

1951

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ROGER T. HARMSTON, as Admini-
strator of the Estate of Isabelle T.
Harmston, Deceased,

Appellant,

vs.

FARMERS AND MERCHANTS
BANK, a Utah Corporation,

Respondent.

District Court Docket No. 2437.

AND

ROGER T. HARMSTON, as the Ad-
ministrator of the Estate of Isabelle
T. Harmston, Deceased, HELENE
E. GILLIS, MARION EUGENE
HARMSTON, ROGERS T. HARMS-
TON 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.

BRIEF OF RESPONDENTS

FILED

Appealed from District Court of Duchesne County
Hon. R. I. Tuckett, Judge

FEB 7 1931

Clerk, Supreme Court, Utah
R. J. Hogan

J. Rulon Morgan and
Elias Hansen

Attorney for Appellants *Attorneys for Respondents*

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ROGER T. HARMSTON, as Administrator of the Estate of Isabelle T. Harmston, Deceased,

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FARMERS AND MERCHANTS BANK, a Utah Corporation,

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ROGER 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

BRIEF OF RESPONDENTS

STATEMENT OF ADDITIONAL FACTS

The Statement of the case contained in Appellants' Brief is correct so far as it goes, except that one of the

mortgages foreclosed by the Farmers & Merchants Bank was for \$2,500.00 and not \$3,000.00 as stated in Appellants' Brief. (R. 265.) (Throughout this Brief the judgment Roll is indicated by the Letter R and the transcript by the letters Tr.) The reference to some of the facts disclosed by this record should, in our opinion, be given in greater detail than that contained in Appellants' Brief, and there are other facts not mentioned in Appellants' Brief which, as we view them, are necessary to an understanding of the questions which divide the parties to this controversy.

As stated in Appellants' Brief, in the action brought against the Farmers and Merchants Bank, the plaintiff seeks to set aside the mortgage foreclosures prosecuted by the bank against Roger T. Harmston as Administrator of the Estate of Isabelle T. Harmston, deceased, et al. To the amended complaint filed in this case the Bank filed a demurrer to each of the two causes of action alleged in the Amended Complaint. The demurrers are both general and special and both causes of action are attached by the demurrers (R. 200-201). The demurrers were overruled (R. 205). The defendant Bank claims that the demurrers should have been sustained. As indicated in Appellants' Brief, most of the Facts are not in dispute. Briefly the facts as alleged in plaintiffs' Amended Complaint are admitted by the defendant Bank.

There is no controversy as to the existence of the following facts.

Isabelle T. Harmston died intestate on December 11, 1937. At the time of her death she owned the property described in the mortgages given to the Farmers and Merchants Bank.

For a time the Utah Savings and Trust Company acted as administrator of Isabelle T. Harmston's estate. On July 31, 1937, Isabelle T. Harmston made, executed and delivered to the Farmers and Merchants Bank her promissory note for \$4,500.00, which note was secured with a mortgage executed by Mrs. Harmston on part of the real estate involved in this proceeding. On October 19, 1937, Mrs. Harmston executed and delivered to the Farmers and Merchants Bank another mortgage in the sum of \$2,500.00, which note was also secured by a mortgage on part of the property involved in this action. The mortgages were duly recorded in Duchesne County, the same being the county in which the property was situated. The property was leased at the time the same was mortgaged and the leases were assigned to the bank as additional security. Prior to bringing the foreclosure proceedings, claims were presented to the Utah Savings and Trust Company, which at the time such claims were presented, was the administrator of the Estate of Isabelle T. Harmston, Deceased, and such claims were by the administrator approved.

. On December 7, 1940, the Utah Savings and Trust Company was removed as administrator of the estate of Isabelle T. Harmston, Deceased, and Roger T. Harm-

ston, the plaintiff herein, was by the court ordered appointed administrator of said estate in the stead and place of the Utah Savings and Trust Company. The order required Roger T. Harmston to take the oath of office and furnish a bond in the sum of \$1,500.00 if a corporate bond.

Roger T. Harmston furnished the required corporate bond and the same was filed on March 8, 1941. At the time of trial there was no record in the Probate Files of the Estate of Isabelle T. Harmston, or in the other court records, showing that Roger T. Harmston took the oath of office prior to February 4, 1948. Nor do the probate files show that letters of administration were issued to Roger T. Harmston prior to that date.

It is further alleged in plaintiff's Amended Complaint herein and by the Answer of the defendant herein admitted that on May 9, 1941, the Farmers and Merchants Bank filed its complaints to foreclose the mortgages on the property mortgaged to the bank by Isabelle T. Harmston. That in such action Roger T. Harmston, as administrator of the Estate of Isabelle T. Harmston, was named as one of the defendants; that after the complaints were filed in said action Summons were placed in the hands of the Sheriff of Duchesne County and on May 13, 1941, the said Sheriff personally served such Summonses upon Roger T. Harmston as administrator of the Estate of Isabelle T. Harmston, deceased. Plaintiff in his Amended Complaint alleges that in truth and in fact, Roger T.

Harmston was not at the time of the commencement of the actions to foreclose the mortgages or at the time of the service of such summonses upon him, the administrator of the Estate of Isabelle T. Harmston.

It is further made to appear that on July 17, 1941, judgment by default was entered against Roger T. Harmston, and in favor of the Farmers and Merchants Bank, foreclosing the two mortgages executed by Isabelle T. Harmston during her lifetime; that pursuant to such decrees of foreclosure, the property was advertised for sale and sold by the Sheriff of Duchesne County, and in due time on March 12, 1942, the Sheriff of Duchesne County executed and delivered a Sheriff's Deed to the Farmers and Merchants Bank, the purchaser of the property at the Sheriff's sale, and that the bank has, since March 12, 1942, been in possession of the property so sold and has collected the rents and profits derived from said property. The foregoing facts are alleged in plaintiff's Amended Complaint and will be found on Pages 173 to 199 of the Judgment Roll. In its answer the Bank admits all of the allegations contained in plaintiff's Amended Complaint except defendant alleges on information and belief that Roger T. Harmston was the administrator of the Estate of Isabelle T. Harmston, from and after May 9, 1941. The Answer and Counterclaim of the defendant bank will be found on Pages 209 to 230 of the Judgment Roll.

It will thus be seen that the only issues of fact raised by the pleadings so far as the same affect the

foreclosure proceedings is whether or not Roger T. Harmston had taken his oath of office and Letters of Administration had issued to him when the Complaint was filed and when he was served with Summons.

In its Answer and Counterclaim the defendant bank sought to defeat plaintiff's attempt to set aside the judgments of foreclosure and if that could not be done, then to foreclose its mortgages in this action pursuant to the allegations of the Counterclaim.

It will thus be seen that by the Stipulation mentioned in Appellants' Brief it was agreed that the first issue that should be tried was whether or not the mortgage foreclosures precluded the plaintiff from prosecuting the present action. Of course, if it should be determined that the mortgage foreclosures were valid and by reason thereof the property foreclosed was no longer a part of the Estate of Isabelle Harmston, then there is no occasion to again foreclose such mortgages pursuant to the allegations of defendants' Counterclaim. If, on the other hand, it should be determined that the mortgage foreclosures were invalid, then the issues raised by the Counterclaim must be tried.

The evidence which was offered and received touching the controversy as to whether or not Roger T. Harmston did or did not take an oath of office on or about March 8, 1941 is brought here for review by a transcript of the evidence.

As stated in appellants' Brief, there was no oath of office of Roger T. Harmston at the time of the trial in the files of Isabelle T. Harmston's estate, nor was there any other court record that an oath of office had been filed, except in each of the mortgage foreclosures the court found: "That Roger T. Harmston has been appointed as administrator of the Estate of Isabelle T. Harmston, Deceased, and he is now the duly appointed, qualified and acting administrator of the Estate of Isabelle T. Harmston, Deceased." Tr. 101 as to the foreclosure of the mortgage for \$4,500.00 and Tr. 117 as to the foreclosure of the mortgage for \$2,500.00.

At the commencement of the trial, it was agreed that the foreclosure proceedings were regular in every particular except with respect to whether or not Roger T. Harmston had taken his oath of office and whether or not Letters of Administration had issued to him at or before the time the foreclosure actions were brought, and at or before the time service of summons was had upon Rogers T. Harmston. (Tr. 3-4.)

Plaintiff called the County Clerk of Duchesne County, who identified the files in the Estate of Isabelle T. Harmston, Deceased. He testified that the only Letters of Administration in the files were dated February 10, 1948 (Tr. 7). He further testified that the only oath of office was one taken before R. J. Hogan, on February 4, 1948, which appears to have been filed on February 10, 1948 (Tr. 8).

It further is made to appear that prior to September 4, 1940, Roger T. Harmston, one of the heirs at law of Isabelle T. Harmston, had filed a petition praying that he be appointed administrator of his mother's estate; that he personally appeared in court represented by his counsel (Tr. 9-10). That Roger T. Harmston was appointed administrator of the Estate to take effect on November 18, 1940. The order was not signed until December 4, 1940 (Tr. 12). On March 8, 1941, a bond dated February 27, 1941, for the sum of \$1,500.00 was filed in which bond Rogers T. Harmston is named as principal (Trs. 14-15). County Clerk Merrill further testified that the Register of Actions failed to show that any Letters of Administration were issued to Roger T. Harmston prior to February 10, 1948 (Tr. 17).

The County Clerk, on cross examination, further testified that the one-half of the outside cover of the files in the Isabelle Harmston Estate had been torn off (Tr. 19). That the fact that the cover on the files in the Isabelle Harmston Estate was in part torn off was first called to his attention in 1947, at which time he put on a new cover (Tr. 20).

On Cross examination Roger T. Harmston testified that he had collected the income from Lots 5 to 12, Block 16, Plat A, Roosevelt Townsite (owned by the Estate of Isabelle T. Harmston) since he bought it in for taxes. (Tr. 46-47.) That he signed the bond in

the files of his mother's estate. (Tr. 57.) That the property he bought for taxes is the property of his mother's estate. (Tr. 58.) That he has been collecting the rent on that property. (Tr. 59.) That he didn't remember whether he was or was not served with summons in the foreclosure proceedings. That he did know the property of his mother was being foreclosed. (Tr. 64.)

G. Arthur Goodrich was called as a witness by the defendant and testified that he was County Clerk of Duchesne County, Utah, from 1935 to 1942. He identified defendant's Exhibit 3 as being a letter, the latter part of which was dictated by him. It will be noted that among other things, it is said that "On March 8, 1941, Rodger T. Harmston filed his bond and oath of office and is now the acting and qualified administrator of the Estate of Isabelle T. Harmston." He testified that he dictated that letter and over objections he further testified that while he did not actually remember the oath of office referred to in the letter as being in the office when the letter was dictated, the oath must have been in the office when the latter was dictated; otherwise he would not have dictated the same (Tr. 78). That when he dictated letters relative to the records in the office he always had such records before him (Tr. 79).

Arlene Smith was called as a witness by defendant and testified that she was a deputy clerk of

Duchesne County from February, 1940, until November, 1942; that Mr. Goodrich, the County Clerk, dictated letters to her (Tr. 84-5). That when Mr. Goodrich dictated letters about the records in the office he would examine the records and dictate the letters from such records. That was his uniform practice. That she was in the office when defendant's Exhibit 3 was written so that she probably wrote the same (Tr. 85).

Edna T. Hartman was called as a witness by the defendant and testified that she worked as a deputy county clerk from 1935 to spring of 1941, except for two months in the summer; that she did some more work in the fall of 1943; that when Mr. Goodrich, the County Clerk, dictated letters as to matters relating to the records in the office, he always dictated the same with the records before him (Tr. 90).

J. Rulon Morgan was sworn and testified for the defendant bank: That he was the attorney for the Farmers and Merchants Bank and conducted the mortgage foreclosure proceedings in the two cases involved in this proceeding; that he testified in such foreclosure proceedings; that when he so testified he had before him the files in the matter of the Estate of Isabelle T. Harmston, and there was an oath of office of Roger T. Harmston (Tr. 94 and 95). This testimony of Mr. Morgan was received over the objection of counsel for plaintiff.

Notwithstanding Roger T. Harmston testified at considerable length he did not testify that he had not taken an oath of office in the matter of the Estate of Isabelle T. Harmston, deceased.

As stated in Appellants' Brief, the property involved in the case against the Labrums was purchased from the Bank after it secured the Sheriff's Deed, pursuant to the mortgage foreclosure proceedings.

As an additional Reason Why the Judgment Appealed From Should Be Affirmed. The Defendant Claims That The Court Was In Error In Its Ruling In The Following Particulars:

STATEMENT OF CROSS ERRORS

I. The Trial Court was in error in overruling the demurrer of the defendant to the effect that the allegations contained in plaintiff's first cause of action do not state sufficient facts to constitute a cause of action (R. 200).

II. The Trial Court was in error in overruling the demurrer of the defendant to the effect that the allegations contained in plaintiff's second cause of action do not state sufficient facts to constitute a cause of action (R. 201).

III. That the Trial Court erred in overruling the demurrer to each of the two causes of action alleged in the amended complaint upon the ground that the

allegations therein contained are uncertain and ambiguous in that no facts are therein alleged upon which plaintiff, in this case, claims that he has a meritorious defense to the foreclosure of the mortgages which were foreclosed by the defendant and which mortgage foreclosure proceedings plaintiff herein seeks to have vacated (R. 200 & 201).

IV. The Court was in error in overruling the demurrer to each of the causes of action upon the ground that the court was and is without jurisdiction to vacate or amend the judgments attacked because of the provisions of U.C.A., 1943, 104-14-4 (R. 201).

ARGUMENT

It will be noted that no claim is made that the defendant was not personally served with Summons. The Complaints in the foreclosure proceeding were filed May 9, 1941 (R. 177). Service of Summons was had personally on Roger T. Harmston May 13, 1941 (R. 178). It also appears from the pleadings that the Judgments sought to be vacated were entered on July 17, 1941 (R. 195 & 199). The sheriffs' deeds were issued on March 13, 1942 (R. 179 & 186). This action was commenced by filing a Complaint on February 20, 1948 (R. 160). Thus, 6 years, 9 months and 11 days elapsed between the time the plaintiff in this action and the defendant in the foreclosure action was served with Summons in the foreclosure action and the time the

present action was commenced. There is nothing in the record which even remotely indicates any justification for this long delay. Of course, the value of the property involved has doubtless increased, but such fact could not well be urged as an excuse for such delay. While we shall contend that the judgment appealed from should be affirmed because the facts found by the trial court must be sustained, we wish at the outset to direct the attention of the court to the questions of law raised by the demurrers to plaintiff's Amended Complaint.

POINTS ONE AND TWO

THE AMENDED COMPLAINT FAILS TO STATE SUFFICIENT FACTS TO ENTITLE PLAINTIFF TO ANY RELIEF.

While there are a few cases to the contrary, the authorities generally are to the effect that judgments shown by court records impart absolute verity, especially when attached collaterally and that extrinsic evidence is not admissible to show that the court was without jurisdiction. Freeman on Judgments 5 Edition, page 785, Sec. 375 and cases cited in note 14 to the text. On pages 792-93 of the same volume the learned author says:

“And it is so necessary that confidence should be reposed in court of a higher character as well as in records of such courts that on the whole and in view of all the considerations affecting the subject, it is the only safe rule to give the

decisions of courts of general jurisdiction full effect so long as they remain in force rather than to leave them open to be attached in every way and on all occasions. Being domestic judgments, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose and reviewed on error or by a new trial, and if the danger is imminent and special, relief can be temporarily, if not finally, obtained by application to a court of equity. Any other rule with regard to judgments of such courts would be attended in its application with very great embarrassment and would be very dangerous in its general operation. The general good clearly requires and has heretofore established the rule that domestic judgments of courts of general jurisdiction cannot be attached collaterally."

Again on Pages 807-808 of the same volume, it is said:

"A finding or recital showing that the court had jurisdiction is, in the vast majority of the states, not disputable when a judgment based thereon is drawn in question collaterally, particularly where the other portions of the record are silent as to jurisdictional steps as where the judgment finds that jurisdiction attached and no process or service or return of process appears in the record. In such cases the record will be taken to affirmatively show jurisdiction."

In support of the Text the following cases are cited, which support the text: *Kavanaugh vs. Hamilton*, 53 Colo. 157; 125 Pac. 512; *Virginia and West Virginia Coal Co., vs. Charles*, 251, Fed. 83; *Searl vs. Galbreath*

73 Ill. 269. To the same effect is *Salt Lake City vs. Industrial Commission of Utah*, 82 Utah 179; 22 Pac. (2), 1048.

The authorities also teach as we view them, that the attack made by the plaintiff upon the judgments of foreclosure is a collateral and not a direct attack. In Volume 1, page 608 of Freeman on Judgments, 5 Edition, a collateral attack on a judgment is thus explained:

“If on the other hand the direct purpose and aim of the proceeding is to obtain some other relief than the vacation or setting aside of the judgment, and the attack upon the judgment is merely incidentally involved, it will be considered a collateral attack, though relief from the judgment may also be necessary under the circumstances. Thus, where the primary relief in a suit is the recovery of land and the setting aside of a judgment through which defendants claim title is only an incident to that relief, the rights of the parties must be adjudged by the rules applicable to collateral attack.”

O'Neill vs. Bohien, 13 Idaho 721; 93 Pac. 20; *Wilcox vs. Superior Court*, 151 Appeal Division 297; 136 N. Y. Supp. 377.

In the case from Idaho just cited, the law is thus stated:

“The attack upon a judgment is collateral if the action or proceeding has an independent purpose and contemplates some other relief, or results, than the mere setting aside of the judgment, although the setting aside of the judg-

ment may be necessary to secure such independent purpose.”

To the same effect is *Intermill vs. Nash*, 94 Utah 271, 75 Pac. (2d) 157.

It will be noted from the Amended Complaint that the plaintiff in this action is, among other things, seeking an accounting of the rents and profits that defendant bank has collected since it went into possession of the property pursuant to its Sheriff's Deeds. Plaintiff also seeks to recover the land covered by the mortgage, including that sold to the Labrums. That being so, the attack upon the judgment is collateral and it appearing from the Amended Complaint that all of the proceedings had in the mortgage foreclosure proceedings are regular on their face, the plaintiff may not be heard to complain.

The doctrine above stated will also be found stated in Volume 1 of Black on Judgments, Sec. 252, Page 306.

Moreover “One who is objecting to a judgment on the ground that it was entered without personal jurisdiction must limit his subsequent appearance in the case to the sole purpose of having the judgment vacated. In this and other cases of act which amounts to a general appearance confers jurisdiction and defeats any objection based on its lack.” Freeman on Judgments, Volume 1, Sec. 265, page 530; *Burdette vs. Corgan*, 26 Kan. 102; *Whitehead vs. Post* 2 Ohio Div. Reprint 468; *Yorke vs. Yorke* 3 N.D. 343; 55 NW 1095; *Myers vs. Myers*, 27 Ore. 133; 39 Pac. 1022; *Gilbert*

Arnold Land Co. vs. O'Hare, 93 Wis. 194; 67 N.W. 138. Even though the applicant in terms limits his appearance to the special purpose of vacating the judgment if his application embraces other grounds than the jurisdictional one it is an appearance on merits. Freeman on Judgments, 5 Edition, Volume 1, Page 552, Sec. 280-281.

POINT 3

THE TRIAL COURT WAS IN ERROR IN FAILING TO SUSTAIN DEFENDANT'S DEMURRER TO EACH OF THE TWO CAUSES OF ACTION BECAUSE THE ALLEGATIONS OF PLAINTIFF'S AMENDED COMPLAINT ARE UNCERTAIN AND AMBIGUOUS.

It will be observed that in his Amended Complaint the plaintiff (touching the matter of having a defense to the foreclosure of the mortgages), contents himself with merely alleging that the plaintiff as administrator of the Estate of Isabelle T. Harmston, has now and there always has been a good and meritorious defense to the aforementioned civil actions (1931 and 1932), but has never had an opportunity to present the same (R. 182 and 88). Obviously, the language just quoted does not inform either the court or counsel of any facts which plaintiff claims constitutes a defense to the mortgage foreclosure suits. In this connection the authorities generally hold that the facts themselves, rather than the conclusions to be drawn from them, must be stated and it is not sufficient merely to state

facts from which a defense may be inferred. That the moving party should disclose his cause of action or grounds of defense with such particularity as enables the court to determine whether or not it is good and sufficient on the merits. Freeman on Judgments, 5 Edition, Vol. 1, page 560, Sec. 283 and cases there cited.

POINT 4.

THE COURT WAS IN ERROR IN OVERRULING THE DEMURRER TO EACH OF THE CAUSES OF ACTION UPON THE GROUND THAT THE COURT WAS AND IS WITHOUT JURISDICTION TO VACATE OR AMEND THE JUDGMENTS ATTACHED BECAUSE OF THE PROVISIONS OF U.C.A. 1943 - 104-14-4.

Under the provisions of U.C.A. 1943-104-14-4, a party who deems himself aggrieved, may, within ninety days after a judgment is rendered, apply to the court to be relieved from such judgment because of mistake, inadvertence, surprise or excusable neglect. So far as appears from the allegations of the Amended Complaint, none of the grounds mentioned in the statute are here present. It is made to appear from the allegations of the Amended Complaint that the plaintiff was personally served with summons; that from the time the Sheriff's Deed was issued the Bank was in the possession of the property and collected the rents and profits therefrom. So far as appears from the allegations of the Amended Complaint, nothing whatsoever was done by way of questioning the validity of

the decrees of foreclosure until the present proceeding was commenced, which, as we have heretofore stated in this Brief, was 6 years, 9 months and 11 days after Summons was served upon the plaintiff herein in the foreclosure action. Courts of equity do not look with favor on such stale claims. *People vs, Swalm*, 80 Cal. 199; 22 Pac. 66.

Turning now to the matters relied upon by the Appellant for a reversal of the judgment, it will be noted that he relies primarily upon the claim that the facts found by the trial court are not supported by competent evidence.

THE BURDEN OF PROOF WAS ON THE PLAINTIFF TO PROVE THAT THE DISTRICT COURT OF DUCHESNE COUNTY DID NOT HAVE JURISDICTION TO ENTER THE JUDGMENTS OF FORECLOSURE AND NOT ON THE DEFENDANT TO SHOW THAT THE COURT DID HAVE JURISDICTION TO ENTER SUCH JUDGMENTS OF FORECLOSURE.

In our research we find the authorities generally teach as stated by our own court in the case of *Intermill vs. Nash*, *supra*, that:

“A judgment upon its face, or the judgment roll upon inspection, may show, First, that the court had jurisdiction of the res and parties; second, that the court did not have jurisdiction of the res or of the parties, or third, the record may be silent on the question of jurisdiction. In the first instance, the record supplies all the evidence; in the second instance, the record

shows the judgment void, and in the third situation, the record imparting verity, jurisdiction in the court entering the judgment is presumed, since every court has the initial right and duty to pass upon its own jurisdiction."

In the mortgage foreclosure proceedings, the record shows that Roger T. Harmston, as administrator of the Estate of Isabelle T. Harmston, was personally served with summons, and it is so alleged in the Amended Complaint as to each of the causes of action (R. 178 and 185). In its Findings on each of the mortgage foreclosure proceedings, the court found that Roger T. Harmston has been appointed as administrator of the Estate of Isabelle T. Harmston, Deceased, and he is now the duly appointed, qualified and acting administrator of the Estate of Isabelle T. Harmston, Deceased (Trs. 101 and 117). Thus, looking to the record in the mortgage foreclosure proceedings, it affirmatively appears that the court had jurisdiction of the res and the parties. It is only by going outside of the mortgage foreclosure proceedings and examining the proceedings in the Matter of the Estate of Isabelle T. Harmston, that any documents are found missing touching the question of whether or not Roger T. Harmston was or was not the qualified administrator of the Estate of Isabelle T. Harmston. The records in that estate shows that Roger T. Harmston was appointed administrator and he furnished and signed a bond as ordered by the court. It is so admitted (Trs. 43). That Roger T. Harmston signed such bond (Trs.

57-58). He did not, however, remember signing or filing a bond (Tr. 44). Thus, the record in the Matter of the Estate of Isabelle T. Harmston affirmatively shows that all was done touching the appointment and qualification of Roger T. Harmston, as administrator of Isabelle T. Harmston's Estate, except taking the oath. There is nothing in the records of that estate, except the absence of any record showing that an oath of office was taken, that shows, or tends to show, that an oath of office was not taken. Thus, as stated by the authorities in the absence of a record to the contrary, the record imparts verity and jurisdiction of the court on entering a judgment is presumed, since every court has the initial right and duty to pass upon its own jurisdiction.

We are mindful that there was not involved in the mortgage foreclosure proceedings the question of the validity of any order or judgment rendered in the matter of the Estate of Isabelle T. Harmston. However, if an order or judgment had been made in the matter of the Estate of Isabelle T. Harmston, and such order or judgment were to be attached on the ground that Roger T. Harmston was not the administrator of such estate because the record failed to show that he had taken an oath of office, such a contention could not be sustained because the court would presume that he had taken his oath of office and the same had been lost and the clerk had neglected to make a record of the oath and Letters of Administration. Such as we

understand it is the doctrine of this court as announced in the case of *Intermill vs. Nash*, supra; *Amy vs. Amy*, 12 Utah 278, 142 Pac. 1121; *Hoagland vs. Hoagland*, 19 Utah 108; 57 Pac. 20. If the court would assume that an administrator had taken the oath of office in an attack made upon a judgment or order entered in the probate proceedings, for stronger reasons will the court assume that an oath of office was taken in another action where such court expressly finds that an oath of office had been taken.

THE EVIDENCE OFFERED BY THE DEFENDANT
WAS PROPERLY RECEIVED BY THE COURT.

As we gather from plaintiff's Brief, it is contended that no evidence was admissible touching the question of whether or not Roger T. Harmston had taken an oath of office other than that contained in the Probate Proceedings in the Matter of the Estate of Isabelle T. Harmston, deceased, and the records which the law provides should be made of such proceedings. If that is so, then the plaintiff must, of necessity, fail in his attempt to vacate the judgments of foreclosure which he seeks to vacate. As we have heretofore pointed out and as this and the courts generally hold, a judgment is not vulnerable to attack by a mere showing that the record fails to show that jurisdiction was acquired. If the attack is collateral, the record itself must affirmatively show that the court rendering the judgment was without juris-

diction to render the same before the judgment may be vacated. It is not sufficient to show merely that the record fails to show that the court did have jurisdiction because in such case the court will presume that the court rendering the judgment did have jurisdiction. On the other hand, in a direct attack on a judgment, evidence may be received to show that the court did not have jurisdiction in those cases where the record is silent as to whether or not the court did have jurisdiction and also in those cases where the court erroneously finds that it did have jurisdiction. Indeed it is of the very essence of making a direct attack upon a judgment to thereby permit the introduction of evidence, both oral and documentary, to show that the judgment was rendered without jurisdiction.

As we understand plaintiff's position in this case, he contends that by his pleading he is making a direct attack on the judgments in the foreclosure proceedings. If we are correct in our understanding of plaintiff's claim in such particular, then it follows that he may offer evidence that dehors the record if that court was in error when it found in the mortgage foreclosure proceedings that Roger T. Harmston was the duly appointed, qualified and acting administrator of the Estate of Isabelle T. Harmston, deceased. Even in a direct attack unless there is affirmative evidence showing that Roger T. Harmston was not such administrator, the court is bound to conclude that he was the administrator notwithstanding the record is silent as to whether he did or did not take an oath of office.

With the foregoing doctrine in mind, let us briefly examine the evidence offered at the trial of this case:

Roger T. Harmston was called as a witness, but he failed to testify that he did not take an oath of office. Indeed it is a fair inference from the evidence he did give that he did not know whether he had or had not taken an oath of office. Notwithstanding he had signed and filed a bond, he did not remember of ever signing or filing such bond (Tr. 44). If he could not remember signing or filing a bond, it is doubtful if he could remember anything about taking an oath of office.

The only other evidence offered by the plaintiff was the records and files in the Matter of the Estate of Isabelle T. Harmston, Deceased, together with certain books that the Clerk of the Court is required to keep and therein record certain proceedings and documents of the court. In the records which the law requires the clerk to keep, there was an absence of any record showing that an oath of office had been taken and of course there was no record showing that an oath of office had not been taken. While, in our opinion, the plaintiff failed to make out a prima facie case, even if his pleadings constitute a direct attack, still the defendant went forward with evidence tending to show that the plaintiff did take an oath of office at or about the time he filed his bond. Needless to say that if the plaintiff may offer evidence other than the records tending to show that the court rendering a judgment

was without jurisdiction to render the same, the plaintiff may offer similar evidence to show that the court did have jurisdiction.

Defendant called four witnesses who testified as to facts which showed or tended to show that Roger T. Harmston had taken an oath of office and Letters of Administration had issued to him prior to the time the actions were commenced to foreclose the mortgages held by the defendant bank. We have heretofore directed the court's attention to such evidence. Briefly the evidence is this: G. Arthur Goodrich testified that he was County Clerk of Duchesne County, Utah, from 1935 to 1942; that he dictated the document marked Exhibit 3 (Tr. 77); that it was his practice, while acting as County Clerk, in answering inquiries about the documents filed in his office, to have the documents before him when he dictated letters concerning the same; that while he did not actually remember what was in the files of the Estate of Isabelle T. Harmston when he dictated Exhibit 3, he would not have written that letter if an oath of office was not in the files (Trs. 78). Both Mrs. Arlene Smith and Mrs. Edna T. Hartman testified that they had worked in the office with Mr. Goodrich while he was County Clerk and that he always had the records of the court before him when he wrote letters concerning the contents thereof (Tr. 89-91). In the letter, Exhibit 3, it is in part said: "On March 8, 1941, Roger T. Harm-

ston filed his bond and oath of office and is now the acting and qualified administrator of the estate of Isabelle T. Harmston.”

J. Rulon Morgan testified that when he took the judgments of foreclosure which are involved in this controversy, he had before him the files in the Estate of Isabelle T. Harmston, deceased, and that in such files was an oath of office of Roger T. Harmston (Tr. 94). There is also evidence that the files in the matter of the estate of Isabelle T. Harmston had been somewhat mutilated and it was necessary to put a new cover on the same (Tr. 19). In the light of this evidence, and the fact that in the mortgage foreclosure proceedings the trial court found that Roger T. Harmston was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston, the trial court in this case could not have found other than as did the court in the mortgage foreclosure proceedings.

We have no quarrel with the law stated on Page 15 of Appellants' Brief where a quotation is taken from 32 Corpus Juris Secundum, Page 738, (inacurately stated to be on Page 728), Sec. 809 (a), where it is stated “That proceedings, orders, judgments and decrees of courts 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 converse is also true.

In this case the evidence shows that when the mortgage foreclosure proceedings were had there was no oath of office of Roger T. Harmston in the matter of the estate of Isabelle T. Harmston, but no such oath of office could be found at the time of the trial of this case in the court below. It would be a travesty on the law if a judgment of a court could be rendered vulnerable to attack solely because a part of the files in a matter had been lost or destroyed and the Clerk of the Court had neglected to make a proper record thereof.

ROGER T. HARMSTON WAS THE DE FACTO IF NOT THE DE JURE ADMINISTRATOR OF THE ESTATE OF ISABELLE T. HARMSTON, DECEASED, AND AS SUCH SERVICE OF SUMMONS UPON HIM WOULD BE BINDING UPON THE ESTATE.

The record in this case shows not only that the plaintiff was, by the court, appointed administrator of the estate of Isabelle T. Harmston, and that he furnished and signed a bond as fixed by the court, but also that he collected some of the rents of the property belonging to the estate (Trs. 46).

If the plaintiff did not take the oath of office when he filed his bond, he was negligent in failing to do so and he may not take advantage of his own negligence. *Harris v. Coates, et al*, 69 Pac. 475. To the same effect is *Harris v. Chipman*, 9 Utah 101. In the case of *Anderson v. Union Pac. R. R. Co.*, 76 Utah

324, 289 Pac. 156, it is held that an action brought by an administrator before he has qualified will not be dismissed if he qualifies during the course of the trial. In the case of *Colorado Development Co. v. Creer*, 80 Pac. (2d) 914; 920 it is said: "One may not at the same time perform the functions of an office and maintain successfully that he has abandoned it. *Tooele County v. DeLa Mare*, 90 Utah 46, 59 Pac. (2d) 1155; 106 A.L.R. 182."

Before concluding this brief we should probably call to the attention of the court the case of Roger T. Harmston, et al vs. Kenneth Labrum, et al. In that case the plaintiff seeks to quiet title to the lands therein described. The Labrums acquired title to those lands by purchase from the Farmers and Merchants Bank after the Bank had secured a Sheriff's Deed pursuant to its mortgage foreclosure. As we understand plaintiffs' position, it is that the bank acquired no interest by its mortgage foreclosure proceedings and therefore had no title to pass on to the Labrums.

It will be noted that no attack whatsoever is made upon, nor is there any mention of the decree of foreclosure in the complaint against the Labrums. That being so, any attempt to attack the mortgage foreclosure decrees in that case would clearly be a collateral attack on the judgment in the foreclosure proceedings,

and as such binding upon the plaintiff under the doctrine announced by the cases heretofore cited from this and other jurisdictions touching the binding effect of judgments when an attempt is made to attack the same in a collateral proceeding.

We submit the judgments appealed from should be affirmed with costs to respondents.

Respectfully submitted,

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