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Rober T. Harmston v. Farmers and Merchants Bank et al : Reply Brief of Appellants on Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ROGERS T. HARMSTON, as Ad-
ministrators 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-
ministrators 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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**REPLY BRIEF OF APPELLANTS ON
PETITION FOR REHEARING**

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7614

REPLY BRIEF OF APPELLANTS ON PETITION FOR REHEARING

Comes now appellants and file this, their reply to
respondents petition for re-hearing:

POINT ONE

The same answer is still appropriate and in point as is set forth in appellant's reply brief heretofore filed in these proceedings concerning the respondents' argument set forth with respect to this point.

I cannot urge too strongly, however, that *this is an action in equity*, for relief from a judgment, on the grounds of lack of jurisdiction of the person of the defendant and that a court of equity may undo a wrong comprehended in the judgment complained of, by compelling the restoration of the status quo, is well settled and sustained by the authorities of this state and other jurisdiction as cited in appellant's reply brief and as set forth in 31 Am. Jur. Sec. 622, page 210 and this practice of directly attacking a judgment in equity should not be confused with the practice of opening judgments by the court which rendered the judgment. 31 Am. Jur. 712-713, pages 263-264.

As a matter of fact, at the very outset it was stipulated by and between counsel for the parties, that the only issue in the case, was the question of the regularity of the service of process (Tr. 3-4), and on that issue alone the matter was tried and the question briefed and the authorities with respect thereto cited in appellant's reply brief, which we again respectfully refer to the court, as a reply to the point here made.

POINT TWO

Point two was fully discussed and supporting citation furnished in appellant's assignments of error 1-2-3,

discussed on pages 14 to 17 inclusive of appellant's Brief on Appeal.

The case of *Atwood vs. Cox* (Utah), 55 Pac. 2nd 377, cited by respondent, is concerned with the use and application of a "Writ of Prohibition" and very aptly defines and sustains appellant's theory in this case, i.e., the right and jurisdiction of the court to proceed in the first instant to foreclose the mortgages and the court in quoting the law says, "Jurisdiction can never depend upon the merits of the case but only upon the right to hear, determine, and decide, if at all." "The test of jurisdiction of the court is not whether there was good cause for the relief but whether the court had the power to make the inquiry *and this* inquiry must be sought for in the general nature of the powers of the court or the general laws defining jurisdiction and, of course, fundamentally that depends upon the service of process." "It does not depend upon whether the conclusion in the course of the action is right or wrong or whether the court's methods were regular." "Jurisdiction is the authority to hear and determine the cause." "It is this very right to hear, determine and decide, whether rightfully or wrongfully, what we denominate "jurisdiction." And that is precisely the question in the case at bar. Did the court at the outset have jurisdiction of the person of Rogers T. Harmston, *as the Administrator of the Estate of Isabelle T. Harmston*, that empowered the tribunal to determine and decide the issues of foreclosure? That is the crux, the meat, the whole question. And, of course, the statutes 102-1-7 and 102-1-8 (erroneously cited as 104-

1-7 and 104-1-8 by respondent) have no application, but refer to probate matters. The decree in the first instant was one of foreclosure in a civil proceeding and the case at bar is an equitable action contesting the validity of the first decree. Of course, the jurisdiction of the court was not in question in any of the cases cited by respondent in its brief on this point and therefore have no application to the question at bar.

POINT THREE

The principal of law stated by this honorable court, in its opinion with respect to this point, is correctly reflected in the cases cited. The principal is well decided that courts speak only through their records and such records can not be impeached collaterally.

POINT FOUR

The appellant is satisfied this court, in its opinion, is correct on this point but does not believe the court went far enough. This case, as heretofore stated, was tried on one issue: "*The jurisdiction of court over the person of the defendant.*" And on that point the appellant offered the record which was silent as to Letters of Administration and the recording thereof. Conclusively showing that at the time of service the defendant was not the Administrator of decedent's estate.

Respondent had their day in court and failed to refute that fact. Why is not that the end of the litigation in these proceedings?

And it must be remembered the statutory provision U.C.A. 102-5-1 required not only the execution and filing of the letters but the recording thereof. "The integration of a transaction, that is, the reduction to a single document, is either voluntary or compulsory. Where it is voluntary, it may be integrated or not, as the parties choose. If involuntary, the law compels integration. The process of embodying a jural act in a single memorial may be termed "The integration of the act" and where a jural act is embodied in a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what was the terms of their act." Wigmore on Evidence, 3rd Ed. Sec. 2425, and "this is so even though the record has not been made up, for herein appears the compulsory nature of the rule, as distinguished from the voluntary integration." And the absence of the record can not be supplied by parole for the rule is that what ought to be recorded must be proven by the record. *Miebra vs. Sloss Sheffield Steel and I. Co.*, 182 Ala. 622—62, So-176-46 LRA (NS) 274; *Gaulding vs. Madison*, 179 N.C. 461-102-SE 851, 10 ALR-1497; *Flemming vs. Board of County Commissioners of Ellsworth County*, 119 Kan. 598-240 P. 591; *Spalding et al vs. City of Lebanon*, 156 Ky. 37 160 SW 751-49 LRA (NS) 387; *Pape vs. United States Fidelity and Guaranty Co.*, 200 Ga. 69, 35 SE 2d 899; *People vs. Pfeiffer et al vs. Morris et al.*, 365 Ill. 470, 6 NE 2d 864; *Patterson vs. Crow*, 385 Ill. 514—53 NE 2d 415. And the record can not be enlarged or contradicted by parole evidence. *Potomac S. B. Co. vs. Upper Potomac S. B. Co.*, 109 U.S. 672-27 L.

ed. 1070 3 S. Ct. 445-4 S. Ct. 15; *Strong vs. United States* 6 Wall U. S. 788-18 L. ed 740. *Ex parte v. Young*, 154 Cal. 317-97 Pac. 822-22 LRA (NS) 330.

And the necessary presumption arising from the record can not be contradicted by parole evidence any more than the express words of the record itself. *Re Evingson* 2 ND 184-49 NW 733-33 Am. St. Ref. 768.

POINT FIVE

Of course, as heretofore pointed out by this court in its opinion, the evidence respondents rely on in support of this point was inadmissible.

POINT SIX

Under the issues formulated by the pleading and the stipulation of the parties, upon the introduction of the court records showing the omission and record of the letters thereof, the appellants sustained the burden of proof required of them and, of course, any impeachment of that record was not admissible as heretofore pointed out by the authority cited.

Respectfully submitted;

R. J. HOGAN,
Attorney for Appellants.