concerned the failure to serve Clark had no importance, and its only consequence has relation to Mrs. Sandford, and the effect of the foreclosure action, the decree, and its execution, if executed, upon her alleged inchoate right of dower in the premises. Assuming, as we may for the purposes of this review, that such right existed when the foreclosure action was commenced, it was the subject of her protection by means of defense or any other adequate remedy until lawfully barred. *

* * The right of dower is not derived from the husband. It is a right at common law, and arises by reason of the marriage and by operation of law. It is a right which attaches on the land when the seisin and the marriage relation are concurrent, and such is the effect of the statute. * * *

When it was essential, under an early statute of this state, to determine the relation of the wife to the grant made of land to her husband, it was held that the wife's inchoate right of dower vested at the moment of the grant to the husband; and that she took such right constructively as purchaser from the grantor. * * * And, inasmuch as Mrs. Sandford did not derive her inchoate right of dower from her husband, the fact that he was a party defendant to the foreclosure action did not operate to bar or defeat her right of redemption.”

42 C. J., Section 1574, p. 53:

“The wife of the grantee of an equity of redemption in lands subject to a mortgage is a necessary party to an action against the grantee for foreclosure of the mortgage, but the judgment is not void for the failure to make her a party.”

Carlquist v. Coltharp,

248 Pac. 481, (Utah). Quoting at page 485:

“Louise Jensen, being the owner of the legal title, was entitled by reason of her interest in the premises to redeem from the foreclosure sale at least that part of the premises to which she held title. Her right to redeem would not expire until she had had her day in court or until some judgment or decree had been entered terminating such right, or at least fixing a time when her right to redeem would terminate, and that, as we understand the court’s order, is its legal effect. * * *

“Louise Jensen by reason of the conveyance to her, had the right to redeem from the foreclosure sale. Her right of redemption was equal in time to the right of any other person entitled to redeem, namely six months from the date of the foreclosure sale, if she was a party to the proceedings then pending and had been served with process. The duration of her right, or the time in which she is entitled to redeem, could not be curtailed or shortened by any order the court might at a subsequent date make.”

On the question of the statute of limitations, the Utah case of *Boucofski v. Jacobson*, 36 Utah 165, 104 Pac. 117, is conclusive on the point that one claiming title to or an interest in or a lien on realty may invoke the statute of limitations as against a prior claimant

when the latter's claim has been barred by the statute of limitations.

Quoting from 42 *C. J., Mortgages, Section 1567*, p. 50:

“If the mortgagor, after the execution of the mortgage, makes a conveyance of the mortgaged property, and the conveyance is not recorded before foreclosure proceedings are commenced, and the mortgagee is not notified of the grantee's interest, by his being in possession or otherwise, such grantee need not be made a defendant, and a judgment against the mortgagor is conclusive against him.”

Under the authorities above mentioned the appellant was a necessary party to the foreclosure suit and not having been made a party defendant her right of redemption has never been terminated and as to her the foreclosure proceedings are void. It is earnestly contended that this court should and must determine the equities, rights and interests of the appellant in and to the property described in the complaint as against the respondent, the purchaser at the foreclosure sale, a sale had in proceedings in which the appellant was not made a party. It is contended that appellant is now entitled, by reason of the quit claim deed introduced in evidence by the respondent himself on cross examination, and by reason of the expiration of the statute of limitations as well as her inchoate and homestead rights to the decree prayed for.

By reason of the unusual turn of events at the trial of this cause an extensive brief on some of the matters

originally relied upon by way of reply are unnecessary. It will be remembered that the respondent introduced a deed in evidence dated prior to the commencement of the foreclosure suit. This deed was from the two elderly Gigliotties and Ross Gigliotti to the appellant and involved the property in question.

Having introduced the deed in evidence the respondent made no attempt to attack its authenticity and, therefore, we have a situation where the appellant is, by the respondent's own evidence, a purchaser of the property for value before notice of the pendency of any action and is in a position to invoke the statute of limitations, there being no privity of contract between she and her grantors.

That a wife can raise the statute of limitations upon a note which even she has signed with her husband and where it is not shown that her husband was acting as her agent in making payments is clearly held in the case of *Halloway v. Wetzel*, 86 Utah 387, 45 Pac. (2d) 565.

So far as the homestead laws are concerned, the matter is purely statutory coming under Title 38 of our Revised Codes of Utah, 1933. It would be a matter of supererogation to quote these various statutes, but the cases of *Panagopoulos v. Manning*, 93 Utah 198, 69 Pac. (2d) 614; *Utah Builders Supply Company v. Gardner*, 86 Utah 257, 42 Pac. (2d) 989, and *Williams v. Peterson*, 86 Utah 526, 46 Pac. (2d) 674, all indicate the broad effect given our statute by the Supreme Court. The weakness of respondent's position is very clearly shown in

his effort to discredit the marriage between the appellant and her husband and in the fact that the evidence is undisputed that he, the respondent, knew that the appellant was residing on the property at the time of his foreclosure suit and holding herself out as the wife of Ross Gigliotti and yet he failed to make her a party to the same.

The problems involved are very clear and simple. We submit that appellant should have judgment as prayed for in her complaint and in her reply, bearing in mind the amendment to the reply permitted by the Court which amendment pertained to the deed produced and introduced in evidence by the respondent himself.

Respectfully submitted,

HARLEY W. GUSTIN,

*Attorney for Plaintiff
and Appellant.*