

1951

Rober T. Harmston v. Farmers and Merchants Bank et al : Petition for a Re-hearing and Brief in Support Thereof

Utah Supreme Court

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J. Rulon Morgan; Elias Hansen; Attorneys for Respondents;

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

Appellant,

vs.

FARMERS AND MERCHANTS BANK,
a Utah Corporation,

Respondent,

AND

ROGER T. HARMSTON, as the Adminis-
trator of the Estate of Isabelle T.
Harmston, deceased, HELEN E. GIL-
LIS, MARION EUGENE HARMSTON,
ROGER T. HARMSTON, AND FRED
HARMSTON,

Appellants,

vs.

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

Defendants.

PETITION FOR A RE-HEARING AND
BRIEF IN SUPPORT THEREOF

FILED

OCT 20 1952

J. RULON MORGAN,
ELIAS HANSEN,

Clerk, Supreme Court, Utah

Attorneys for Respondents.

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THAT IN ITS OPINION HERETOFORE RENDERED, THIS COURT ERRED IN HOLDING THAT THE "TRIAL COURT ERRED WHEN IT ADMITTED PAROL EVIDENCE TO PROVE THAT THE FACTS WERE DIFFERENT THAN SHOWN BY THE RECORD" IN THE PROBATE PROCEEDING IN ISABELLE T. HARMSTON ESTATE.

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IN THE SUPREME COURT of the STATE OF UTAH

ROGER T. HARMSTON, as Administrator
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Deceased,

Appellant,

vs.

FARMERS AND MERCHANTS BANK,
a Utah Corporation,

Respondent,

AND

ROGER T. HARMSTON, as the Adminis-
trator of the Estate of Isabelle T.
Harmston, deceased, HELEN E. GIL-
LIS, MARION EUGENE HARMSTON,
ROGER T. HARMSTON, AND FRED
HARMSTON,

Appellants,

vs.

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

Defendants.

Case No.
7614

PETITION FOR A RE-HEARING AND BRIEF IN SUPPORT THEREOF

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of Utah:*

COME NOW the defendants in the two above en-
titled causes and move that this Court grant them, and
each of them, a re-hearing for the following reasons and
upon the following grounds:

1. That in the opinion heretofore handed down in the above entitled causes, this Court erred in overlooking and failing to consider the fact that the trial court at the time it ordered the foreclosure of the mortgages involved in the above entitled action found as a fact, "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."

2. That in its opinion heretofore rendered, this Court erred in holding that the "trial court erred when it admitted parol evidence to prove that the facts were different than shown by the record" in the probate proceeding in Isabelle T. Harmston estate.

3. That in its opinion heretofore rendered, this Court erred in concluding that *Wigmore on Evidence*, 3rd Ed., Sec. 2450, *Hamill v. Schlitz Brewing Co.*, 165 Iowa 266, 145 N.W. 511; *Cazell v. Cazell*, 133 Kan. 766, 3 Pac. (2d) 479; *In Re Burnett's Estate*, 11 Cal. (2d) 259, 79 Pac. (2d) 89; *Turley v. Tobin* (Texas), 7 S.W. (2d) 949 and *State v. Poole*, 68 Mont. 178, 216 Pac. 798 announce any doctrine to the effect that the Trial Court erred by admitting evidence touching defendants' claim that there was an oath of office of Roger T. Harmston in the files in the Estate of Isabelle T. Harmston at the time of the foreclosure of the two mortgages involved in this controversy.

4. This Court erred in concluding that even if the evidence had been admissible in this action, it is doubtful whether it was sufficient to uphold the court's order to correct the records, in view of the fact that not only were the Oath of Office and Letters of Administration missing from the files, but there is also lacking any record of such filing in 1941 in the book kept for such purpose in the office of the County Clerk.

5. This court erred in holding that "By admitting evidence contradicting the record in the probate proceeding without a direct issue in the pleadings that the record was not correct, this Court cannot say that the rights of appellants were not substantially affected."

WHEREFORE, defendants pray that a re-hearing be granted in the above entitled causes to the end that the errors above mentioned be corrected and the judgments appealed from be affirmed.

FARMERS AND MERCHANTS BANK,
KENNETH LABRUM, JEAN CRUMBO
LABRUM, his wife, EDGAR LABRUM
and VIDA LABRUM, his wife.

By J. RULON MORGAN and ELIAS
HANSEN,

Their Attorneys.

CERTIFICATE OF MERITS

I, ELIAS HANSEN, one of the attorneys for the defendants in the above entitled causes, hereby certify that in my opinion there is merit to the foregoing Petition for a Re-Hearing, and that the record in said causes

should be re-examined to the end that the errors above mentioned be corrected and the judgment appealed from affirmed.

(Signed) ELIAS HANSEN

ARGUMENT

POINT I.

THAT IN THE OPINION HERETOFORE HANDED DOWN IN THE ABOVE ENTITLED CAUSE, THIS COURT ERRED IN OVERLOOKING AND FAILING TO CONSIDER THE FACT THAT THE TRIAL COURT AT THE TIME IT ORDERED THE FORECLOSURE OF THE MORTGAGES INVOLVED IN THE ABOVE ENTITLED ACTIONS FOUND AS A FACT "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 \$4500.00, AND (TR. 117) AS TO THE FORECLOSURE OF THE MORTGAGE FOR \$2500.00.

At the outset of this controversy it should be noted that in each of the mortgage foreclosure proceedings, the trial court found "That Roger T. Harmston has been appointed as administrator of the Estate of Isabelle T. Harmston, deceased (Tr. 101 and 117)." In the opinion heretofore written that fact has not been mentioned and apparently it was overlooked. The fact that the trial court has once determined that question is not only evidence of the fact that Roger T. Harmston had taken the oath of office when the mortgage foreclosure

proceedings were had, but as we read the authorities, such finding of the court is of controlling importance. This is not a case where the defendant has not been served with summons. He was personally served by the Sheriff of Duchesne County. In the summons so personally served upon Roger T. Harmston he is designated as the administrator of the estate of Isabelle T. Harmston, deceased. Therefore, he must have known that he was served as the administrator of such estate because both the complaint and the summons designated "Roger T. Harmston, as administrator of the estate of Isabelle T. Harmston, deceased." If Roger T. Harmston had entered his appearance in the mortgage foreclosure proceeding and set up as a defense that he was not the administrator of the estate of Isabelle T. Harmston, deceased, and after a hearing was had on that issue the Court had found, as it did in the mortgage foreclosure proceedings, that Roger T. Harmston was the duly appointed and qualified administrator of the estate of Isabelle T. Harmston, we think no one would contend that after a lapse of nearly seven years, Roger T. Harmston would or could be heard to come in and say that the mortgage foreclosure proceeding should be set aside because the court records in the matter of the Estate of Isabelle T. Harmston fail to show that Roger T. Harmston had taken an oath of office. In these cases, Roger T. Harmston did not answer, but for nearly seven years he did nothing notwithstanding the defendants were in possession of the property that was foreclosed, and a Sheriff's deed issued to the purchaser. Under

this state of facts, it is proper to inquire, "Is not the defendant bound by the trial court's finding in the mortgage foreclosure proceedings as effectively as if he had actually appeared and contested the claim that he was the qualified administrator of that estate?" As we read the authorities, the answer to such question must be in the affirmative. The authorities teach that the failure of a defendant, who is personally served with summons, constitutes admission of the facts alleged in a complaint. The law in such particular is thus stated in *49 C.J.S., page 359, Sec. 201*, "A default has been held to admit the capacity in which plaintiff sues, that the defendant is the person named in the writ and intended to be sued, that he occupies the position or status, or fills the relation to others which is alleged in the declaration, and that the court has acquired jurisdiction of his person and of the cause of action. It also admits the due execution and validity of the instrument sued on, that plaintiff's claim or demand is just and legal and that defendant has no defense to the action." Numerous cases from both state and federal courts are collected in footnotes which support the text. The case of *Utah Credit Men's Association v. Bowman*, 38 Utah 326, 113 Pac. 63, is in harmony with the text above cited and the cases in support thereof, in that it is held that the Clerk of a court may enter a judgment without taking evidence when the statute so authorizes. It should be observed, however, that no claim is made in this case that no evidence was taken to establish the fact that Roger T. Harmston had taken his oath of office. The evidence is all to the contrary.

At the hearing of this case before the trial court, Roger T. Harmston did not deny that he had taken the oath of office prior to the time the mortgages were ordered foreclosed. Suppose the defendant, Roger T. Harmston, had answered in the proceeding to foreclose the mortgages and denied that he had taken an oath of office prior to the time of such proceeding and the evidence had been the same as in this case, and the trial court had found as it did in the present case and no appeal had been taken attaching the finding that Roger T. Harmston was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston, we believe no authority can be found that would permit Roger T. Harmston to wait nearly seven years and then come into court and attack such finding solely upon the ground that the record in the matter of the estate of Isabelle T. Harmston fails to show that he had taken the oath of office. To permit this to be done would render judgments which are regular on their face to be set aside upon the sole ground that they were not supported by a preponderance of the evidence, and would reward a party defendant by permitting him to interpose his claimed defense after a lapse of nearly seven years, notwithstanding the defendant has been in possession of the property involved in the controversy without any claim by the plaintiffs and has sold some of the property to a bona fide innocent purchaser.

If judgments may be set aside under such a state of facts, then indeed have judgments, which are in full respects regular, lost the sanctity which this and the

courts generally have accorded to them. Any examination of the mortgage foreclosure proceeding would not reveal that Roger Harmston had not taken his oath of office, but on the contrary, would show by the court's expressed findings that he had taken his oath of office.

If the opinion heretofore written is to become the law of this state, one could not safely rely on a judgment regular on its face which had stood for nearly seven years without being attacked, but on the contrary must run the risk that perchance some of the evidence offered in support of the judgment was erroneously received and did not support the judgment. In many cases where default judgments are taken without a reporter taking down the evidence, it would be impossible to furnish the necessary proof to sustain judgments. It is for that very reason that this and other courts have uniformly held 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 the parties, or Third, the record may be silent on the question of jurisdiction.”

“In the first instance, the record supplies all the evidence; on the second instance, the record itself shows the judgment void, and in the third situation the record importing 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.”

Intermill v. Nash, 94 Utah 271; 75 Pac. (2d) 157.

In this case the judgment on its face affirmatively shows that the Court had jurisdiction of the res and the parties. Indeed no claim is or could successfully be made that the court in the mortgage proceedings was without jurisdiction of Roger T. Harmston. He was duly and regularly personally served with Summons. Nor may it be said that the Court was without jurisdiction of the res that is the property covered by the mortgage. A *lis pendens* was filed. The property is in Duchesne County where the court was held. District courts have jurisdiction of mortgage foreclosures. The most that can be said is that an examination of the probate proceedings in the Isabelle Harmston Estate fail to show that Roger T. Harmston had taken an oath of office at the time of the mortgage foreclosure proceedings. The record and files in that case do show that Roger T. Harmston was appointed administrator and that he had furnished a bond as by the Court order directed. Thus, if a sale of property had been made or other acts performed by Roger T. Harmston as administrator of the Estate of Isabelle T. Harmston, an application of the doctrine announced by this court in the case of *Intermill v. Nash*, *supra* that when the record is silent on the question of jurisdiction "the record importing 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." This case is, of course, much stronger than would be a case where the question of whether or not Roger T. Harmston had taken the oath of office was directly brought in question in the matter of the estate of

Isabelle T. Harmston, deceased. In this case there is a total absence of anything in the record of the mortgage foreclosure proceeding which shows or tends to show that there was anything irregular or defective in those proceedings. The records in those proceedings are all to the contrary.

In the case of *Cazell v. Cazell*, 133 Kan. 766; 3 Pac. (2d) 479, it is held that the Judge's recollection of circumstances of rendering judgment and of the Court's intention has force of evidence on question of property of nunc pro tunc order to amend a decree of divorce. If that be true, certainly the fact that the trial court in the proceeding found that Roger T. Harmston was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston, deceased, is evidence, and we believe under the authorities conclusive evidence that Roger T. Harmston was such administrator. It should be kept in mind in this case that even under plaintiff's theory, it is the burden of the Harmstons to secure an amendment of the decree of foreclosure to the effect that Roger T. Harmston was not the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston, deceased, at the time of the mortgage foreclosure. So long as such findings remain a part of the record in those proceedings, the mortgage foreclosures must stand because that is the only basis for appellants' claim. Obviously, there cannot be a finding in the mortgage foreclosure proceeding both ways on that question or that Roger T. Harmston was and was not the duly appointed, qualified and acting administrator

of the estate of Isabelle T. Harmston. In determining that question certainly the finding of the trial court in the mortgage foreclosure proceeding is evidence of the fact, if not, as we contend, conclusive evidence of the fact that Roger T. Harmston was the duly appointed, qualified and acting administrator of that estate.

POINT II.

THAT IN ITS OPINION HERETOFORE RENDERED THIS COURT ERRED IN HOLDING THAT THE TRIAL COURT ERRED WHEN IT ADMITTED PAROL EVIDENCE THAT THE FACTS WERE DIFFERENT THAN SHOWN BY THE RECORD IN THE PROBATE PROCEEDING OF ISABELLE T. HARMSTON, DECEASED.

None of the evidence offered by the defendants in the trial of this case was calculated to establish any facts that were at variance with the record in the matter of the estate of Isabelle T. Harmston, deceased. The most that can possibly be said about such evidence is that it tended to show that Roger T. Harmston in truth and fact had taken an oath of office as administrator of that estate and the same had been lost or destroyed. On the contrary, what had occurred in the estate of Isabelle T. Harmston, deceased, was collateral to the issue in this case.

The only issue in this case was whether or not the trial court in the mortgage foreclosure proceedings had jurisdiction to find that Roger T. Harmstrom was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmstrom's estate at the time of the foreclosure of the mortgages. The evidence offered by the

defendants was offered to establish the fact that the trial court not only had jurisdiction to find such fact, but that such finding was not erroneous, but was in accord with the fact. It was the plaintiffs who were attacking the judgments of the court in the mortgage foreclosure proceedings and in furtherance of such attempt, sought to show by the absence of any record of an oath of office in the probate proceedings. What Roger T. Harmston sought to show, and in order to prevail must show, is that the trial court erroneously 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 and apparently because of such error, the trial court was without jurisdiction to decree a foreclosure of the property covered by the mortgages. In passing, it may be observed that even if, contrary to our contention, the trial court erroneously found that Roger T. Harmston was such administrator, such error would not deprive the trial court of jurisdiction. It is so held by this court in the case of *Atwood v. Cox*, Utah 437; 55 Pac. (2) 377; where numerous authorities are collected.

Even if this were a proceeding in the matter of the estate of Isabelle Harmston, deceased, involving the validity of some act of an appointed administrator, the fact that the oath of office was absent from the files would not render the act invalid. U.C.A. 1943, 104—1-7 provides:

“No order or decree affecting the title to real property heretofore or hereafter made in any probate or guardianship matter, shall be held to be void at the suit or instance of any person claiming adversely to the title of the decedent or ward, or under a title not derived from or through the decedent or ward, on account of any want of notice, defect or irregularity in the proceedings, or of any defect or irregularity in such order or decree, if it appears that, before the order or decree was entered, the executor, administrator or guardian, as the case may be, was appointed by a court of competent jurisdiction upon such notice as was or may be prescribed by law; and in a probate matter in which a competent court shall have appointed an executor, administrator or guardian upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased or under the ward, on account of any such want of notice, defect or irregularity, in any other manner than on direct application to the same court, made at any time before distribution, or on appeal.”

U.C.A., 1943, 104-1-8 provides:

“An object to any paper, petition, decree or order in any probate or guardianship matter, for an erroneous or defective statement or determination of any fact necessary to jurisdiction which actually existed, or for an omission to find or state any such fact in such paper, petition, decree or order, is available only on direct application to the same court, or on appeal.”

The statutes above cited are construed in the cases of *Barrett v. Whitney*, 36 Utah 574; 106 Pac. 522 and

Erickson v. McCullough, 91 Utah 159; 63 Pac. (2d) 109. This court has also held in the case of *Hatch v. The Lucky Bill Mining Co.*, 25 Utah 405; 71 Pac. 865 that where the directors of a corporation have taken an oath of office but neglected to file the same as by law required "the irregularity is not of sufficient importance to authorize a court of equity to set aside the proceedings (the levying of an assessment) and especially so where, as in this case, no one appears to have been mislead or injured thereby." To the same effect is the case of *Jones v. Bonanza Mining & Milling Co. et al*, 32 Utah 440; 91 Pac. 273.

While the foregoing statutes are not directly in point, they do show that the legislative branch of government and the courts of equity are very reluctant to set aside decrees of courts, especially courts of general jurisdiction because of some irregularity or omission not going to jurisdiction. If as the authorities just cited hold, irregularities or omissions invalidating title to real estate may not be maintained "in any other manner than on direct application to the same court, made at any time before distribution or on appeal" where an administrator has been appointed upon due notice, then for much stronger reasons the title to real estate may not be successfully attacked where, as here, the court found that Roger T. Harmston was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston at the time the decrees foreclosing the mortgages were entered.

In its opinion, the Court seems to attach considerable importance to the fact that our statute, (U.C.A. 1943, 102-

5-1) requires the clerk to record letters of administration to which the oath of office is attached in books to be kept by him in his office for that purpose, but no such record was made. Of course, if, as the evidence shows, the oath of office disappeared soon after it was taken and before a record was made thereof, it is of no special significance that it does not appear of record. Obviously, when the letters of administration and the oath of office attached thereto disappeared, the same could not be recorded.

POINT III.

THAT IN ITS OPINION HERETOFORE RENDERED THIS COURT ERRED IN CONCLUDING THAT WIGMORE ON EVIDENCE, 3rd Ed. Sec. 2450, HAMILL v. SCHLITZ BREWING CO., 165 Iowa 266; 145 N.W. 511; CAZELL v. CAZELL, 133 Kan. 766; 3 Pac. (2d) 479; IN RE BURNETT'S ESTATE, 11 Cal. (2d) 259; 79 Pac. (2d) 89; TURLEY v. TOBIN (TEXAS) 7 S.W. (2d) 949 AND STATE v. POOLE, 68 Mont. 178, 216 Pac. 798 ANNOUNCE ANY DOCTRINE TO THE EFFECT THAT THE TRIAL COURT ERRED BY ADMITTING EVIDENCE TOUCHING DEFENDANTS' CLAIM THAT THERE WAS AN OATH OF OFFICE OF ROGER T. HARMSTON IN THE FILES IN THE ESTATE OF ISABELLE T. HARMSTON AT THE TIME OF THE FORECLOSURE OF THE TWO MORTGAGES INVOLVED IN THIS CONTROVERSY.

We have carefully examined the foregoing authorities and cases, but as we read them they are not applicable to the facts in this case. In none of those cases does it appear that in the case immediately before the court, the validity of which is being brought in question, is there a finding, which if true, defeats the claim that the court

was without jurisdiction to render the judgment. In this case there is a total absence of any evidence of any infirmities in the mortgage foreclosure proceedings. In order to find any evidence to support appellant's claim, he must not only go outside of the mortgage foreclosure proceedings, but he must ignore or strike down the finding that Roger T. Harmston was the duly appointed qualified and acting administrator of the estate of Isabelle T. Harmston, deceased. Looking solely to the failure of the records in the Isabelle T. Harmston estate to show that Roger T. Harmston had taken an oath of office and the express finding in the mortgage foreclosure proceedings that he had taken the oath of office prior to the time of the entry of the decree of foreclosure, it would seem that the latter is entitled to at least greater weight than former.

The cases and authorities cited in the opinion are founded on the proposition that a judgment should be full and complete within itself and that one who seeks relief under a judgment must first secure a full and complete judgment. That doctrine has no application here because in this case there is no infirmity in the foreclosure proceedings. They are full and complete in every particular. The appellants and not the respondents are seeking to have the judgment changed. If the judgment in the mortgage foreclosure proceeding, after a lapse of nearly seven years, may attack and have held for naught the findings of fact in the mortgage foreclosure proceedings because of a claim that there was not proper evidence to support the same by reason of the failure of the record

in the probate proceedings to reveal that Roger T. Harmston had taken an oath of office in that estate, there is no reason why the mortgage foreclosure proceeding may not be attacked because of a failure of some other probate proceeding record through which Isabelle Harmston acquired title fails to show that the administrator thereof failed to take the oath of office and thus cast upon the person claiming title through a mortgage foreclosure the burden of showing that such an oath of office was taken notwithstanding the court in such other probate proceedings had found that an oath of office had been taken.

Moreover the great weight of authority as we find them is against those cited in the opinion heretofore rendered in this case.

The matter of the proof of proceedings in courts is discussed in Freeman on Judgments—Fifth Edition, page 2145. It is there stated that in some states it is necessary to re-establish a judgment-roll before it may be admitted in evidence, but then goes on to say: This view is in conflict with that expressed by Mr. Greenleaf in his work on Evidence, in which he lays down the following rule: "If the record is lost and is ancient, its existence and contents may sometimes be presumed, but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence where the case does not from its nature disclose the existence of other and better evidence." In a footnote to the text, it is stated that the rule stated by Greenleaf is beyond doubt sustained by the

weight of authority. Numerous cases from both federal and state courts are cited in footnote Number 15. We have examined such cases and they support the text. It would extend this brief to an unreasonable length to review all of the cases there cited and to do so would probably not substantially add to respondents' position because in those cases, as well as those cited by the court in its opinion, the situation presented to the court was one in which a judgment was relied upon and sought to be enforced in the proceeding directly brought in question. No such question is here presented. Here, as we have repeatedly pointed out, the decrees of foreclosures were free from any and all infirmity. In order to make out a case casting any question of the validity of the decrees of foreclosure, resort was had to an entirely different proceeding from the one brought in question. In our investigation, we have been unable to find a case or other authority where that doctrine has been applied to facts similar to those here involved. Indeed the trial court having found in the mortgage foreclosure proceeding that Roger T. Harmston was at the time of the mortgage foreclosure proceeding the duly appointed qualified and acting administrator of the estate of Isabelle T. Harmston, deceased, it would seem to be a useless proceeding to have the court again make such a finding if indeed the respondents have such an interest as will entitle them to maintain such a proceeding in light of the fact that they have already such a finding and of the further fact that Roger T. Harmston was such administrator of that estate at the time of the trial. Certain it is that the trial

court could not well make a finding that Roger T. Harmston was not such administrator until and unless it first set aside the finding in the mortgage foreclosure proceedings that Harmston was such administrator. The law abhors inconsistent findings as between the same parties where there is involved the same property rights.

POINT IV.

THE COURT ERRED IN CONCLUDING THAT EVEN IF THE EVIDENCE HAD BEEN ADMISSIBLE IN THIS ACTION, IT IS DOUBTFUL WHETHER IT WAS SUFFICIENT TO UPHOLD THE COURT'S ORDER TO CORRECT THE RECORDS, IN VIEW OF THE FACT THAT NOT ONLY WERE THE OATH OF OFFICE AND LETTERS OF ADMINISTRATION MISSING FROM THE FILES, BUT THERE IS ALSO LACKING ANY RECORD OF SUCH FILING IN 1941 IN THE BOOK KEPT FOR SUCH PURPOSE IN THE OFFICE OF THE COUNTY CLERK.

We have in part at least discussed the question which we wish to raise under this heading.

The only evidence which lends any support to the claim that Roger T. Harmston did not take an oath of office is the fact that the record of the probate proceedings fail to show that such oath of office was taken. Roger T. Harmston, though present in court at the time of the hearing, did not deny that he had taken the oath of office. The evidence of Rulon Morgan is that he had the files in the probate proceedings before him at the time of the hearing of the mortgage foreclosure proceeding. The clerk and his two assistants all testified that when he wrote a letter, such as the one written to Mr. Morgan

stating that an oath of office had been taken by Mr. Harmston, he, the clerk, always had before him the record concerning which he wrote and what is of greater weight, if not conclusive, is the fact that the trial court found that Roger T. Harmston was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston when the mortgage foreclosure proceedings were had. In addition thereto, is the fact that notwithstanding Roger T. Harmston was sued as such administrator, personally served with summons as such administrator, yet he failed to answer or deny such fact until nearly seven years after the foreclosure decree was entered.

In light of these facts, some of which were apparently overlooked because they are not mentioned in the opinion, we most earnestly urge that this cause be reconsidered. It seems, to say the least, unlikely that an attorney-at-law would be so forgetful of his duties as to fail to assure himself that an oath of office had been taken by the person against whom suit is being brought to foreclose a mortgage executed by one who is deceased, or that he would testify, as did Mr. Morgan in this case, that the oath of office was in the files at the time of the entry of the decree of foreclosure. It seems equally improbable that the trial judge would be so neglectful of his duties as to find as a fact that Roger T. Harmston was the duly appointed, qualified and acting administrator of the estate of Isabelle T. Harmston, deceased, if such were not the fact. So also Mr. Harmston was personally served with summons as the administrator of the estate of Mrs.

Harmston on May 13, 1941, yet he paid no attention to the fact that he was so served and that the Farmers and Merchants Bank has been in possession of the mortgaged property and collected the rents and profits therefrom since March 12, 1942, when it secured a Sheriff's Deed until the present action was brought. If such evidence is not sufficient to show that an oath of office was taken by Harmston, then indeed have judgments and decrees lost the sanctity which, as we have heretofore pointed out, have been most zealously upheld by the authorities generally, as well as by this court.

POINT V.

THIS COURT ERRED IN HOLDING THAT "BY ADMITTING EVIDENCE CONTRADICTING THE RECORD IN THE PROBATE PROCEEDING WITHOUT A DIRECT ISSUE IN THE PLEADINGS THAT THE RECORD WAS NOT CORRECT, THIS COURT CANNOT SAY THAT THE RIGHTS OF APPELLANTS WERE NOT SUBSTANTIALLY AFFECTED."

While it is true that there is no direct issue in the pleadings that the record in the probate proceedings were not correct, it is also true that there was no occasion to try out in this proceeding the matters involved in the probate proceedings. In order to show that the court was without jurisdiction to enter the decree of foreclosure, the appellants offered the record in the probate proceedings to show that Roger T. Harmston had not taken an oath of office and the respondents offered evidence that he had taken an oath of office. As we understand the law it is not the function of pleadings to raise

issues as to the admissibility of evidence to support or defeat an issue in a case. The issue in this case was whether or not the court had jurisdiction to enter the decree of foreclosure and what occurred in the probate proceedings was not and could not well be made an issue by the pleadings. It is elementary that evidence need not be pleaded. Moreover, if it were necessary that an issue be made in the pleadings of such nature it was the appellants and not the respondents duty to raise such issue. They were the ones who brought into these cases the matter of the failure of Roger T. Harmston to take an oath of office. If it were necessary to make an issue in the pleadings upon that question that burden was on the appellants as they were the ones who sought relief from the mortgage foreclosures. That being so, the appellants may not be heard to complain if they failed to allege the facts necessary to have the foreclosure proceedings set aside. The only pleading required of the respondents was a general denial of the allegations relied upon by the appellants for relief. If, as we have heretofore contended, the rights of the appellants were lawfully foreclosed, then, of course, the rights of the appellants may not be said to be affected, because if the foreclosure proceedings are to be sustained, the appellants are without any rights.

We submit that a rehearing should be granted to the end that the cause be re-examined and the errors above mentioned be corrected and the judgment appealed from be affirmed.

Respectfully submitted,

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