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Stella Pelice Gigliotti v. Leopoldo Albergo : Brief of Respondent

Utah Supreme Court

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CASE NO. 6295

In the Supreme Court of The State of Utah

STELLA FELICE GIGLIOTTI,
Plaintiff and Appellant,
vs.
LEOPOLDO ALBERGO,
Defendant and Respondent.

Appeal from the District Court of the Seventh
Judicial District, in and for Carbon County,
State of Utah.

HONORABLE GEORGE CHRISTENSEN, Judge.

Respondent's Brief

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Attorney for Respondent.

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Respondent's Brief

STATEMENT OF CASE

This action was brought by the appellant to quiet title to certain real property in Carbon County. It is important at the outset to note the allegation in plaintiff's complaint as to the title she claimed at the time of bringing the action and to bear said claim in mind throughout the arguments. Said allegation of her claim is as follows:

"2. That the plaintiff is now the holder and owner in fee simple and in possession and entitled to the possession of that certain piece or parcel of real property lying" etc.

This was the allegation that the defendant, respondent herein, was required to defend against.

Appellant states in part on page 1 of her brief, as follows:

"In the main, this court is called upon to determine the rights of a wife of a party defendant to a foreclosure suit omitted therefrom as a party defendant and regardless of her deed, had an inchoate interest in the property sought to be foreclosed."

This claim is apparently based on the theory that because she is and was the wife of Ross Gigliotti she has an inchoate interest in the property in the nature of or similar to a dower interest. This is right in the teeth of her complaint because certainly if she is "the owner in fee simple" of the property in question she has no such "inchoate interest" in the nature of or similar to a dower interest.

She then comes back in her reply and claims a homestead in the property in question. If the allegations of her complaint are true that she is "the owner in fee simple" and that her right is superior and prior to the right of the respondent then the claim of homestead is immaterial. If she makes the claim of homestead on the theory that her husband was the owner of the property and that she as his wife is entitled to claim a homestead exemption as the head

of the family she would not be entitled to prevail as the claim constitutes a variance from her complaint. In fact such testimony would disprove the allegations of her complaint that she is “the owner in fee simple” of the property in dispute and she would therefore lose.

Appellant also states on page 1 of her brief, as follows:

“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**”.

This last statement is in conflict with the plaintiff’s testimony which is in part as follows:

“I do not personally claim to be the owner of this property. I believe Ross is the owner. I am claiming as Ross’ wife.” (S. Ab. p. 2)

The plaintiff’s attorney likewise stated in open court that **“we are not claiming under any deed.”** (Tr. p. 38). The appellant did not include this statement in his abstract and through an oversight we did not include it in the supplemental abstract, but we believe that the court should consider it anyway, although the statement of appellant herself is conclusive.

A lis pendens was recorded by Albergo of the case of Albergo v. Gigliotti, et al, — Utah —, 85 P. (2d) 107, on July 18, 1936, in Book 3-R of Miscellaneous records, page 254, of the records of the county recorder of Carbon County, Utah.

On July 29, 1936, a quit-claim deed to the property in question was recorded wherein Maria Gigliotti and Felice W. Gigliotti were grantors and Rosario Gigliotti and Stella Felice Gigliotti, his wife, appellant herein, were grantees. This deed bears the date July 28, 1936.

After the case of *Albergo v. Gigliotti* supra had been appealed to the Supreme Court by the Gigliotti's and the decision had been adverse to them and on February 18, 1939, a quit-claim deed was recorded wherein Rosario Gigliotti, Felice W. Gigliotti and Maria Gigliotti were grantors and Stella Felice Gigliotti, appellant herein, was grantee. This deed bears the date July 17, 1936.

It is our contention that this deed is a fraud and that the idea was conceived only after the Gigliotti's discovered that the deed dated July 28, 1936, and recorded July 29, 1936, would of necessity, have been delivered after the recording of the *lis pendens* above described. If this deed had been in existence on July 28, 1936, or on July 17, 1936, the deed dated July 28, 1936, would never have been executed and delivered. The parties could not have forgotten the deed dated July 17, 1936, by July 28, 1936, if it had been executed and delivered and there would have been no object in the execution and delivery of the second deed if the first one had been in existence.

Quite a complete statement of the other facts in the case are contained in the Findings of Fact of the court beginning on page 25 of the Abstract of Record. They are lengthy and instead of again setting them forth here we refer the court to them there. It would be well if the court would read them at this point.

In the paragraph numbered 2 on page 3 of appellant's brief she states as follows:

"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")"

This statement is incorrect as said contract of sale describes only a portion of the property involved in this controversy.

A substantial part of the consideration for said contract of sale was that Ross Gigliotti, the buyer and the husband of appellant, assume, be liable for and pay for the Albergo mortgage. By doing so he became legally bound to pay the taxes levied and assessed against said property as shown by the first case. It held that the Gigliotti's, and Ross in particular, could not defeat Albergo's mortgage by allowing the property to be sold to the county and then by purchasing it at tax sale, because they, and Ross in particular, were under a duty to pay the taxes. The case does not hold what the appellant claims for it on pages 2 and 3 of her brief except the duty of Ross to have paid the taxes might be inferred from appellant's statement.

It seems appropriate at this point to set out some of the findings of the lower court as to the actions of the Gigliotti's and the part played by the appellant to cheat and

defraud Albergo of his mortgage indebtedness. A part of said findings are as follows:

“15. That the said Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, prior to the 11 day of July, 1936, and with the 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 knowledge 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.” (Abs. p. 33 & 34)

The “Release and Contract of Sale” mentioned is the same document as that described in the paragraph numbered 2 on page 3 of appellant’s brief.

“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, Harry 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." (Abs. p. 34)

"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." (Abs. p. 35)

"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 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." (Abs. p. 37 & 38)

"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. (Abs. p. 38 & 39)

"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." (Abs. p. 39)

The respondent herein contends in part as follows:

1. That appellant, or Ross Gigliotti, acquired no rights

superior to respondent's by the two quit-claim deeds above mentioned because both of said quit-claim deeds were recorded after the recording of the lis pendens in the foreclosure case. **Revised Statutes of Utah 1933, Sec. 104-55-3.**

2. That Albergo is not charged with notice of any alleged "fee simple title" in appellant by reason of the fact that she was living on the premises with her husband, Ross Gigliotti, Albergo having the right to assume that she was on the premises merely by reason of the martial relationship.

3. That appellant and her attorney are bound by their representations in open court to the effect that they "are not claiming under any deed" and that they cannot and could not thereafter, and after cross examination, change their theory of the case and make a claim under a deed.

4. That because of the fact that Felice W. Gigliotti, Maria Gigliotti and Rosario Gigliotti, prior to the 11th day of July, 1936, and with the 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 the appellant has no "inchoate interest" in said property and cannot impress it with a homestead claim because of said "Release and Contract of Sale."

5. It is the settled law of this state that a wife has no "inchoate interest" in lands held by her husband under an uncompleted executory contract of sale.

6. That appellant cannot prevail on the theory that she

is entitled to claim the property in question as a homestead under said "Release and Contract of Sale" because said "Release and Contract of Sale" describes only part of said property and because in her complaint she alleges that she is the owner of the fee simple title.

7. That appellant cannot prevail under the tax deed from Carbon County to her husband and his parents, because said deed was declared void as far as initiating any new title is concerned, amounting only to a payment of taxes, and the appellant claims a fee simple title, but she was not a grantee in said deed.

8. That appellant is estopped to claim a homestead in the property in question as alleged in her reply or to claim a fee simple title because she knowingly cooperated with and assisted her husband in his attempt to defraud Albergo of his mortgage lien, and knew as found by the lower court:

"18. That the said Rosario Gigliotti defended said foreclosure action and claimed to be the sole owner of said property because of said quitclaim 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." (Abs. p. 35)

9. That after so cooperating with and assisting her husband in his attempt to defraud Albergo and knowing

the representations he had made as to his title she sat idly by until after sheriff's sale without asserting her alleged title and is thereby estopped from making any claim to said property.

10. That as this is an equity case and the appellant is not in court with clean hands the court will not aid her in her claim.

11. That the court likewise will not aid her in perpetrating a fraud.

ARGUMENT

The appellant on page 8 of her brief states that "Any interest in property and even possession alone is sufficient to maintain" a quiet title action and cites three cases in support of said contention.

These cases do not hold what the plaintiff states that they do, as a reading of them will readily show. The matter, however, is not important as the plaintiff has alleged in her complaint that she is the owner of a fee simple title. She is bound by that.

We have read all of the authorities cited by appellant in her brief but none of them apply or are in point in the case at bar.

We do not have access to the case of *Fahie v. Pressey*, 2 Ore. 23, 80 Am. Dec. 401, cited on page 10 of appellant's brief but a reading of what appellant says concerning said case shows that it has no application here. So far as the

statement of facts show, the property was in the name of the wife and that fact must have been of record or there was something that advised the mortgagee of that fact. He foreclosed only against the husband. We note that she has quoted the following portion from said brief:

“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 with due diligence.”

There is no way that Albergo through due diligence could have ascertained that appellant herein was the holder of an unrecorded deed. The purpose of our recording statutes is to require persons who hold deeds to property to have them recorded or lose when intervening rights arise. There was no lack of diligence on Albergo's part in this case. We also claim as will be hereinafter argued that appellant in this case assisted her husband in misrepresenting the true state of facts in an attempt to perpetrate a fraud upon Albergo.

We have also read the case of **Bank of United States v. Lee**, 13 Pet. 107. This case has absolutely no application to the case at bar. The facts involved and the decision are as follows:

“R. B. L. in 1809, then residing in Virginia, for a valuable consideration, made a conveyance in trust for the benefit of his wife, of certain personal property and slaves, which deed was duly recorded

according to the provisions of the act of the Legislature of Virginia. The property thus conveyed, remained in the possession of the husband and wife while they resided in Virginia; and in 1814, R. B. L. removed to the District of Columbia, with his wife and family, and brought with him the slaves and property conveyed in trust for his wife. In 1817, R. B. L. borrowed a sum of money of the Bank of the United States, on his promissory note, indorsed by one of the trustees named in the deed of trust of 1809. At the time the loan was made, R. B. L. executed a deed of trust of eleven slaves, and among them were the slaves and the household furniture conveyed by the deed of 1809, to secure the bank for the amount of the loan. In 1827, R. B. L. died, entirely insolvent. During his residence in Washington, being in reduced circumstances, he sold some of the slaves, conveyed by the deed of 1809, for the support of his family; without objection by his wife or her trustees. In 1834, the debt to the bank being unpaid, a bill was filed against Mrs. E. L., the wife of R. B. L., and the trustees in order to compel the surrender of the remaining slaves and the household furniture, to the trustee for the bank, for the sale of the same, to satisfy the debt due to the bank. Held, that the deed of 1809, vesting the property in Mrs. L.'s trustees, was effectual, according to the laws of Virginia, to protect the title thereto, against the subsequent creditors, or purchasers from R. B. Lee; and that the removal of R. B. L. and his wife into the District of Columbia with the property conveyed to the trustees for the use of Mrs. L., did not affect or impair the validity of the deed of trust.

“A liberal construction should be given to the clause of the Virginia statute for the suppression of fraud. This is the well established rule in the construction of the statute of Elizabeth, which the first section of the Virginia statute substantially adopts.

“If A sells, or conveys his lands or slaves to B,

and then produces to another his previous paper title, and obtains credit on the goods or lands, by pledging them for money loaned, he is guilty of fraud; and if the true owner stands by, and does not make his title known, he will be bound to make good the contract, on the principle that he who holds his peace when he ought to have spoken, shall not be heard now that he should be silent. He is deemed, in equity, a party to the fraud."

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

There is no question involved in this case as to the knowledge of the mortgagee as to the title of the land. The purchaser had a deed and was, therefore, seised of the property, and of course, his wife should have been made a party defendant.

In the case at bar Ross Gigliotti, the husband of the appellant herein, did not have any deed which showed of record and of which Albergo had knowledge, and the appellant herself had no deed which appeared of record and of which the defendant Albergo had knowledge. Ross Gigliotti had been purchasing a part of the property in question under a contract of sale but he and the sellers, his parents, had abandoned and released one another from said contract, with the knowledge and consent of the appellant as will be more fully discussed hereinafter.

Northwestern Trust Co. v. Ryan, 132 N. W. 202, (Minn):

This case is likewise one in which the title was conveyed to the husband before the foreclosure proceedings were commenced. The mortgage made the husband a party defendant in the case but

failed to include the wife. It is obvious that this case has no application.

Kursheedt, et al., v. Union Dime Savings Inst., 23 N. E. 473, (New York):

The portion of the case quoted by the appellant states that the "right" of dower "attaches on the land when the seisin and the marriage relation are concurrent."

Ross Gigliotti never became seised of the property in question or any part of it prior to the recording of the lis pendens. Appellant is likewise foreclosed from making a claim of inchoate interest in the property because in her complaint she alleges she is the owner of a fee simple title, which is something entirely different from an inchoate interest in real property, the title of which is in her husband and not in herself.

Carlquist v. Coltharp, 248, P. 481, (Utah):

This case does not involve the rights of a married woman. In fact the court speaks of Louise Jensen as Miss Louise Jensen. She had been deeded part of the property in question and her deed had been properly recorded prior to the bringing of the foreclosure action. The case has absolutely no application to the case at bar in any particular.

Boucofski v. Jacobson, 36 U. 165, 104 P. 117,

and

Halloway v. Wetzel, 86 U. 387, 45 P. (2d) 565:

We are at a loss to see how appellant claims

these cases apply.

Appellant did not record any deed to her until February 18, 1939. If she had taken and kept possession of the property Albergo would have been required within the limitation period to bring an action against her for possession or be barred. The note and mortgage were not barred and no attempt is being made here to require her to pay them. Appellant has failed to point out in her brief which section of the statute of limitations applies and why it does so. We are certain that it has no application whatsoever.

On page 19 of appellant's brief she has quoted the following:

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.”

This is a correct statement of law as we understand it and it completely answers against the plaintiff any claim as to the validity of her unrecorded deed giving her a title superior to Albergo's. He was not notified as to her interest in the property and we will hereinafter discuss appellant's contention that the fact that she was on the property was sufficient to put him on notice.

We will now present our contentions concerning the case in order :

I.

THAT APPELLANT, OR ROSS GIGLIOTTI, ACQUIRED NO RIGHTS SUPERIOR TO RESPONDENT'S BY THE TWO QUIT-CLAIM DEEDS ABOVE MENTIONED BECAUSE BOTH OF SAID QUIT-CLAIM DEEDS WERE RECORDED AFTER THE RECORDING OF THE LIS PENDENS IN THE FORECLOSURE CASE.

Revised Statutes of Utah, 1933, Section 104-55-3, provides as follows:

“No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.”

At the time the lis pendens in the foreclosure action was recorded the property was shown in the name of Felice W. Gigliotti and Maria Gigliotti his wife. Said lis pendens was recorded on July 18, 1936. On July 29, 1936, a quit-claim deed dated July 28, 1936, was recorded wherein Felice W. Gigliotti and Maria Gigliotti quit-claimed the property in question to Ross Gigliotti and Stella Felice Gigliotti his wife, appellant herein. On February 18, 1939, a quit-claim deed was recorded wherein Rosario Gigliotti, Felice W. Gigliotti and Maria Gigliotti, quit-claimed the property in

question to Stella Felice Gigliotti. This deed is claimed to be dated July 17, 1936. These are the only deeds to appellant in this case and the only source of any "fee simple title" in her. Because of the statute above quoted she cannot prevail in this case under either of said deeds.

II.

THAT ALBERGO IS NOT CHARGED WITH NOTICE OF ANY ALLEGED "FEE SIMPLE TITLE" IN APPELLANT BY REASON OF THE FACT THAT SHE WAS LIVING ON THE PREMISES WITH HER HUSBAND, ROSS GIGLIOTTI, ALBERGO HAVING THE RIGHT TO ASSUME THAT SHE WAS ON THE PREMISES MERELY BY REASON OF THE MARTIAL RELATIONSHIP.

**Tiffany on Real Property — (2d) Edition, Vol. 2,
Section 571, at page 2233:**

"That the property is occupied by a married couple would not ordinarily put a purchaser from the husband on inquiry as to the adverse interest in the wife, he having the right to assume that she is on the premises merely by reason of the martial relationship."

Langley v. Pulliam, et al., 162 Ala. 142, 50 So. 365:

"Where a husband conveyed a lot to his wife by deed, which was not recorded, and there was no change of possession, even if the husband and wife, who lived together, afterwards lived on the lot conveyed, it would not afford notice of the wife's rights as against those claiming as bona fide purchasers through the husband.

"Where a husband conveyed a lot to his wife

and executed a mortgage on it, which was assigned before the deed was filed for record, and the lot was purchased at foreclosure after the recording of the deed the purchaser would have been exempt from the effect of notice to the mortgagee of the existence of the wife's title before the mortgage was executed if there had been proof of a consideration paid for the mortgage."

Storz v. Clarke, 221 N. W. 101, 117 Neb. 488:

"Joint occupancy of premises as family home did not impart notice of wife's claim of any interest other than homestead right."

III.

THAT APPELLANT AND HER ATTORNEY ARE BOUND BY THEIR REPRESENTATIONS IN OPEN COURT TO THE EFFECT THAT THEY "ARE NOT CLAIMING UNDER ANY DEED" AND THAT THEY CANNOT AND COULD NOT THEREAFTER, AND AFTER CROSS EXAMINATION, CHANGE THEIR THEORY OF THE CASE AND MAKE A CLAIM UNDER A DEED.

The appellant was the first witness that was called to testify in the case. She and her attorney had apparently changed their minds since the filing of the complaint as to what she should claim as her source of title. She stated in part, as follows:

"I do not personally claim to be the owner of this property. I believe Ross is the owner. I am claiming as Ross's wife." (S. Ab. p. 2)

The plaintiff's attorney stated in open court, as follows:

"We are not claiming under any deed." (Tr. p. 38).

So far as the record showed the only deed to Ross was the one from his parents to him and the appellant herein. She was a grantee in it with him. The deed, however, was recorded after the *lis pendens*, and, of course, would give her no rights. It appeared that the only claim that she could be making would be under the "Release and Contract of Sale" above described.

We cross examined her on the deed that she had caused to be recorded on February 18, 1939, wherein she was the grantee. This was done to show that at that time she was making no claim under said Release and Contract of Sale and as some proof of our contention that said Release and Contract of Sale had been abandoned by the parties to it, with appellant's knowledge and consent. If said deed was actually executed and delivered on July 17, 1936, the day before the foreclosure action was started, it shows conclusively as far as appellant is concerned that prior to the commencement of the foreclosure she was claiming a fee simple title herself and not any right under said Release and Contract of Sale, and bears out our contention that said Release and Contract of Sale had been completely abandoned by the parties to it with her knowledge and consent.

The deed was introduced to explain the conversation and to show that Mrs. Gigliotti was not making any claim under said Release and Contract of Sale.

After said quit-claim deed had been introduced and received into evidence, the appellant was permitted, over Albergo's objections, to amend her reply by addition of the following thereto:

“That on or about the 17 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.”

This was certainly improper after her statement that she was not claiming under any deed and the statement of her attorney that they were not claiming under any deed. We believe, however, that it constituted an abandonment of any homestead claim as set forth in her reply as the homestead matter was based on her rights because her husband was a purchaser under the “Release and Contract of Sale.” She could not and cannot claim under both as they are entirely inconsistent matters.

IV.

THAT BECAUSE OF THE FACT THAT FELICE W. GIGLIOTTI, MARIA GIGLIOTTI AND ROSS GIGLIOTTI, PRIOR TO THE 11TH DAY OF JULY, 1936, AND WITH THE 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, THE APPELLANT HAS NO “INCHOATE INTEREST” IN SAID PROPERTY, AND CANNOT IMPRESS IT WITH A HOMESTEAD CLAIM BECAUSE OF SAID “RELEASE AND CONTRACT OF SALE.”

Finding of Fact No. 18 of the Court is, as follows:

“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."

Ross Gigliotti at the trial of the first case in the beginning of the trial denied the existence of said Release and Contract of Sale and admitted it only after Albergo had proven it conclusively against him. Ross Gigliotti claimed that the deed from Carbon County initiated an entirely new source of title and for that reason the lien of the Albergo mortgage was defeated.

Ross Gigliotti had not performed the terms of said Release and Contract of Sale by paying off the Albergo mortgage as he agreed to do in said Release and Contract but in the attempt to defeat the lien of Albergo's mortgage the property was allowed to go to Carbon County for the purpose of "initiating a new title". And to strengthen the matter the parents of Ross Gigliotti gave him and his wife the quit-claim deed, which was recorded after the lis pendens. These matters alone show that the "Release and Contract of Sale" was abandoned by the parties in question and they all agreed to release one another from liability under it.

The claim that appellant makes that the quit-claim

deed to her alone by the other three Gigliotti's, was prior to the commencement of the foreclosure action, shows that said Release and Contract of Sale was abandoned with her knowledge and consent. She was not a party to said Release and Contract of Sale and it did not provide that title be conveyed to her. She was assisting her husband in attempting to defraud Albergo and took this deed as an added precaution. He was claiming under the deed from Carbon County, and with her knowledge and consent. The appellant and her husband, Ross Gigliotti, conferred with Mr. Gustin from the time the first action was started. Flora Tolman, witness for appellant, testified that she was employed as a secretary in Mr. Gustin's office and concerning the deed to Mrs. Gigliotti recorded on February 18, 1939, and as to Mrs. Gigliotti being in Mr. Gustin's office, as follows:

"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. I know she was in the office several times. The suit that I refer to is the foreclosure suit. She came to town with Mr. Gigliotti and she came in the office. (Abs. p. 60 and S. Abs. p. 3).

Mrs. Gigliotti herself testified in part as follows:

"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.” (Abs. p. 56)

“I delivered the deed to Mr. Gustin at his office. I don’t remember if it isn’t a fact that Ross Gigliotti delivered it to him.” (S. Abs. p. 2).

This testimony shows conclusively that Mrs. Gigliotti knew what was going on in the first case from the beginning; that she was conspiring with her husband to defeat the lien of Albergo’s mortgage, and that the abandoning of said Release and Contract of Sale and the releasing of all parties thereto from liability was done with her knowledge and consent.

A further fact that said Release and Contract of Sale had been abandoned and the parties thereto released is, that said Contract describes only a part of the property in question, and Ross Gigliotti in case No. 4553 was claiming all of the property under the quit-claim deeds from Carbon County and his parents, and the appellant herein is likewise claiming all of the property and not a part of it.

That a wife can consent that her husband abandon a contract under which she might have some rights is too elementary to require citation of authorities. All rights under the Release and Contract of Sale had gone out of existence and been terminated prior to the commencement of the foreclosure action if appellant’s contention is correct, that a quit-claim deed was made, executed and delivered to her, prior to the time of the commencement of the foreclosure suit. This fact alone precludes her from making a claim of homestead under said Release and Contract of Sale.

Anderson v. Cosman 72 N. W. 523:

“The vendee under a land contract occupied the land, with his family, as a homestead. Owing to his inability to make the required payments, he surrendered the contract to the vendor, who sold and conveyed the land to a third person, and the original vendee leased the premises from this grantee. Held, that by acquiescing in this arrangement, with full knowledge of the facts, the wife of the original vendee abandoned her homestead rights in the land.”

V.

IT IS THE SETTLED LAW OF THIS STATE THAT A WIFE HAS NO “INCHOATE INTEREST” IN LANDS HELD BY HER HUSBAND UNDER AN UNCOMPLETED EXECUTORY CONTRACT OF SALE.

66 A. L. R. 67: Annotation.

“In jurisdictions where the husband must be seized of the legal title, or of such a complete equitable title that it will be deemed an estate of inheritance, to entitle the wife to dower, it is generally held that a wife has no dower in lands held by the husband at the time of his death under an uncompleted executory contract of sale.”

See UTAH CASE in support of said statement. **McNeil v. McNeil 61 U. 141, 211 P. 988:**

VI.

THAT APPELLANT CANNOT PREVAIL ON THE THEORY THAT SHE IS ENTITLED TO CLAIM THE PROPERTY IN QUESTION AS A HOMESTEAD UNDER SAID “RELEASE AND CONTRACT OF SALE” BECAUSE SAID “RE-

LEASE AND CONTRACT OF SALE" DESCRIBES ONLY PART OF SAID PROPERTY AND BECAUSE IN HER COMPLAINT SHE ALLEGES THAT SHE IS THE OWNER OF THE FEE SIMPLE TITLE.

The description of the property included in said Release and Contract of Sale, is as follows:

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 Meridian, 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 said right-of-way to the North line of said Section 13, thence West to the place of beginning;

and it is only a portion of the property that is involved in this action. The said property involved in this action is described, as follows:

Commencing at a point 74 feet East of the Northeast corner of the Northwest quarter of the Northwest quarter Section 13 Township 13 South, Range 9 East of the 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 any wise 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 parcel of land.

VII.

THAT APPELLANT CANNOT PREVAIL UNDER THE TAX DEED FROM CARBON COUNTY TO HER HUSBAND AND HIS PARENTS BECAUSE SAID DEED WAS DECLARED VOID AS FAR AS INITIATING ANY NEW TITLE IS CONCERNED, AMOUNTING ONLY TO A PAYMENT OF THE TAXES, AND THE APPELLANT CLAIMS A FEE SIMPLE TITLE, BUT SHE WAS NOT A GRANTEE IN SAID DEED.

Apparently, and so far as we know, appellant since the commencement of this action has not, and does not now, make a claim because of the tax deed from Carbon County. Said deed was declared absolutely void in the other case and that it amounted merely to a payment of the taxes and a redemption of the property from tax sale. She also cannot claim anything under the tax deed because in her complaint she alleges to be the owner of a fee simple title and in her reply, as amended, she claims to be the owner of

said fee simple title because of the quit-claim deed to her personally, which was given to her by the other three Gigliotti's and which was recorded on February 18, 1939.

VIII.

THAT APPELLANT IS ESTOPPED TO CLAIM A HOMESTEAD IN THE PROPERTY IN QUESTION AS ALLEGED IN HER REPLY OR TO CLAIM A FEE SIMPLE TITLE BECAUSE SHE KNOWINGLY COOPERATED WITH AND ASSISTED HER HUSBAND IN HIS ATTEMPT TO DEFRAUD ALBERGO OF HIS MORTGAGE LIEN, AND KNEW AS FOUND BY THE LOWER COURT:

"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." (Abs. p. 35)

The same testimony quoted under No. IV above shows conclusively that the appellant knowingly cooperated with and assisted her husband in his attempt to defraud Albergo of his mortgage lien.

It has been the claim of appellant throughout this case that it would be necessary for her to have actively done something before she can be estopped and that she could not

be estopped by merely sitting idly by. As the testimony conclusively shows that she actively cooperated with and assisted her husband we will not take the time of the court by citing authorities.

IX.

THAT AFTER SO COOPERATING WITH AND ASSISTING HER HUSBAND IN HIS ATTEMPT TO DEFRAUD ALBERGO AND KNOWING THE REPRESENTATIONS HE HAD MADE AS TO HIS TITLE SHE SAT IDLELY BY UNTIL AFTER SHERIFF'S SALE WITHOUT ASSERTING HER ALLEGED TITLE AND IS THEREBY ESTOPPED FROM MAKING ANY CLAIM TO SAID PROPERTY.

The testimony quoted above shows conclusively that Mrs. Gigliotti knew of the foreclosure action and that she assisted her husband in his defense of it, and of necessity must have known of the sheriff's sale. It was stipulated in the case, as follows:

"That prior to the 1st day of September, 1939," — the date of the sheriff's sale — "the sheriff was not notified by Mrs. Gigliotti or anyone acting for her that she claimed an interest in the property." (Abs. p. 65)

On the general topic of estoppel to assert homestead, we refer the court to that topic, which is No. 9, under the heading of homestead in 26 Am. Jur.

26 Am. Jur. — Homestead — Section 212:

If a mortgagee can show that a homestead claimant acted with intention to deceive him he is

entitled to prevail.

X

THAT AS THIS IS AN EQUITY CASE AND THE APPELLANT IS NOT IN COURT WITH CLEAN HANDS THE COURT WILL NOT AID HER IN HER CLAIM.

XI.

THAT THE COURT LIKEWISE WILL NOT AID HER IN PERPETRATING A FRAUD.

These two are closely interwoven. All of the evidence introduced shows conclusively that the appellant herein assisted and cooperated with her husband in an attempt to defeat and defraud Albergo of this mortgage lien.

“HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.”

Hensley v. Maxwell, (Okla) 44 P. (2d) 60:

“Homestead exemptions cannot be used as shield for fraud.”

Principles of Equity — Clark — Section 30:

“He who comes into equity must come with clean hands. This maxim is closely related to the one just preceding in that it is founded upon ‘good conscience;’ but it differs from that one in placing an absolute bar against relief instead of requiring only the giving of a conditional decree. Unlike the other maxim, too, there is an analogous maxim in the common law and Roman law, which is usually given in the Latin form: *Ex turpi causa non oritur action*; of which the following is a free translation; ‘no cause of action will arise out of an illegal transaction.’ ”

We would now like to discuss one or two other features of this case. There is much authority to the effect that it is not necessary to make a married woman a party defendant in a case when she does not have the legal title to the property unless she could have claimed dower because of the right of her husband to the property.

Skillen et al v. Harris et al., (Mont) 3 P (2d) 1054:

“Wife whose dower right was not involved in foreclosure action held proper but not necessary party.”

We must distinguish between a necessary and a proper party to an action. There is authority to the effect that Ross Gigliotti was likewise a proper party to the foreclosure action but not a necessary party.

Bennett v. U. S. Land, Title and Legacy Company, (Ariz) 141 P. 717:

“A party holding an executory contract to purchase mortgaged property, executed by the mortgagor subsequent to the giving and recording of the mortgage and before a foreclosure is commenced is **not** a necessary party defendant to foreclosure proceedings.”

“In ejectment plaintiff must recover upon the strength of his own title.”

It is elementary law that the appellant in this case to secure a decree quieting title to the property in her must prevail upon the strength of her own title. We call to the court's attention that the appellant offered no testimony whatever by deed, abstract or otherwise, showing any source of title in herself or Ross Gigliotti prior to the institution of the foreclosure action.

Bancroft Code Pleading — page 3299:

“The mortgagor represents the interests of the grantee in the unrecorded conveyance and when the court acquires jurisdiction of the mortgagor in the action to foreclose it also acquires jurisdiction of all persons who hold unrecorded conveyances or contracts from him so as to conclude them by the judgment entered in the foreclosure suit. By standing idly by and permitting the action to be prosecuted without intervention upon his part, such grantee in effect consents to be represented by his grantor and is estopped from asserting his title against the purchaser at the foreclosure sale, or those in privity with him.”

Even if the Release and Contract of Sale had not been abandoned it is very doubtful if appellant could claim a homestead so as to defeat Albergo's mortgage.

Section 38-0-1, Revised Statutes of Utah 1933:

Homestead Exemption — Exceptions.

“A homestead consisting of lands, appurtenances and improvements, which lands may be in one or more localities, not exceeding in value with the appurtenances and improvements thereon the sum of \$2,000 for the head of the family, and the further sum of \$750 for the spouse, and \$300 for each other member of the family, shall be exempt from judgment lien and from execution or forced sale, except upon the following obligations: (1) taxes accruing and levied thereon; and (2) judgments obtained on debts secured by lawful mortgage on the premises and on debts created for the purchase price thereof.”

The largest part of the consideration for the Release and Contract of Sale was Ross Gigliotti's promise and agreement to pay the Albergo mortgage, which would clear the mortgage from the property which he was buying and the property which his parents were keeping and were not selling to him. Albergo's judgment of foreclosure was

therefore obtained on a debt secured by a lawful mortgage on the premises, and Ross Gigliotti in his contract to purchase likewise assumed and agreed to pay said mortgage and his indebtedness under it thereby became a debt created for the purchase price thereof.

The law is clear under that section that Mrs. Gigliotti cannot claim a homestead to defeat Albergo's mortgage.

Section 217, 29 C. J. 866:

"Under most homestead provisions if a part of the consideration for the conveyance of the land is the purchaser's agreement to pay a debt of the vendor to a third person, the latter may enforce his rights in preference to the homestead claim."

19 R. C. L. Section 334:

"The wife, where the mortgage is given for the purchase money of land sold, is not a necessary party to a bill to foreclose the mortgage. In such case, the seizin of the husband passes from him eo instanti that he acquires it, and being immediately revested in the grantor, the widow cannot claim dower in the premises. If then the widow could not be endowable, the wife, while the husband is living can have no interest in the premises, and consequently she need not be a party to the foreclosure."

89 A. L. R. 531: Annotation.

"With few exceptions it is held that one in possession of land under a contract of purchase has a sufficient equitable interest therein on which to claim a homestead therein except as against the unpaid vendor or one claiming through him or under the purchase money obligation, and it appears that that the question of how much of the

purchase price remains unpaid, whether all or part, is not a subject of inquiry in deciding such cases.

See many cases cited and also the Utah case — Hansen v. Mauss (1912) 40 U. 361 121 P. 605.

42 C. J. 53:

“As dower is not claimable against a purchase-money mortgage the wife need not be joined in proceedings to foreclose a mortgage of that kind.”

A contention was made at the time of the trial of the case that Albergo could not claim fraud on the part of Mrs. Gigliotti to defeat her claim of homestead because the fraud claim was not pleaded. There is nothing to such a contention because the only claimed source of title pleaded by the appellant is in her reply and the homestead matter is likewise first pleaded there. They are affirmative matters and pleadings and all defenses to affirmative matters set forth in a reply can be presented.

In closing we wish to point out to the court that the only purpose of the quit-claim deed from the three Gigliotti's to Stella Felice Gigliotti which was not recorded until February 18, 1939, could only have been for the purpose of deeding the title to the property out of the mortgagors in an attempt to defraud Albergo. This fact alone shows the active cooperation of the appellant in all proceedings and her knowledge of them from the beginning.

The judgment of the court below should be affirmed.

Respectfully submitted,

MARL D. GIBSON,
Attorney for Respondent.