

1951

# Willard Y. Morris v. Ted Russell and Manila Russell : Appellants' Petition for Rehearing

Utah Supreme Court

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7630

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In The  
SUPREME COURT  
Of The  
STATE OF UTAH

WILLARD Y. MORRIS, Executor )  
of the Estate of William Shields, )  
Deceased, )

Plaintiff and Respondent, )

vs. ) Case No. 7630

TED RUSSELL and MANILA RUS- )  
SELL, his wife, )

Defendants and Appellants. )

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APPELLANTS' PETITION FOR REHEARING

**FILED**

NOV 5 1951

RICHARDS AND BIRD and

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DAN S. BUSHNELL  
Clerk, Supreme Court, Utah

Attorneys for Petitioners  
and Appellants.

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APPELLANTS' PETITION FOR REHEARING

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The unanimous opinion of the court filed in this case on October 16 represents a commendable effort to do justice and avoid a new trial where it would obviously be a hardship upon the representative of the deceased plaintiff to undertake a new trial. Failure to award costs to appellants when the court compels them

to do what they were previously willing to do and the respondent was unwilling to do, is unfair but within the limits of the court's decision.

But the court has fallen into logical error in disposing of its Point I and has relied on cases which do not support the opinion of the court. Furthermore, the court has ignored one of the Rules of Civil Procedure by holding, in effect, that where the court regards the judgment as fair, all Rules for arriving at a decision may be ignored.

The court thus stated one of the points relied on by appellants in seeking reversal:

1. That it was error for the court to vacate its order dismissing the quantum meruit count following the close of the plaintiff's case and to submit the case to the jury on that theory.

In disposing of this point the court holds that under Rule 41 (b) of the Utah Rules of Civil Procedure

the dismissal of the quantum meruit count was a dismissal with prejudice and operates as an adjudication on the merits. The court then avoids the judgment "on the merits" by the following rationalization:

"Plaintiff, however, refers us to Rule 54 (c) (1), U.R.C.P., from which we have heretofore quoted the applicable part, and which provides that every final judgment shall grant the relief to which a party is entitled even if such relief has not been asked for in the pleadings.

Thus, apparently, if the plaintiff proved he was entitled to relief in quantum meruit, it would have been error for the trial court to refuse him that relief even though at an earlier time in the proceedings the court had dismissed the quantum meruit count. Cases decided under the Federal Rules of Civil Procedure, from which our rule was taken, illustrate that this is true. *United States v. Zara Contracting Co.*, 146 F.2d 606; *Michael Del Balso Inc. v. Carozza*, 136 F.2d 280; *Kansas City, St. L. & C. R. Co. v. Alton R. Co.*, 124 F.2d 780.

The adding of the quantum meruit count, was the equivalent of permitting an amendment to conform to the proof. The defendants were in no worse position than if the quantum meruit count had not been there in the first place. There is no showing that the defendants

were mislead or prevented from presenting all their evidence or in any way prejudiced by re-instating the count."

Petitioners admit that under Rule 54 (c) (1)

the Rules of Civil Procedure if the plaintiff had not pleaded quantum meruit and if the court had found that the evidence established a right to recover on the theory of quantum meruit, the court had the power and the obligation to grant relief on that unpleaded basis. But that is not the problem presented on this appeal although it is the problem presented by the cases cited to the court. The court is misleading in referring to these federal cases as though they held that there is no power to grant relief on quantum meruit where a cause of action seeking such relief had been dismissed at an earlier time in the proceedings. In *United States v. Ira Contracting Co.*, 146 F.2d 606, the claim was abandoned and there was no dismissal on the merits. In *Michael Del Balso Inc. v. Carossa*, 136 F.2d 280, there was no dismissal of any cause of action, and in

ansas City, St. L. & C. R. Co. v. Alton R. Co.,  
 4 F. 2d 780, a motion to dismiss had been granted  
 before trial and without presentation of evidence,  
 which dismissal was, therefore, without prejudice and  
 not on the merits. Petitioners have found no cases,  
 independent cited no cases, and the court cites no cases  
 which hold or intimate that where a cause of action is  
 dismissed on its merits or with prejudice, the court  
 can at a later stage of the trial reinstate the cause of  
 action and give judgment on it.

To say that Rule 54 (e) (1) gives such a broad  
 discretion is completely to ignore the provisions of  
 Rule 41 (b) since the adjudication of a cause of action  
 on the merits prevents its revival in that trial or an-  
 other trial.

It is admitted that if the court erroneously  
 dismissed the quantum meruit cause of action, the  
 court had power to correct the error by vacating the  
 judgment and granting a new trial. This was not done,



and our extensive research has produced no case  
 where a judgment was vacated and a new judgment  
 entered or a cause taken under advisement without  
 bringing evidence or granting a new trial. The court  
 cites Robinson v. Salt Lake City, 39 Utah 580,  
 9 P. 817, as showing that a judgment of non-suit  
 formerly did not bar a later action on the same cause  
 of action. It is true that Rule 41 (b) has changed the  
 law on this, but our purpose in citing Robinson v.  
 Salt Lake City was that this court held that when the  
 motion is granted "the only judgment that is permis-  
 sible is one dismissing the action; that is, one which  
 precludes any further proceedings in that action except  
 appeal." And the same limitation is found in Tintic  
 Standard Mining Company v. Utah County, 80 Utah  
 1, 15 P. 2d 633. The court again held that when a  
 non-suit is granted "the court thereupon divested it-  
 self of the power to do more than enter judgment of  
 dismissal, or upon motion for new trial, to grant a

The change of the applicable rule through establishment of Rule 41 (b) makes petitioners' position in this case that much stronger. Whereas formerly a motion of non-suit after introduction of evidence was a dismissal without prejudice and the court still had no power except to grant a new trial, now that the dismissal is to be considered an adjudication on the merits, it seems even more plain that the only power the trial court is to grant a motion for new trial or permit an appeal. This is precisely what the Pennsylvania court did in *Di Gregorio v. Skinner*, 351 Penn. 41, 41 Atl. 2d 649, cited in appellants' brief.

Rule 54 (c) (1) should not be allowed to make meaningless Rule 41 (b). Since the trial court granted a motion to dismiss which must be treated as an adjudication on the merits, the court, having changed its mind as to the soundness of its ruling, should have ordered a new trial on its own motion or indicated to

The Supreme Court is the court of last resort in this case and in construing the Utah Rules of Civil Procedure. The court's decision in this case makes Rule 41 (b) meaningless because it holds that judgment on the merits is not a judgment on the merits and that the Rule can be ignored to reach a desired result.

When the quantum meruit count was dismissed at the close of the plaintiff's evidence, counsel could have assumed that the count could not have been re-stated and would, therefore, have taken no account of the difference between evidence supporting express contract and the evidence supporting quantum meruit as an effort to win over the jury.

If the court took under advisement a motion to postpone the quantum meruit count at a later stage of the trial, no record of such ruling was made and this court cannot consider such a ruling without requiring proof of the ruling. If the decision turns on that possibility, petitioners submit that the case should be re-

anded for the purpose of having the record amended  
 the trial judge to show any informal rulings made  
 the court and understood by counsel and not reflected  
 the record.

Petitioners are all too aware of the fact that  
 the Supreme Court has many cases at hand. This  
 seems to mean that cases must, therefore, be dis-  
 posed of with dispatch and in an effort to arrive at  
 meretrical justice without too much regard to technical  
 questions of pleadings and procedure. The trouble  
 with this is that it leaves counsel seeking to advise  
 litigants and would-be litigants no right to reply on  
 cases as written or on cases as decided, and puts a  
 premium on sympathy and prejudice.

Petitioners respectfully submit that the court  
 has been illogical and over anxious to reach what it  
 regards as a fair result in the decision filed. The  
 case was tried in a confusion of theories and rulings

ould take the further step and order a new trial in  
 s case so as to permit a trial without the error of  
 .conception of the statute of limitations and the  
 nfusion of the dismissal of the quantum meruit  
 unt. These petitioners should not be penalized by  
 s death of William Shields, any more than they should  
 penalized by the ruling of the trial court dismissing  
 s quantum meruit count and the subsequent change of  
 and by the court.

The court should grant a rehearing on the  
 sstion of vacating an adjudication upon the merits  
 hout requiring a new trial. And in any event, the  
 tober 16 opinion should be re-written to reflect that  
 s decision goes beyond the cited Federal cases.

Respectfully submitted,

RICHARDS AND BIRD and  
 DAN S. BUSHNELL

Attorneys for Petitioners  
 and Appellants.