

1951

# Rober T. Harmston v. Farmers and Merchants Bank et al : Brief of Appellants

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Harmston v. Farmers and Merchants Bank*, No. 7614 (Utah Supreme Court, 1951).

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

---

ROGERS T. HARMSTON, as Ad-  
ministrator of the Estate of Isabelle  
T. Harmston, deceased,

*Appellant,*

— vs —

FARMERS AND MERCHANTS  
BANK, a Utah Corporation,

*Respondent.*

District Court Docket No. 2437.

AND

ROGERS T. HARMSTON, as the Ad-  
ministrator of the Estate of Isabelle  
T. Harmston, deceased, HELENE  
E. GILLIS, MARION EUGENE  
HARMSTON, ROGERS T. HARM-  
STON and FRED HARMSTON,

*Appellants,*

— vs. —

KENNETH LABRUM and JEAN  
CRUMBO LABRUM, his wife, and  
EDGAR LABRUM and VEDA  
MURRAY LABRUM, his wife,

*Respondents.*

District Court Docket No. 2513.

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**BRIEF OF APPELLANTS**

---

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# INDEX

|   | Page |
|---|------|
| Statement of Case.....  | 2    |
| Statement of Error.....   | 9    |
| Argument .....  | 13   |
| Assignment of Error Nos. 1, 2 and 3 Relating to the error<br>of court in admitting oral and written evidence to sup-<br>plement the record..... | 14   |
| Assignment of Error Nos. 4, 5 and 6 That the Findings,<br>Conclusions and Judgment are contrary to the admissible<br>evidence .....             | 17   |

## AUTHORITIES

### STATUTES:

|                           |    |
|---------------------------|----|
| R.S.U. 1933—102-5-1 ..... | 17 |
| R.S.U. 1933—102-5-1 ..... | 18 |

## TEXT

|   |    |
|---|----|
| 31 Am. Jur., page 209, Sec. 621.....                  | 13 |
| 31 Am. Jur., page 221, Sec. 642.....                  | 13 |
| 31 Am. Jur., page 222, Sec. 643.....                  | 13 |
| 31 Am. Jur., page 91, Sec. 430.....                   | 13 |
| 32 Corpus Juris Secundum, page 728, Sec. 809 (a)..... | 15 |
| 32 Corpus Juris Secundum, page 740, Sec. 809 (3)..... | 15 |
| 22 Corpus Juris, page 1009.....                       | 15 |
| 32 Corpus Juris Secundum, page 741, Sec. 810 (d)..... | 16 |
| 22 Corpus Juris, page 1011.....                       | 16 |
| 24 Corpus Juris Secundum, page 791, Sec. 752.....     | 20 |
| 24 Corpus Juris, page 816, Sec. 2051.....             | 20 |

## CASES

|  |    |
|--|----|
| Higgs, et al. v. Burton, 58 Utah 99, 197 Pac. 738.....                         | 13 |
| Kramer v. Pixton, 72 Utah 1, 268 Pac. 1029.....                                | 13 |
| Logan City v. Utah Power and Light Co., 86 Utah 340, 16 Pac.<br>2nd 1097 ..... | 13 |



# INDEX—(Continued)

|  | Page |
|--|------|
| Title Guaranty and Surety Company, et al. v. State of Mo.,<br>ex rel., 105 Fed. 2nd 496..... | 16   |
| Wapello County Savings Bank v. Keokuk County, 209 Iowa 1127,<br>229 N.W. 721.....            | 16   |
| Elliot Admx. v. Eslava, 3 Ala. 568.....  | 16   |
| Guardianship of Sorrells, et al. v. Beigeer, 117 Pac. 2nd 96,<br>58 Ariz. 25.....            | 16   |
| Gaines v. Malone, 13 So.—2nd 870, 244 Ala. 490.....  | 16   |
| Poynter v. Smith, 160 S.W. 2nd 380 (Ky.).....  | 16   |
| Wood v. City of Checkasha, et al., 257 Pac. 286, 125 Okla. 212.....                          | 16   |
| Lyons v. Bolling, et al., 14 Ala. 753.....   | 16   |
| Aldrich v. Wells, et al., 55 Cal. Sup. 81.....   | 18   |
| Estate of William Hamilton, 34 Cal. Sup. Ct. Reports 464.....                                | 18   |
| Colman Estate, 269 NYS 617.....  | 19   |
| Blood v. Waszak, 265 NYS 752.....  | 19   |
| Pierce v. Mutual Life Insurance Company of New York, et al.,<br>190 NYS 50.....              | 19   |
| Bailey v. Merchants Insurance Company, et al., 86 Alt. 328.....                              | 19   |
| Mobley, et al. v. Mobley, 131 Alt. 770.....  | 19   |



# IN THE SUPREME COURT of the STATE OF UTAH

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ROGERS T. HARMSTON, as Administrator of the Estate of Isabelle T. Harmston, deceased,

*Appellant,*

— vs —

FARMERS AND MERCHANTS BANK, a Utah Corporation,

*Respondent.*

District Court Docket No. 2437.

AND

ROGERS T. HARMSTON, as the Administrator of the Estate of Isabelle T. Harmston, deceased, HELENE E. GILLIS, MARION EUGENE HARMSTON, ROGERS T. HARMSTON and FRED HARMSTON,

*Appellants,*

— vs. —

KENNETH LABRUM and JEAN CRUMBO LABRUM, his wife, and EDGAR LABRUM and VEDA MURRAY LABRUM, his wife,

*Respondents.*

District Court Docket No. 2513.

Case No. 7614

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## BRIEF OF APPELLANTS

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## STATEMENT OF CASE

This is an appeal from a judgment and decree in favor of the defendants and against the plaintiffs upon two actions filed by the appellants in the Fourth Judicial District Court of Duchesne County, Utah, and consolidated for hearing.

The case of Rogers T. Harmston, as administrator of the estate of Isabelle T. Harmston, deceased, plaintiff, vs. Farmers and Merchants Bank, a Utah Corporation, defendant, docketed in the lower court as civil no. 2437, is an action on the part of the plaintiffs, to set aside a judgment of foreclosure secured by the defendant against decedent's estate and for an accounting for rents, on the grounds that said judgment was void for jurisdictional reasons.

The plaintiff below is the duly appointed and acting administrator of decedent's estate; the defendant is a banking corporation organized and existing under and by virtue of the laws of the State of Utah; Isabelle T. Harmston died on the 11th day of December, 1937, a resident of the city of Roosevelt, county of Duchesne, State of Utah; at the time of her death she left real property in said city, county and state aforesaid, consisting of the following:

All of Lots 29, 30, 31 and 32, Block 9, Plat 9, "A". All of Lots 1, 2, 3 and 4, Block 16, Plat "A".



On the 7th day of March, 1938, in the Fourth Judicial District Court of Duchesne County, Utah, in that action in probate, docketed by the clerk as no. 374, entitled, "In the Matter of the Estate of Isabelle T. Harmston, deceased," Utah Savings and Trust Company, a banking corporation, of Salt Lake City, Utah, was duly appointed the administrator of decedent's estate.

During her lifetime, on the 31st day of July, 1937, and October 30, 1937, Isabelle T. Harmston made and executed her Promissory Notes for Four Thousand Five Hundred Dollars (\$4,500.00) and Three Thousand Dollars (\$3,000.00), each respectively, in favor of the defendant, Farmers and Merchants Bank, and secured the same by two real property mortgages upon the aforesaid real property. The said notes were payable in monthly installments and were further secured by assignment of the rents payable under lease to the mortgagee; said mortgages and leases of the said property were duly recorded.

On the 4th day of December, 1940 (T-9), the Utah Savings and Trust Company, by a nunc pro tunc order, was discharged as the administrator of decedent's estate, as of November 18, 1940, and the court made and entered its order appointing Rogers T. Harmston the administrator of decedent's estate, "subject, however, to his taking the proper oath of office and posting good and sufficient bond in the premises" (T-13).



On the 8th and 9th days of May, 1941, respectively, in the Fourth Judicial District Court of Duchesne County, Utah, in those civil proceedings designated as civil nos. 1931 and 1932, the mortgagee, Farmers and Merchants Bank (the respondent here), the plaintiff in those actions, filed its Complaint against Rogers T. Harmston, as the administrator of the estate of Isabelle T. Harmston, deceased, et. al., wherein it sought to foreclose the aforementioned mortgages. Summons in both actions were, on the 13th day of May, 1941, served on Rogers T. Harmston, as the administrator of the estate of Isabelle T. Harmston, deceased.

On the 17th day of July, 1941, J. Rulon Morgan of Provo, Utah, Attorney for the plaintiff in the said foreclosure proceedings, caused the court to enter Default Judgments in both of said actions against the said Rogers T. Harmston, as the administrator of the estate of Isabelle T. Harmston, deceased, and the court ordered the said real property to be sold to satisfy the judgment.

On the 22nd day of August, 1941, the Sheriff of Duchesne sold the property to the said Farmers and Merchants Bank in satisfaction of said judgment and on the 12th day of March, 1942, pursuant to said judgment and sale, the Sheriff issued to the said Farmers and Merchants Bank a Sheriff's Deed to said property foreclosing the said Estate from its equity of redemption, said certificates of sale and deed were duly recorded.



Since the 3rd day of November, 1937, the Farmers and Merchants Bank, under its assignment of rents and foreclosure, has collected the rents, issues and profits from said premises.

The probate record of the estate of Isabelle T. Harmston, deceased, discloses that Rogers T. Harmston, after the entry of the order of the court appointing him administrator (December 4, 1940 — T-13), on the 8th day of March, 1941, filed his administrator's bond in the sum of One Thousand Five Hundred Dollars (\$1,500.00) (T-14) and nothing further was done by the said Rogers T. Harmston in said estate proceedings until he subscribed to his oath of office, as administrator of decedent's estate, on the 4th day of February, 1948, pursuant to which in said proceedings, Letters of Administration were duly issued to the said Rogers T. Harmston on the 10th day of February, 1948 (T-8).

In the second appellate case, (Supra) lower court no. 2513, in these proceedings, Rogers T. Harmston, as administrator of the estate of Isabelle T. Harmston, was joined by the beneficiaries of decedent's estate as joint plaintiffs.

The defendants below, Kenneth Labrum and Edgar Labrum, on the 19th day of July, 1947, purchased from the Farmers and Merchants Bank a part of the property the bank had taken under the aforesaid foreclosure proceedings, to-wit:



All of Lots 1, 2, 3 and 4, Block 16, Plat "A," above referred to.

The action was filed in the Fourth Judicial District Court of Duchesne County against the said defendants to quiet plaintiff's title.

The defendants, in their answer, denied plaintiff's title and alleged ownership to said premises in themselves, predicated the same upon the said conveyance from Farmers and Merchants Bank and the title and interest their predecessor had acquired in the foreclosure proceedings against the estate of Isabelle T. Harmston.

The plaintiffs, in their reply, pleaded the invalidity of the judgment of said foreclosure on jurisdictional grounds.

The issue being the same in each case, upon stipulation of counsel, the cases were consolidated for trial.

The above Statement of Fact, unless otherwise indicated, is admitted by the pleadings.

The probate files and records of, "In the Matter of the Estate of Isabelle T. Harmston, deceased," filed in the office of the clerk of the court, Duchesne County, Utah, are docketed as number 374.

Rogers T. Harmston, one of the beneficiaries of Isabelle T. Harmston's estate, filed a petition for the appointment of himself as administrator thereof, in the place and stead of said Utah Savings and Trust Company, the then acting administrator. Pursuant thereto



the trust company filed its accounting, the entire matter came on for hearing September 4, 1940 (T-9-13).

The court did not enter its order on said hearing until December 4, 1940 (T-9-13). Therein the court then discharged the said trust company as the administrator of said estate nunc pro tunc as of November 18, 1940, (T-13) and ordered Rogers T. Harmston appointed the administrator de bonis non of said estate, "subject, however, to his taking the proper oath of office and posting a good and sufficient bond in the premises." (T-13).

Rogers T. Harmston's bond was not filed in said probate proceedings until March 8, 1941, (T-14), three months after the entry of said order.

According to the said probate record and the clerk's register of action, no oath of office was ever taken by Rogers T. Harmston, as administrator of decedent's estate or were Letters of Administration ever issued to him until February 10, 1948 (T-6-7-8).

At the time of Isabelle T. Harmston's death, she was the administratrix of her husband's estate, Marion Eugene Harmston; J. Rulon Morgan was her attorney in those proceedings. Upon her death J. H. Calder was appointed in her stead, J. Rulon Morgan was his attorney (T-96-97) in those proceedings.

J. Rulon Morgan was the bank's attorney that foreclosed the mortgages against J. Rulon Morgan's client, J. H. Calder, administrator of the Marion Eugene Harm-



ston Estate, (T-96-97) and he appeared in the foreclosure proceedings and testified in behalf of the bank (T-95).

In these proceedings he is one of the attorneys for the respondents and at the hearing, in the lower court, again a witness on behalf of the bank (T-93).

It must be remembered, service of summons in the aforesaid foreclosure proceedings was had on Rogers T. Harmston, as the administrator of decedent's estate, May 13, 1941, and Rogers T. Harmston filed his oath as such administrator and letters were issued to him the 10th day of February, 1948.

The matter came on for trial on the 28th day of February, 1950, at which time it was stipulated between counsel that the only issue to be determined in the cases was the sufficiency of service of process in the foreclosure proceedings and the cases were submitted to the court on that one issue.

During the trial of the cases, the court, over the objections of the plaintiffs, permitted the defendants to introduce oral testimony in an effort to impeach the records of the lower court with respect to the filing of the administrator's oath in the said probate proceedings of the estate of Isabelle T. Harmston, deceased.

At the conclusion of the trial, the court filed its consolidated Findings of Fact, Conclusions of Law and Judgment in said causes, wherein the court found that the said Rogers T. Harmston, at all times since March, 1941, has been the duly qualified administrator of the



estate of Isabelle T. Harmston, deceased, and that the said service of summons in the said foreclosure proceedings, on the said Rogers T. Harmston, as the administrator of the estate of Isabelle T. Harmston, deceased, on the 13th day of May, 1941, was a good and legal service of process on said defendant; that by reason thereof, the foreclosure of said mortgage was a good and valid proceedings and the Judgment entered thereon and the proceedings thereafter had, in said proceedings, by reason thereof was good and valid and that the defendants, Labrum, were the owners of said real property described in said Complaint and purchased from said bank and concluding as a matter of law that the said defendants, in each cause of action, were entitled to a judgment in accordance therewith (R-259-270) pursuant to which the court did, on the 25th day of May, 1950, make and enter its Judgment in said actions in favor of the defendants and against the plaintiffs (R-273).

June 6, 1950, the plaintiffs in each cause filed their Motion for a New Trial (R-278).

September 18, 1950, the court denied plaintiff's Motion for a New Trial (R-280).

October 13, 1950, (R-287) the plaintiffs filed their Notice of Appeal, together with appellants' designation of record on appeal (R-290) and cost bond (R-293).

## STATEMENT OF ERROR

(1) The court erred in admitting, over appellants' objection, the oral testimony of the witness G. Arthur



Goodrich on behalf of the respondents, to supplement, impeach and prove the records of the probate court, as set forth on pages 78, 79 and 80 of the transcript.

(2) The court erred in admitting, over the objection of appellants, respondents Exhibit No. 3 as shown on pages 78, 79 and 80 of the transcript to supplement, impeach and prove the records of the probate court, to-wit:

J. Rulon Morgan  
Provo Commercial Bank Bldg.  
No. 8 West Center Street  
Provo, Utah

In Re: Estates of Marion  
Eugene Harmston and  
Isabelle T. Harmston

Dear Mr. Morgan:

On Jan. 10, 1941 you wrote us the following letter:

Mr. G. A. Goodrich  
County Clerk  
Duchesne, Utah

In Re: Estates of Marion  
Eugene Harmston and  
Isabelle T. Harmston

Dear Mr. Goodrich:

I received your letter of January 8 and thank you for the same.

You state that Roger T. Harmston has been appointed as administrator for both the estates, but has not qualified yet.

In light of those facts, will you please tell me who were the former administrators of said estates who have qualified.



I will appreciate your usual prompt response by return mail.

With kindest regards, I remain

Yours very truly,

J. Rulon Morgan

J. Rulon Morgan

In answer to this letter we were attempting to tell you who the people were that had been administrators in the estates. Perhaps the letter was not worded just as it should have been, but I think you had a complete understanding of just how the estate stood, because on the 8th day of January we told you that Roger T. Harmston had been appointed the administrator of both estates.

As to the status of the estates at the present time, there has been nothing filed in the Marion Eugene Harmston Estate since you filed your demurrer, which was May 10, 1940. The last Court minute entry was September 4, 1940, and according to the minute entry, J. H. Calder was not to be released as administrator until he made certain reports. He has never made these reports. At any rate Roger T. Harmston has never qualified as administrator in the estate of Marion Eugene Harmston.

As to Isabelle T. Harmston, the Utah Savings and Trust Company submitted their report as requested by the court on September 4, 1940. And on December 4, 1940, an order was signed by Judge Dallas H. Young, discharging them as administrator. On March 8, 1941, Roger T. Harmston filed his bond and oath of office and is now the acting and qualified administrator of the estate of Isabelle T. Harmston.



If there is any other information that I can give you, I will be very pleased to do so.

With kind personal regards, I remain

Very Truly yours,

(Signed) G. A. Goodrich

G. A. Goodrich,  
County Clerk

(3) The court erred in admitting, over appellants' objection, the oral testimony of the witness, J. Rulon Morgan, on behalf of the respondents to supplement, impeach and prove the record of the probate court as set forth on pages 94 and 95 of the transcript.

(4) That the Findings of Fact and Conclusions of Law, awarding judgment to the defendants and against the plaintiffs, together with the judgment, are not supported by admissible evidence and are contrary to the law.

(5) The court erred in finding that Rogers T. Harmston, at the time service of summons was had upon him in said foreclosure proceedings, was the administrator of the estate of Isabelle T. Harmston, deceased.

(6) The court erred in finding the defendants, Labrum, were the owners of the property described in the Complaint.

(7) The court erred in denying appellants' Motion for a New Trial.



## ARGUMENT

This is an equity action for relief against a judgment alleged by the appellants to be void for lack of jurisdiction of the court and a court of equity may exercise such jurisdiction for the purpose of affording appropriate relief from a judgment (31 Am. Jur., Sec. 621, Page 209). The grounds for such relief is a want of jurisdiction of the original court to make and enter the judgment (31 Am. Jur., page 221, Section 642), this may emendate from a lack of jurisdiction of the court over the parties, due to irregularities as to notice or process (31 Am. Jur., Page 222, Section 643 — *Higgs, et al. v. Burton*, 58 Utah 99, 197 Pac. 738; *Kramer v. Pixton*, 72 Utah 1, 268 Pac. 1029) and the aggrieved party may maintain direct action to enjoin the enforcement of a judgment void for the want of service (*Kramer v. Pixton*, (Supra); *Logan City v. Utah Power and Light Company*, 86 Utah 340, 16 Pac. 2nd 1097). For a void judgment is not entitled to the respect accorded a valid adjudication and may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it; it has no legal or binding force or efficacy for any purpose, it cannot impair or create rights (31 Am. Jur. 91, Section 430).

The Assignment of Error will be consolidated and considered in the following order.



ASSIGNMENT NOS. 1, 2, AND 3, RELATING TO THE ERROR OF THE COURT IN ADMITTING OVER THE OBJECTION OF THE APPELLANTS, ORAL AND WRITTEN EVIDENCE, TO SUPPLEMENT, IMPEACH AND PROVE THE RECORDS OF THE PROBATE COURT WILL BE CONSIDERED TOGETHER.

The probate court records of Duchesne County, in the probate proceedings of Isabelle T. Harmston, deceased, including the clerk's register, showed conclusively that the court, on December 4, 1940, entered its order nunc pro tunc, appointing Rogers T. Harmston to be the administrator of decedent's estate as of November 18, 1940 (T-13) and the court was very careful to recite therein, that his appointment should take effect, upon his posting a bond and filing his oath (T-9-13); that his bond was not filed until the 8th day of March, 1941, and his oath was not filed and letters issued until the 10th day of February, 1948 (T-7-8-17).

Respondents, over appellants' objection, tried to supplement or impeach this record by attempting to prove, by parole testimony, that Harmston had filed his bond and oath of office on March 8, 1941; this they attempted to do by the introduction of an undated letter that is purported to have been written by the former clerk of the court to J. Rulon Morgan concerning an inquiry Morgan is purported to have made January 10, 1941, concerning just who was the administrator of the estate. To this inquiry the clerk is alleged to have made representation that Harmston filed his oath with his bond March 8, 1941, (T-78-79) they attempted to show,



by the clerk's former deputies, that the clerk was a very careful and prudent man, therefore, if he made representation in a letter that Harmston had filed his oath it must be so (T-79-81-85-90). They also attempted to supplement and impeach the probate court's records by attempting to prove, over the objections of the appellants by the oral testimony of J. Rulon Morgan, that he was present and acted as a witness on behalf of his client at the foreclosure proceedings July 17, 1941 and that he saw Harmston's oath of office in the probate file (T-94); to all of this testimony the appellants' objected, on the grounds that it was incompetent and not admissible for the purpose of proving or impeaching the court's record (T-94), over the objections of the appellants, the court admitted the letter and permitted the witnesses to supplement and impeach the record by said parole testimony (T-78 to 96).

The rule, with respect to the admissibility of such testimony, is well stated in 32 Corpus Juris Secundum, (Page 728, Section 809 (a)) to the effect, "that proceedings, orders, judgments and decrees of court of record cannot be proved by parole evidence, unless the record is lost or destroyed or otherwise inaccessible and a properly authenticated copy or transcript thereof cannot be obtained."

The general rule, relating to proof of facts appearing in the records of a court, excludes parole evidence of the proceedings of probate courts (32 C.J.S., Section 809 (3), Page 740; 22 Corpus Juris, Page 1009; *Title*



*Guaranty and Surety Company, et al. v. State of Mo. ex rel.*; "Use of Stormfeltz," 105 Federal Reporter 2nd 496; C.C.A. 8th C.; *Wapello County Savings Bank v. Keokuk County*, 209 Iowa 1127, 229 N.W. 721; *Elliot Admx. v. Eslava*, 3 Ala. 568; *In re. Guardianship of Sorrells, et. al. v. Beigeer*, 117 Pac. 2nd 96, 58 Ariz. 25; *Gaines v. Malone*, 13 So.—2 870, 244 Ala. 490).

Courts can speak only through their records and parole testimony cannot impeach such records (*Poynter v. Smith*, 160 S.W. 2nd 380 (Ky.) ). The acts of a court of record are known by its records alone and cannot be established by parole testimony nor can the records of a court be impugned upon matters within its jurisdiction, when offered in evidence, by counter evidence (*Wood v. City of Checkasha, et al.*, 257 Pac. Reporter 286—125 Okla. 212).

A witness cannot testify that he was at one time a clerk of the court and that certain papers, exhibited to him, were issued and filed by him and are in his hand writing and that of his deputies (*Lyons v. Bolling, et al.*, 14 Ala. 753).

The rule, whereby secondary evidence is admitted as to lost or destroyed records, is not applicable to judicial records, for if no record of such matter has been made, the absence of the record cannot be supplied by parole or other extrinsic evidence. In such cases the proper remedy is by legal proceedings to have the missing record properly made up (32 C. J. S., Sec. 810 (d), page 741, 22 C.J. Page 1011).



And that such a matter as an administrator's oath, being required to be made part of the court record, we have but to refer to Section 102-5-1 R.S.U. 1933:

**"102-5-1. LETTERS, OATHS AND BONDS TO BE RECORDED.**

Before letters \* \* \* of administration \* \* \* are issued the \* \* \* administrator \* \* \* must take and subscribe an oath that he will perform according to law the duties of \* \* \* administrator, which oath must be attached to the letters. *All letters \* \* \* of administration \* \* \* issued to, and all bonds executed by, \* \* \* administrators \* \* \*, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estate, in books to be kept by him in his office for that purpose."*

(Italics supplied by us.)

POINTS 4, 5 AND 6 ASSIGNING AS ERROR; (a) THAT THE FINDINGS, CONCLUSION AND JUDGMENT ARE CONTRARY TO THE ADMISSIBLE EVIDENCE, (b) THE FINDING THAT ROGERS T. HARMSTON, AT THE TIME SERVICE OF PROCESS ON HIM, WAS THE ADMINISTRATOR OF DECEDENT'S ESTATE AND (c) THE FINDING THAT THE DEFENDANTS, LABRUM, WERE THE OWNERS OF THE REAL PROPERTY IN CONTROVERSY WILL ALL BE CONSIDERED HERE TOGETHER.

The uncontradicted court record in the probate proceedings of Isabelle T. Harmston's estate show Rogers T. Harmston never did qualify by filing his oath of office as the administrator of decedent's estate until February 10, 1948, and that Letters of Administration were never issued to him until that date and he never



purported to act for the estate until that time (T-16) (and as heretofore argued, parole testimony is not admissible to vary that record), yet on May 13, 1941, the Sheriff of Duchesne County, in the two foreclosure actions purports to serve summons on Rogers T. Harmston, as the administrator of decedent's estate and on that service default judgment of foreclosure was entered and the court in this proceeding held that Rogers T. Harmston, at the time of service, was in fact the administrator of decedent's estate and for that reason the judgments of foreclosure were valid and by reason thereof the defendants, Labrum, as successors in interest of the mortgagee, were the owners of the real property in controversy (R. 259-273).

Section One (1) of Chapter five (5) of Title 102, Revised Statutes of Utah 1933, provides as follows:

“Before letters \* \* \* of administration \* \* \* are issued \* \* \* the administrator \* \* \* must take and subscribe an oath that he will perform according to law the duties of administrator \* \* \* which oath must be attached to the letters.”

Under a California statute, similar to the above, the Supreme Court of California has held that a testamentary executor cannot act as such until he qualifies and letters are issued to him; until then his acts are void, (*Aldrich v. Welles*, et al., 55 Cal. Sup. 81—see also the Estate of William Hamilton, 34 Cal. Sup. Ct. Reports 464) and likewise the Surrogates Court of New York has held until the issuance of Letters Testamentary an



executor has no substantial power of administration and therefore an application to compromise a debt can only be made an executor upon whom the court has placed its stamp of approval by the issuance of letters to him. (Colman Estate at 269 NYS 617).

In the case of *Blood v. Waszak* at 265 NYS 752, the court held that where an executor named in a will sued in behalf of his estate, before the issuance of letters to him for want of capacity to sue, the proceedings should be dismissed. Certainly if a representative, before the issuance of letters for the want of capacity, cannot sue, he could not defend.

In the case of *Pierce v. Mutual Life Insurance Company of New York, et al.*, the Supreme Court at 190 NYS 50, held; service of process on one alleged to be the administrator de bonis non of the estate but to whom no Letters of Administration were issued and who never qualified or acted as such, gave the court no jurisdiction over the estate and a decree pro confesso as to such administrator was not binding on the estate, since it was not made a party to the suit. Also the same holding, by the Supreme Court of Maine in *Bailey v. Merchants Insurance Company, et al.* at 86 Alt. 328; also a like ruling by the Supreme Court of Maryland, the case of *Mobley, et al. v. Mobley* at 131 Alt. 770, holding the administrator without authority to act until Letters of Administration issued.



Service on one not at the time a personal representative is not binding so far as his representative capacity is concerned (24 C.J.S., page 791, Section 752) and the recital in an order making the administrator a party that he has been served does not prevent his showing that he neither was served nor appeared (24 C.J. Page 816, Section 2051).

THE COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

Because of the law and errors of the court, heretofore cited, the court erred in denying appellants' Motion for a New Trial.

We respectfully submit that the Findings of Fact, Conclusion of Law and Judgment of the court, in the above matter, are contrary to and are not supported by either the fact or the law. We, therefore, maintain the Findings, Conclusions and Judgment be modified to conform to the evidence and the law as herein presented.

Respectfully submitted,

R. J. HOGAN,

*Attorney for Appellants.*