

1951

Rober T. Harmston v. Farmers and Merchants Bank et al : Reply Brief in Support of Petition for a Rehearing

Utah Supreme Court

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**IN THE SUPREME COURT
of the**

STATE OF UTAH **FILED**

DEC 11 1951

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

Clerk, Supreme Court, Utah

Appellant,

— vs. —

FARMERS AND MERCHANTS BANK,
a Utah corporation,

Respondent.

District Court Docket No. 2437
and

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

**REPLY BRIEF IN SUPPORT OF PETITION FOR A
REHEARING**

**J. RULON MORGAN
ELIAS HANSEN**

Attorneys for Respondents

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EDGAR LABRUM and VEDA MURRAY
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Respondents.

Case No. 7614

REPLY BRIEF IN SUPPORT OF PETITION FOR A REHEARING

RESTATEMENT OF RESPONDENTS' POSITION

In the opening brief in support of respondents' petition for a rehearing, the attention of this court was directed to the fact that all of the cases and authorities

cited by this court in support of its opinion heretofore written were cases and authorities holding that one who relied directly upon a judgment to support a claimed right must, so to speak, reconstruct or re-establish such a judgment by producing evidence to show that the judgment was either not in accord with the judgment intended by the court, or was incomplete because of some of the record thereof had been lost or destroyed. We also, in respondents' opening brief, directed the attention of the court to the statement of the law together with the numerous cases cited in Freeman on Judgments, Fifth Edition, page 2145, wherein it is held that parol evidence is properly admitted to show the existence and contents of a lost judgment roll and to re-establish the same. It is there said and the cases cited in a foot note show that the great weight of authority support the rule announced by Greenleaf rather than that stated by Wigmore, cited in the opinion heretofore written. We further directed the attention of the court to the fact that there was no occasion to re-establish or reconstruct the judgment involved in this controversy. Those judgments are full and complete in every particular. Personal service of summons was had upon Roger T. Harmston, as administrator of the estate of Isabelle T. Harmston. The Court found that Roger T. Harmston was such duly appointed, qualified and acting administrator. We shall not again review the evidence which tended to show that Roger T. Harmston had taken the oath of office. Suffice it to say that the trial court so found and there is evidence that the oath of office was then in the files and

offered in evidence at the mortgage foreclosure hearing, and the plaintiff herein did not deny that he had taken the oath of office and had even forgotten that he had furnished a bond and during a period of more than seven years had paid the premiums thereon.

THE CASES CITED BY APPELLANTS DO NOT SUPPORT
THEIR CONTENTION

We have recently been served with a brief on behalf of the appellants and have carefully read the cases and authorities there cited. As we read the cases, not one of them support the contention of the appellants herein. A number of them support the position of the respondents. Lest we be chargeable with making an unjustifiable statement about such cases, we will briefly review the same.

The case of *Miebra v. Sloss Sheffield Steel and I. Co.*, 182 Ala. 622-62 So. 176-46 LRA (NS) 274 is an appeal where it is held that oral evidence may not be admitted to show that someone other than that shown by the record was appointed as administrator of an estate.

Pape v. United States Fidelity and Guaranty Co., 200 Ga. 69-35 S.E. 2d 899 on appeal holds that on direct attack in nature of equitable proceedings on public records, parol evidence is admissible to impeach the record. It is further held that an investigator may rely on the truth of specific recitals contained in a public record, and that the one relying upon public records is protected, not only by the natural equities of his position, but also by the special equities arising from the protection afford-

ed everyone who relies upon the record. In this case for nearly seven years there was a public record full and complete showing that the mortgages were properly foreclosed. That was the basis for the Farmers and Merchants Bank buying the property at the foreclosure sale, and that was probably the basis for the Labrums buying the property from the Bank.

In *Gaulding v. Madison*, 179 N.C. 461—102, S.E. 851, 10 ALR 1497 it is held in a case on appeal that where a record in a former action is relevant in the present one, the record itself is the only evidence admissible to prove its contents, unless it is shown by the party desiring it, with the burden of proof on him, that it once existed and has been lost or having existed it cannot be produced. It is there said: "The principle established in these adjudications is that parol proof is admissible and only admissible in aid of the record, that is whenever the record of the first trial fails to disclose the precise point on which it was decided; that there must however be a record to be aided."

In *Fleming v. Board of County Commissioners of Ellsworth County*, 119 Kan. 598-240 P. 591 it was held on appeal that an order laying out road cannot be modified by parol evidence.

In *Spaulding et al v. City of Lebanon*, 156 Ky. 37 160 S.W. 751-49 LRA (NS) 387 on appeal it is held that where a city charter provides that no ordinance for the establishment of any license shall be valid unless the yeas and nays thereon were recorded in the journal of the proceedings of the counsel and the journal failed to

show that the yeas and nays were taken or that the ordinance was passed, parol evidence was inadmissible to show these facts.

In *People v. Pfeiffer et al v. Morris et al*, 365 Ill. 470, 6 N.E. 2d 864 on appeal it is held that where officials are required to keep a record, such record constitutes the only lawful evidence and cannot be supplemented by parol evidence.

In *Patterson v. Crow*, 385 Ill. 514-53 N.E. 2d 415 on appeal it is held that the election contest was filed too late. In the course of the opinion it is said that the record to be kept by public officers is the only proper evidence of what occurred.

In the case of *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U.S. 672-27 L. ed. 1070 3 S. Ct. 445-4 S. Ct. 15 is an opinion covering 30 pages devoted to a discussion of whether the city of Washington or certain property owners of land abutting on the Potomac River had the right to construct piers and docks on the Potomac River. The only reference in the opinion which even remotely touches the question here presented is that "preliminary oral negotiations are merged in the writing finally agreed upon where such writing is not ambiguous."

In the case of *Ex parte v. Young*, 154 Cal. 317-97 Pac. 822-22 LRA (NS) 330 it is held on appeal that where record shows that an ordinance was duly passed, oral evidence that it was not passed was inadmissible.

In the case of *Re Evingson* 2 N.D. 184—49 N.W. 733-33 Am. St. Ref. 768 it is held on appeal as stated in ap-

pellants' brief that necessary presumptions arising from the record cannot be contradicted by parol evidence.

In *Strong v. United States*, 6 Wall U.S. 788-18 L. ed. 740, it is held that private books of a government disbursing agent are inadmissible to control accounts as kept by accounting officers of treasury department.

Counsel for appellants directs the attention of the court to his claim that there was a lack of jurisdiction, but certainly none of the cases cited by him even remotely deals with the matter of jurisdiction. Certainly the court in the mortgage foreclosure proceeding had jurisdiction to determine whether or not Harmston had taken an oath of office. It was so alleged and found.

The fact that the plaintiffs and appellants herein have not cited any authority which supports their contention would seem to indicate that none can be found. It should be kept in mind in reviewing the authorities that the respondents did not offer any evidence, written or parol, which tended to impeach the judgment here brought in question. It was the plaintiffs who sought to impeach the judgments in the mortgage foreclosure, not by anything that appeared in those judgments, but by what did not appear in the estate of Isabelle T. Harmston. If, as is said in a number of the cases cited by the plaintiffs, the record as shown by the judgment roll is the only evidence admissible as to the judgment, then it follows that what did not appear in the Isabelle T. Harmston estate proceedings would be incompetent, and if competent would not defeat the validity of the judgment here brought in question. In this case it is obvious that what

appellants seek to establish by the failure of the files in the Isabelle T. Harmston estate matter is to show that Roger T. Harmston failed to take an oath of office. Such claim is at war not only as to what is expressly found by the trial court in the mortgage foreclosure proceedings, but at variance with all of the oral evidence offered in support of what was found to be the fact by the trial court in the mortgage foreclosure proceedings. It seems to be suggested by plaintiffs in their brief that the fact of Harmston taking his oath of office must be shown by the record and could not properly be shown by the original oath of office. If such be the position of the plaintiffs, then such contention is at variance with what we have always understood to be the law. The rule as to the requirements that the best evidence be produced, dictates that the original oath of office should be produced, if available, and not the record thereof. Such evidence as there is, including the finding of the trial court, is to the effect that the oath of office was offered in evidence in the mortgage foreclosure proceedings.

It is the appellants and not the respondents who seek to vary the terms of the judgment here involved by resorting solely to another case which is not directly here involved. If that may be done, a judgment regular on its face in which personal service has been had upon the defendant may be held for naught after the lapse of nearly seven years, not because of any defect in such judgment, but solely because of the failure of some other record to reveal that the party sued had failed to file his oath of office. If that may be done as to the Isabelle

T. Harmston estate, by the same process of reasoning it may be done as to any other number of probate proceedings through which Isabelle T. Harmston may have acquired title.

If judgments of courts of general jurisdiction are to be so lightly treated, then indeed have they lost the sancity that has heretofore been accorded them by the courts. In this case no useful purpose can be served by a proceeding to re-establish or reconstruct what was done in the estate of Isabelle T. Harmston. The plaintiff, Roger T. Harmston, has admittedly now taken an oath of office. Respondents' title does not rest upon what was done in the Isabelle T. Harmston estate, but upon what was done in the mortgage foreclosure proceedings. What was found as a fact in the mortgage foreclosure proceedings is certainly entitled to more weight as to the matter of Roger T. Harmston having taken an oath of office in the Isabelle T. Harmston estate than in the failure of the record in the estate matter to show that he did not take such oath, especially in light of the facts testified to by J. Rulon Morgan and the Clerk of the Court of Duchesne County and his assistants.

We submit that if a party to an action who has been personally served with summons may fail to answer such a summons, permit judgment by default to be taken against him, and the property foreclosed to be taken over by a purchaser for nearly seven years after the issuance of a Sheriff's Deed, and stand by without protest while some of such property is sold, and then come into court and succeed in having such a judgment set aside because

of the absence of a record in some proceeding not directly involved in the judgment sought to be vacated, then indeed have courts of general jurisdiction ceased to be a protection to those who have heretofore been protected in reliance thereon.

We submit that a rehearing should be granted, and upon such re-hearing, the judgment appealed from be affirmed with costs.

Respectfully submitted,

J. RULON MORGAN
ELIAS HANSEN
Attorneys for Respondents