

1960

William K. Howard et al v. Mildred M. Howard et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM K. HOWARD, RUTH N.
HOWARD, ROBERT D. HOWARD
and SHIRLEY L. HOWARD,

Plaintiffs, and Appellants,

vs.

MILDRED M. HOWARD and WALKER
BANK & TRUST COMPANY, as ad-
ministrator of the estate of L. W.
HOWARD, Deceased,

Defendants and Respondents.

FILED

17 1950

Supreme Court, Utah

Case No.
9223

BRIEF OF APPELLANTS

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BANK & TRUST COMPANY, as ad-
ministrator of the estate of L. W.
HOWARD, Deceased,
Defendants and Respondents.

Case No.
9223

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This action is one brought by plaintiffs under the provisions of Chapter 33 of Title 78, Utah Code Annotated, to obtain a declaratory judgment, determining and declaring that a certain judgment, entered July 9, 1958 in Civil Action No. 108689 in the Third Judicial District Court in and for Salt Lake County, State of Utah, between the same parties,

became and is a final judgment and degree, and that a certain "Notice of Intention to Move for a New Trial" filed in said proceeding, after entry of said judgment, is a legal nullity and did not stay the running of the time for appeal from the judgment referred to. In order to obtain a proper understanding of this case, it therefore becomes necessary to review briefly the case out of which the present action arose, to-wit: said Civil No. 108689, above referred to.

L. W. Howard, whose full name was Lucas William Howard, died intestate in Salt Lake City, Utah, November 30, 1955. The day following the death of L. W. Howard, defendant Mildred M. Howard placed of record in the office of the County Recorder of Salt Lake County, Utah, a purported warranty deed bearing date of May 9, 1945, which instrument is now of record in the office of the County Recorder of Salt Lake County, Utah, in Book 1263, page 45, photostat copy of which as it appears on the the County records is hereto attached as Exhibit A.

Action was brought by the plaintiffs Wm. K. Howard, Ruth N. Howard, Robert D. Howard, and Shirley L. Howard, children of the decedent, to have said instrument declared and adjudged to be null and void and of no effect. This case was designated Civil No. 108689. This action resulted in a judgment in favor of plaintiffs and against the defendant, dated July 9, 1958, (Record 33-35) under which the Third Judicial District Court, in and for Salt Lake County, Utah, decreed said purported deed above referred to to be null and void and of no effect. Certified copy of said judgment is contained in the record on appeal. (Record 33-35) Said judgment was a judgment on the pleadings, based upon the fact that the description in said instrument

did not enclose any tract of land and did not contain words showing that the description was intended to go to the place of beginning, but rather it ended at a point two courses away from the point of beginning. No appeal from said judgment of July 9, 1958 was filed and it is the contention of plaintiffs that said judgment became and is a final judgment and decree, binding upon the defendants herein as to matters adjudged and decreed therein. Thereafter, on July 14, 1958, the attorneys for defendant Mildred M. Howard served upon plaintiffs and filed with the court in said civil No. 108689 a document entitled "Notice of Intention to Move for New Trial." (Record 36) Said "Notice of Intention to Move for New Trial" did not specify any time nor place for the hearing thereof nor for the hearing of the motion *intended* to be made, nor did it recite with particularity the grounds therefor, as required by Rule 7 (b) (1) and defendants did not, with said document, file a notice of the hearing thereof, as required by Rule 6 (d) of the Rules of Civil Procedure, and no notice of the hearing of said document was served therewith, nor has any such notice been since served upon plaintiffs.

After the lapse of a considerable period of time, to-wit: more than fifteen months, during which time the defendant Walker Bank & Trust Co. as administrator of the estate of L. W. Howard, deceased, took no action to close the estate, plaintiffs demanded of said Walker Bank & Trust Co., as administrator, that they distribute the estate of L. W. Howard, deceased, and distribute to plaintiffs their share of the assets in said estate; that defendant Walker Bank & Trust Co. thereupon declined so to do, stating that they were unable to determine the finality of the said judgment of

July 9, 1958 (Record 33-35) because they did not know the legal effect of the instrument filed entitled "Notice of Intention to Move for New Trial." (Record 36) Upon refusal of the bank to effect distribution plaintiffs brought this action, under the provisions of the declaratory judgment statute, to obtain a judgment and decree declaring the said "Notice of Intention to Move for New Trial" to be a legal nullity and declaring the judgment entered July 9, 1958 in Civil No. 108689, to be a final judgment and decree.

This action for a declaratory judgment was designated by the Third Judicial District Court of Salt Lake County, State of Utah, wherein it was filed, as Civil No. 123132. In said action both parties moved for summary judgment and on March 9, 1960 the court denied plaintiff's Motion for Summary Judgment and granted defendant Mildred Howard's Motion for Summary Judgment, and dismissed the case as "no cause for action." (Record 32) The court then went on further and made a purported finding that the instrument designated as a "Notice of Intent to move for a new trial" in case No. 108689 is valid and the time for appeal has not expired. It is from this summary judgment of March 9, 1960, (Record 32) that this appeal is taken.

STATEMENT OF POINTS

Plaintiffs base their appeal upon the following five points, wherein it is alleged that the court erred, to-wit:

1. THE COMPLAINT STATES A CAUSE OF ACTION AND IS NOT SUBJECT TO DISMISSAL ON MOTION.

2. THE JUDGMENT MADE AND ENTERED BY THE ABOVE ENTITLED COURT ON THE 9th DAY OF JULY, 1858 IN CIVIL NO. 108689, DOCKETED IN DOCKET 63, PAGE 1709, BECAME AND IS A FINAL JUDGMENT, BY REASON OF THE FAILURE OF THE DEFENDANTS TO APPEAL FROM SAID JUDGMENT WITHIN THE TIME PROVIDED BY LAW.

3. DOCUMENT FILED BY DEFENDANTS IN CIVIL NO. 108689 ENTITLED "NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL" DID NOT COMPLY WITH THE PROVISIONS OF RULE 6, 7, AND 59 OF THE RULES OF CIVIL PROCEDURE, AND DID NOT THEREFORE SUSPEND THE RUNNING OF TIME FOR APPEAL.

4. FAILURE OF THE DEFENDANTS TO CALL UP FOR HEARING, FOR A PERIOD OF MORE THAN ONE YEAR, THEIR "NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL" CONSTITUTED AN ABANDONMENT OF THE MOTION.

5. THE PURPORTED FINDING OF THE COURT IN SUMMARY JUDGMENT ENTERED MARCH 9, 1960, IN CIVIL NO. 123132 (RECORD 32) THAT THE MOTION FOR NEW TRIAL IN CASE NO. 108689 IS VALID AND THE TIME FOR APPEAL HAS NOT EXPIRED, IS NULL AND VOID, FOR THE REASON THAT CASE NO. 123132 HAVING BEEN DISMISSED, THERE IS NOTHING BEFORE THE COURT ON WHICH IT CAN BASE A FINDING THAT THE MOTION FOR NEW TRIAL, SO-CALLED, IS VALID.

ARGUMENT

Point 1. THE COMPLAINT STATES A CAUSE OF ACTION AND IS NOT SUBJECT TO DISMISSAL ON MOTION.

In dismissing plaintiffs' complaint as "no cause for action" the court has dealt with defendants' Motion for Summary Judgment (Record 7) as if it were a motion for dismissal. It is a well recognized rule of law that as against a motion for dismissal all well pleaded facts are to be considered as true. Thus it becomes necessary for the appellate court to review plaintiffs' complaint (Record 1-3) and determine therefrom whether action for declaratory judgment lies and whether the essentials to such an action are adequately pleaded. Rule 57 of the Rules of Civil Procedure and Chapter 33 of Title 78, Utah Code Annotated 1953, establish the requirements for declaratory judgment action. Rule 57 provides, *inter alia*, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." There are numerous cases which hold that an action for declaratory judgment lies where there is uncertainty as to the application of a judgment or the interpretation thereof, or where, as here there is controversy as to whether or not judgment has become final and binding. The rule is set forth in 154 ALR 745, as follows:

"There is substantial authority for the proposition that a real and substantial controversy over the *validity* or effect of a judgment may present a ground for relief under the Federal Declaratory Judgment Act."

Our Rule 57 is substantially the same as the federal rule, bearing the same number, and thus what is set forth in ALR as to the Federal Declaratory Judgment Act applies with equal force to the Utah Rules of Civil Procedure. ALR cites numerous cases in support of the rule of law, as stated. There are also a great many decisions of state courts to the same effect. For example:

Bowan v. Belyeu 51 So. 2nd 27 where a declaratory judgment was held proper to determine whether a judgment was a personal judgment against a certain individual;

Connecticut Savings Bank v. First National Bank, 51A907 which held that a declaratory judgment was proper to declare the effect of and explain judicial decrees;

National Ben Franklin Life v. Camden Trust Co. 115 A 2nd 589 which held that a court can entertain a declaratory action to determine the significance and effect of a judgment;

Stavros v. Bradley 232 SW 2nd 104, which upheld a declaratory action for the purpose of construing a judgment where the parties did not know how to proceed thereunder or how the judgment affected them.

If declaratory judgment is proper, then the next question is whether or not plaintiffs' complaint on file herein (Record 1-3) states a cause of action upon which declaratory judgment could be based. In brief, the complaint alleges the existence of the controversy, in Civil No. 108689, the entry of judgment therein, the failure of the defendants therein to appeal therefrom, the service of the so-called "Notice of Intention to Move for New Trial," the alleged

abandonment of the said "Notice of Intention to Move for New Trial," the request made to defendant Walker Bank & Trust Co., as administrator, to proceed with the probating of the estate of L. W. Howard, deceased, and their refusal to do so, upon the grounds that they did not comprehend the legal effect on the judgment of said "Notice of Intention to Move for New Trial." Certainly this sets forth facts and grounds sufficient to justify relief under the Declaratory Judgment Act. The defendant, by her refusal to concede that the judgment of July 9, 1958 is a final judgment, creates the facts which compel the plaintiffs to bring this action to resolve the controversy as to whether or not the judgment in Civil No. 108689 is final. It is respectfully submitted that plaintiffs' complaint sets forth a cause of action for declaratory judgment and even though there might be other remedies available to plaintiffs, under the provision of Rule 57 a declaratory judgment proceeding is proper, and the essential facts having been properly pleaded the court was without justification in summarily dismissing plaintiffs' complaint.

Point 2. THE JUDGMENT MADE AND ENTERED BY THE ABOVE ENTITLED COURT ON THE 9th DAY OF JULY, 1958, IN CIVIL NO. 108689, DOCKETED IN DOCKET 63, PAGE 1709, BECAME AND IS A FINAL JUDGMENT BY REASON OF THE FAILURE OF THE DEFENDANTS TO APPEAL FROM SUCH JUDGMENT IN THE TIME PROVIDED BY LAW.

Little need be said about this point. Rule 73 of the Rules of Civil Procedure provides that an appeal shall be taken within one month from the entry of the judgment,

with certain exceptions. The running of the time for appeal is terminated by a timely motion, made pursuant to the rules. It is plaintiffs' contention that the instrument filed by defendant Mildred M. Howard did not constitute such a motion and was therefore legally insufficient to stay the running of the time for appeal. Whether or not the instrument filed by defendant Mildred M. Howard in Civil No. 108689 was sufficient to terminate the running of the time of appeal, will be discussed under Point 3 herein. In the event said instrument is not legally sufficient, then definitely the time for appeal has long since expired and by such expiration the judgment of July 9, 1958 in Civil No. 108689 has become and is final and binding upon the parties hereto.

Point 3. DOCUMENT FILED BY DEFENDANTS in CIVIL NO. 108689 ENTITLED "NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL" DID NOT COMPLY WITH THE PROVISIONS OF RULE 6, 7, and 59 OF THE RULES OF CIVIL PROCEDURE AND DID NOT THEREFORE SUSPEND THE RUNNING OF THE TIME FOR APPEAL.

This point goes directly to the heart of the present controversy. If the document filed by defendants entitled "Notice of Intention to Move for a New Trial" (Record 36) was legally sufficient to stay the running of the time for appeal and has not been abandoned, then the action Civil No. 108689 is still pending; but, if said instrument was not legally sufficient to stay the running of the time for appeal, or, in the event it was abandoned, as plaintiffs allege, then the judgment of July 9, 1958 in Civil No. 108689 (Record 33-35) has become final and binding upon the parties hereto

and is not subject to review. Plaintiffs contend that the instrument entitled “Notice of Intention to Move for a New Trial” is a legal nullity and did not stay the running of the time for appeal, for three reasons:

1st: It does not set forth with particularity the grounds for making an application to the court for an order, as required by Rule 7 (b) (1).

2nd: The instrument is not a motion but a mere statement of intent.

3rd: The instrument, if it was or was intended to be a motion, did not have appended thereto a notice of the hearing thereof, as required by Rule 6 (d).

Rule 7 (b) (1) of the Rules of Civil Procedure reads as follows:

“Motions. An application to the court for an order shall be made by motion, which, unless made during a hearing or trial, shall be made in writing; *shall state with particularity the grounds therefor*; and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.”

Let us examine the “Notice of Intention to Move for a New Trial.” A certified copy of this document appears in the record, (Record 36) but for the convenience of the court in analyzing the instrument, it is deemed advisable to set forth here the body of the instrument in order that attention may be drawn to the component parts thereof to determine whether or not they meet the requirements of the rules. The

instrument is entitled "Notice of Intention to Move for a New Trial." The body reads as follows:

"You and each of you will please take notice that the defendant, Mildred M. Howard, intends to move the above entitled court to vacate and set aside the judgment and decision of the court rendered in the above entitled action, and to grant a new trial of said cause, upon the following grounds materially affecting the substantial right of said defendant, to-wit:

1. Irregularity in the proceedings of the court by which defendant Mildred M. Howard was prevented from having a fair trial.

2. The decision is against law.

Said motion with respect to the cause mentioned in the first ground is made upon affidavit herewith attached and served upon you and upon the minutes of the court; and in respect to the second ground said motion is made upon the minutes of the court and upon all of the records in this case."

The defendant, in this instrument, sets forth two grounds based upon which she declares her *intention* to move for a new trial. Rule 59 of the Rules of Civil Procedure sets forth the procedure for applying to the court for a new trial. Subparagraph (a) of said Rule 59 sets forth the grounds. Defendants appear to rely upon subparagraphs 1 and 6 of said Rule 59 (a). These two subparagraphs read as follows:

"(1) Irregularity in the proceedings of the court, jury, or adverse party or any order of the court or

abuse of discretion by which the party was prevented from having a fair trial.”

“(6) Insufficiency of the evidence to justify the verdict or other decision or that it is against law.”

Rule 59 (c) provides that when the application for a new trial is made under subdivisions (1), (2), (3), (4), shall be supported by affidavit. Inasmuch as the affidavit attached to said Notice of Intention, is not in the record on appeal plaintiffs deem it proper to insert it here. The body thereof read as follows:

“Milton V. Backman, being duly sworn on oath deposes and says that he is one of the attorneys for Mildred M. Howard, defendant herein who appeared at the pre-trial conference on said matter. That by the Memorandum of Points and Authorities filed herein request was made for leave to amend defendants’ cross complaint filed in said action by interlineation by adding to paragraph 2 the words ‘containing 2.75 acres, more or less.’ That defendant made known to the court in said memorandum that she was prepared to offer the testimony of C. C. Bush of the Engineering firm of Bush & Gudgell to the effect that by his taking the deed in question he could locate the land on the ground from the description as contained in the deed. Such evidence would bring the instant case within those cases holding that if a surveyor by applying the rules of survey can locate the land, the description is sufficient and the deed will be sustained.

“Defendant was entitled to amend her cross complaint and the case should have been assigned to the trial court for the taking of evidence.”

It is respectfully pointed out that this affidavit does not show any "irregularity" in the proceedings of the court, jury or adverse party or any order of the court. Neither does it show any facts constituting an "abuse of discretion" by which the party was prevented from having a fair trial. The case did not depend upon a survey and it was not an irregularity nor abuse of discretion to decline a trial or testimony of a surveyor *where the fatal defect was apparent upon the face of the deed upon which defendant relied*, in that it did not purport to enclose any tract of land and did not contain words bringing the boundary line back to the point of beginning. Such words being entirely absent from the description no surveyor could supply them. The statement as to acreage was in the purported deed and was before the court, but even had the amendment requested by defendants been allowed it would not have changed the decision.

Hence it follows that the affidavit does not set forth any facts constituting "irregularity" or "abuse of discretion." The "irregularity" or "abuse of discretion" referred to by Rule 59 (a) is a jury verdict "the result of mistake, passion, prejudice, or improper motive on its part or where it is coerced by the court"; (Moore's Federal Practise 2nd Ed. Vol. 6, page 3792 notes 5 & 6 & cases cited therein), or where the verdict is "the result of compromise," or "pure chance" (Moore, *supra*, page 3794 notes 13, 14 and 15.) Or it may mean the "misconduct of third persons toward the jury," (Moore, *supra*, page 3801 note 51); These citations illustrate the type of "irregularities" and "abuse of discretion" contemplated by Rule 59 (a) Nothing of this nature appears in defendants' affidavit.

A Utah case further sets forth the type of “irregularity” referred to in the rule. It says,

“It may consist in what is termed ‘packing’ the jury, or it may be by circulating papers or other documents to influence them or by extending special courtesies to some of them, or by direct communication with one or more of their number.” *Paul v. Salt Lake City R. Co.* 34 U 1, 95 P. 363.

When the “irregularity” or “abuse of discretion” is alleged on the part of the judge it must be a similar offence against justice, and the circumstances must be stated with particularity. When they do not the affidavit in support of the Motion for New Trial may be dismissed as insufficient, as was done in *Paul vs. Salt Lake City R. Co.* *supra*.

Defendants’ statement “that the decision is against law” is likewise not legally sufficient, because it does not set forth “with particularity” as required by the provisions of Rule 7 (b) (1) the points relied upon. The requirements of the rules in providing that all motions state with particularity the grounds therefor, is clearly and thoroughly discussed in a very recent federal case, *U.S. of A vs. 64.88 acres of land in Allegany County, Pennsylvania*, decided January 27, 1960 and reported in 25 Federal Rules Decision, page 88, wherein the court says:

“The government filed a timely motion for a new trial. That motion is now under consideration. Counsel have been heard at oral argument on the merits of the case and have filed briefs. As trial judge I noticed the generality of the reasons assigned

in the government's motion for new trial. Counsel were asked to brief the point as to whether the motion conformed to the requirements of Rule 7 (b) of the Federal Rules of Civil Procedure, 28 U.S.C. Because I do not think that the motion is in compliance with Rule 7 (b), the body of the motion is stated in full.

'And now, to wit, this 29th day of June, 1959, comes Hubert I. Teitelbaum, United States Attorney for the Western District of Pennsylvania, by John R. Gavin, First Assistant United States Attorney, and John F. Potter, Assistant United States Attorney, and moves your Honorable Court for a new trial in the above entitled matter for the following reasons:

1. Improper admission of testimony.
2. Government counsel was prejudiced.
3. Refusal to admit proper testimony.
4. Refusal to permit cross-examination.
5. The verdict is excessive.

'[2] It is to be noticed that Rule 7 refers to both pleadings and motions. Seven (a) pertains to pleadings. Seven (b) says that a motion 'shall state with particularity the grounds therefor . . . ' (sic) Counsel for the government concedes in his brief that the five grounds assigned are general in nature but he says they are 'sufficiently specific to advise the court and opposing counsel of the theories upon which the government sought a new trial.' I must disagree. I will agree that the fifth reason, that is that the verdict is excessive, no doubt is sufficient in and of itself to raise the issue as to whether the verdict may be permitted under the evidence. However, as to the first four reasons, I can conceive of no language which could be less particular or more brief than the reasons assigned."

The court then refers to the rules requiring particularity, shows why they are just and proper. The court continues by quoting from *United States v. Kresnor* D.C. 143 F Supp. 184, 196, as follows:

“I do not consider this rule to establish a mere technical requirement but rather hold it to be ‘real and substantial.’ ”

The court quotes further from *Bigelow v. R.K.O. Radio Pictures* 16 F.R.D. 15 and *Barron and Holtzoff* Vol. 1, p. 405 to the effect that:

“requirements are mandatory; compliance is essential to orderly procedure.”

The court also calls attention to Federal Form 19 as a “guide or standard” and adds,

“It seems to this court that to regard the instant motion as sufficient to raise the first four assigned reasons is to nullify completely Rule 7 (b).”

Further, in view of an attempt to amend the motion:

“Regarding as I do the instant motion as a nullity, no amendment of it or elaboration upon the reasons assigned can be permitted.”

This decision of the Federal Court is likewise the rule in Utah. Our Supreme Court in a case entitled *in re Application 7600*, to appropriate water, 73 Utah 50, 58, 272 P. 225, states:

“As stated, there are no specifications or objections either in the motion for a new trial or in the

assignments of error that the findings of the court are contrary to the weight of the evidence or that they are without support in the evidence. The notice of motion for a new trial but says:

‘that the findings of fact are not supported by the evidence and against the evidence; that such judgment is against the evidence and against law.’

“No specifications wherein the evidence is insufficient to support the findings are found in the motion for a new trial or elsewhere in the record. The insufficiency of the evidence is argued in appellants’ brief. We are left to search through the entire record consisting of more than 455 written pages, without any assistance from the assignments of error or from the motion for a new trial, to ascertain wherein and whereby the findings are contrary to the evidence. That this court has repeatedly declined to do in the absence of assigned errors specifying wherein the findings are not supported by the evidence.”

The Utah Supreme Court, like the United States District Court in the case last above cited, rejected the motion for a new trial, declaring the statements therein as not grounds for a new trial, but “merely statements that the court erred in its conclusions to render judgment for respondents and in the conclusions in denying the motion for a new trial.”

Certainly that is all we have here, the bare statement “that the decision is against law” is certainly not a statement of particularity which complies with the provisions of Rule 7 (b) (2) and being, as the federal court stated, a legal nullity, it did not stay the running of the time for appeal.

The next question is whether the document entitled “Notice of Intention to Move for a New Trial” is a motion at all or a mere statement of intention. Under our old rules the provisions of Section 104-10-4 & 5, Utah Code Annotated 1943, the party intending to move for a new trial was required to first file with the court and serve upon the adverse party a “notice of his intention” and thereafter within five days file supporting affidavits. Section 104-40-6 provided for hearing within 60 days thereafter. All of these sections were repealed and the procedure was entirely changed. Under the new rules now in effect for ten years, there is no provision for a notice of intention and the law now requires the filing of the actual motion itself within ten days. This motion consists of two or sometimes three parts. First, the request to the court for an order, which must comply with Rule 7 (b) (1). Second, the notice of the hearing thereof, required by Rule 6 (d); and Third the affidavits, if affidavits are to be used. The form of motion is set forth in the Appendix of Forms, attached to the Rules of Civil Procedure, as Form 20, which is a modification of Federal Form 19.

The defendant in the district court argued that the instrument referred to was actually a motion, notwithstanding its title. Appellants concede that the title of an instrument is not controlling, but respectfully call to attention of the court the wording of the body of instrument, which states that the defendant “*intends to move* the above entitled court to vacate and set aside the judgment.” A statement of intention is not the doing of the act, and the courts have been very careful to make a distinction between them. For example, in *Halliman v. Prindle* 29 P² 202 (205) the attorney expressed his intention of asking for a directed verdict. The court said:

“This statement of respondents’ counsel was not a motion for an instructed verdict. A motion is an application for an order and counsel’s statement of what he *intended* to do was not an application for an order.”

It is respectfully pointed out that in defendants’ Notice of Intention there is *no request for any order*, but merely a statement of defendants’ intent.

We come now to the final, fatal defect, in the instrument filed by defendant. Rule 6 (d) of the Rules of Civil Procedure provides:

“A written motion other than one which may be heard *ex parte*, *and notice of the hearing thereof*, shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.”

By this provision the notice is made an integral part of the motion. No one need err in respect thereto because in Form 20 of the Appendix of Forms above referred to, the notice of motion is made an integral part of the motion itself. The compiler’s notes to the Utah Rules of Civil Procedure state, in commencing on Form 20:

“The motion and notice above may be combined and denominated notice of motion under rule 7 (b); or, it may be made separately, either as above indicated or on two pages under separate title of the court and cause.”

No notice, as required by these rules, was attached to the instrument, and no notice of the hearing said instrument

has ever been served upon the plaintiffs or filed. This omission constitutes a fatal defect in the instrument, rendering it legally insufficient to stay the running of the time for appeal. Defendant in the lower court argued that it was not the practice under the old code, in effect before the new rules were adopted, nor is it "the practice now" to give notice in all cases. What the practice was prior to the adoption of the present rules is wholly immaterial; neither are we bound by what the "practice" is now if it is contrary to the rules. There is no purpose whatever in having rules if they are not to be followed. If the courts have power to ignore Rule 6, then they have power to ignore all of the rules. Then we are not governed by rules, but by what someone conceives "the practice" to be.

The courts have been very strict in applying the rules. The rule in question is discussed in Barron & Holzoff, Federal Practice & Procedure, Vol. 1, page 387, section 218, which states:

"Motion, notice of hearing, and supporting affidavit, if any, must be served not later than five days before the time specified for the hearing, unless a different period is fixed by the court or by the rules."

The five day period of time has been shortened in some cases for good cause, but if a complete motion is not made, that is, the motion, notice, and affidavit, if any, it is impossible later to amend, to file affidavits for example or to show additional grounds. There are numerous federal cases to this effect. This court is bound by its own decision in Lund v. Third District Court, 62 P 2d 278, wherein it is determined that a motion for new trial may not, after time for

filing motion has expired, be amended by adding new or additional grounds not specified in the original motion.

If it is impossible to amend a motion by adding new grounds, then it should also be impossible to add an essential integral part by adding, after the expiration of the time limit, the essential notice of hearing, which by Rule 6 and 7, above referred to, and by Form 20, is a part of the very motion itself.

Point 4. FAILURE OF THE DEFENDANTS TO CALL UP FOR HEARING FOR A PERIOD OF MORE THAN ONE YEAR THEIR NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL CONSTITUTES AN ABANDONMENT OF THE MOTION.

The purpose of the rules above referred to and the strictness with which they have been applied, is for a salutary purpose, to-wit: the termination of litigation. A final judgment is a termination to an action and is intended to settle the controversy. If the losing party is not satisfied therewith there is a right, first of all, to move for amendment or new trial within ten days, and a right to appeal within thirty days. If these remedies are not followed, then the judgment is final, and its finality is binding not only on the parties but on the court, both district and supreme; and it is to support this finality that the rules are as strict as they are. Now, when judgment was entered against the defendants on July 9, 1958, the matter so far as the plaintiffs were concerned, was determined. Plaintiffs had received what they requested and had no duty to go forward. The defendants had the right to move for a new trial or to appeal. It is

conceded that it is obvious that at first defendants intended to move for a new trial, but so far as the record discloses, that intention was not carried into fruition. Until the entry of the final judgment it was the duty of the plaintiffs to go forward. When final judgment was entered in favor of the plaintiffs, that duty shifted to the defendants, if they desired further relief of the court. They notified the court of their intention to ask further relief and there the matter rested. Plaintiffs respectfully urge that by their inaction, the defendants abandoned their motion; if by any stretch of the imagination the instrument can be deemed a motion. Now it is conceded that plaintiffs could have called up the said "Notice of Intention to Move for a New Trial" for hearing, but that was not plaintiffs' responsibility. Plaintiffs had received from the court all that they requested. No longer was it their responsibility to move forward, and the defendants did not move forward but apparently abandoned any original intent to ask for further relief from the court. It is not at all uncommon for persons having legal rights, to fail to press those rights, particularly where the rights are questionable; and it is a common rule of law that if a claim is not pressed aggressively, the right to do so will be lost. Defendants' failure to press the matter for a period of fifteen months after judgment against them, is more than ample time to justify the court in ignoring or dismissing the so-called motion, if there is any motion before the court. In *Darke v. Ireland*, 4 Utah 192 (196), the Supreme Court of the State of Utah said:

"It appears from the record that on June 20, 1883, 26 days after the date of the judgment and during the term in which it was rendered, plaintiff filed an

affidavit in which he stated certain reasons for a new trial. And on the 27th day of the same month, this affidavit appears to have been served on defendant. This is all that appears on the record with respect to the motion. The plaintiff urges that the effect of the steps toward a motion for a new trial was to retain jurisdiction in the courts over the case for the purpose of the motion to vacate the judgment. No such notice of motion as is required by Section 1420 of the Compiled Laws of Utah 1876 was given. The failure to comply with the law with respect to the motion, with the further fact that no notice appears to have been taken of it by the court or counsel, authorized the inference that the motion for a new trial was abandoned.”

It should be noted that in the Darke case there is nothing indicating abandonment other than the failure to give the notice required by Section 1420. The moving party merely let the matter rest for a period of 13 months and because it was the duty of the moving party to go forward, the court implied an abandonment. In that case the period of failure to press the matter was less than in the case now before the court. At the time the Darke case, *supra*, was heard, the laws granted far greater time within which acts were to be performed. But in that case failure for 13 months to call up the motion for new trial was considered to be an abandonment. The Darke case has never been overruled nor modified and stands now as precedent that a motion for new trial, if not called to the attention of the court for action within a 13 months’ period, may be ignored and considered as abandoned.

Point 5. THAT THE PURPORTED FINDINGS OF THE COURT IN SUMMARY JUDGMENT ENTERED MARCH

9, 1960, IN CIVIL NO. 123132, THAT THE MOTION FOR A NEW TRIAL IN CASE NO. 108689 IS VALID AND THE TIME FOR APPEAL HAS NOT EXPIRED, IS NULL AND VOID, FOR THE REASON THAT CASE NO. 123132 HAVING BEEN DISMISSED THERE IS NOTHING BEFORE THE COURT ON WHICH IT CAN BASE A FINDING THAT THE MOTION FOR NEW TRIAL, SO-CALLED, IS VALID.

The court in the summary judgment rendered March 9, 1960, (Record 32) dismissed plaintiffs' case for "no cause for action." Thereafter, it purports to adjudicate the case on the merits. That it cannot do. Once having dismissed the case, there is nothing before the court on which it can act. No affirmative request for relief was filed by the defendants, by way of counterclaim or cross-complaint, and once the matter is dismissed as "no cause of action" the plaintiffs could, unless the dismissal was with prejudice, as is not the case here, commence a new action for determination of the points in litigation. The District Court could not after the dismissal proceed to adjudicate those points.

CONCLUSIONS

It is the contention of the plaintiffs herein that the defendants failed to file and serve such a motion as is required by Rule 6 (d), Rule 7 (b) (1), and Rule 59, and that no motion effective to stay the running of the time for appeal having been filed and the period for appeal having expired, the district court and the supreme court are without jurisdiction to modify the judgment

in any way or to vacate or modify or rehear the judgment. Plaintiffs respectfully urge that the matters herein set forth are jurisdictional and not merely procedural; nor are they matters of discretion. The defendant not having made a motion, but only having expressed an intention, and not having given notice thereof as required by the rules, the essential machinery for staying the period of appeal was not set in motion and after the expiration of the period for appeal, the court lost all jurisdiction over the case.

In *National Popsicle Corp. v. Hughes*, 32 Fed. Supp. 399, the court said:

“It would be contrary to sound reasoning, as well as settled principles of federal law, to construe Rule 6 (c) to mean that the court has continuing jurisdiction over its final judgments and decrees. The power of the court over its final judgments must end some time. If the period of termination is specified in the Rules of Civil Procedure that period governs. Otherwise the end of the term marks the termination of the court’s power, in accordance with settled law.”

Moore, in commenting on the federal rules, as amended, including the 1939, 1946, and 1948 amendments, has this to say in commenting on rule 73, dealing with appeals.

“The second sentence of the amended rule deals with this problem. It should be noted that the time for appeal is terminated only by a timely motion made for judgment n. o. v. under rule 50 (b), or to amend or make additional findings under rule 52 (b), or for a new trial under rule 59 (b), or to alter or amend the judgment under rule 59 (e); to be timely a motion under rule 52 (b), 59 (b), or 59 (e) must be made not later than ten days after the entry

of judgment. And a motion for judgment n. o. v. under rule 50 (b) must be made within ten days after the reception of a verdict or if a verdict is not returned within ten days after the jury has been discharged.

“In general, then, all of these rules provide for a very short time, a ten-day period.

“It should be recalled that under rule 6 (b) as amended, the court may not enlarge any of these time periods. This changes the former practice, since under the original rule 6 (d) the only express limitation upon the court’s power to enlarge any of these time periods was a prohibition against enlarging the time for moving for a new trial under rule 59.” Moore’s Federal Rules and Official Forms, page 1210.

In further support of plaintiffs’ contention that the problem here involved is jurisdictional, plaintiffs quote further from Moore:

“In ordinary civil actions governed by the federal rules of civil procedure, however, the better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction to entertain a motion as for new trial, or for a rehearing, or to vacate or amend, as the case may be, and cannot thereafter entertain such a motion and thereby start the appeal time running anew. *Safeway Stores, Inc. v. Coe* (Appellate D.C. 1943) 136 F 2d 771; *Jusino v. Moreles & Tio* (CCA 1st, 1955); 139 F 2d 946; *Nealon v. Hill* (CCA 9th 1945); 149 F 2d 883; *Norris v. Kemp* (CCA 10th, 1944) 144 R 2d 1.” Moore’s Federal Rules and Official Forms, pages 1210 and 1211.

There is a recent federal case quite closely in point on this entire problem. It is entitled *Raughley v. Pennsylvania R.R. Co.* and is a decision of the Third Circuit Court of Appeals, decided Feb. 7, 1956 and reported in 230 F 2d 387. In that case the losing attorney requested the court for re-argument so that a question not previously presented might be argued:

“At the judge’s request the narrative runs, counsel left a memorandum of his authorities with the judge’s secretary for examination. On January 3, 1955 counsel was informed by the court that reargument would be allowed and it was, as the docket entries show.”

The re-argument was allowed and the court made an order denying the motion for re-argument. The losing party forthwith appealed and the question was whether the appeal was timely. The Circuit Court held that the trial court was without authority to enlarge the time, that the *motion made, even though heard and ruled on by the court, did not comply with the provisions of Rule 7 (b) and:*

“cannot be considered as a motion under the other rules.”

Because the motion was defective the appeal came too late and motion to dismiss the appeal was granted. It is respectfully submitted that in the case now before the court we have a written “Notice of Intent to Move for a New Trial” but no motion. Neither is the notice appended thereto, as required by Rule 6 (d) and as set forth in Form 20 nor does the instrument meet the requirements of a motion as required by Rule 7 (b); and its is plaintiffs’

contention that the instrument was therefore insufficient to comply with the rules and did not in the least degree follow Form 20. And being insufficient to suspend the running of the time for appeal, the rule in *Raughley v. Pennsylvania RR* should be followed. It is further contended that even if the court should now hear and pass on defendants' "Notice of Intention," thereby regarding the document as a motion, this would not cure the defect because the court is without jurisdiction so to do. The court in the *Raughley* case just quoted, did exactly that, but the Circuit Court of Appeals held:

"Now is there any way in which such a motion, even though not timely made, can still have the effect of tolling the period for appeal? Specifically, did the court below produce such an effect by entertaining and ruling (on May 12th on appellants' motion of January 4th). It should be noted that the motion of January 4th was timely in that it was within the ten-day period, but it was not timely because not in proper form."

The court discusses the problem further and concludes:

"The action of the trial court here in regards to the motion of January 4th must therefore be regarded as a nullity."

The ruling of the court in the *Raughley* case to the effect that a defective motion, even though made within the ten day period, and even though acted upon, is not sufficient to stay the running of the appeal period, squarely supports plaintiffs' position. Adopting the language of the court in *US of A vs. 64.88 Acres etc., supra*. To regard the instant motion as sufficient to stay the running of the time for appeal is

to nullify completely Rule 6 (d) and Rule 7 (b). If the Supreme Court should rule that compliance with these rules is not mandatory then it will, at the same time, cast doubt upon all the rules and we shall be left without guidance in conducting litigation.

It is respectfully urged that the court erred in granting defendants' motion for summary judgment. This decision of the district court should be reversed and the court should be instructed to grant plaintiffs' motion for summary judgment, affirming the validity of the judgment of July 9, 1958, in Civil No. 108689.

Respectfully submitted,

PERRIS S. JENSEN
Attorney for Plaintiffs
1414 Walker Bank Bldg.
Salt Lake City, Utah

WARRANTY DEED

L. W. Howard
of 4704 Holladay Blvd, County of Salt Lake, State of Utah, hereby
CONVEY and WARRANT to
Mildred M. Howard, his wife

of Holladay Wt.
Ten dollars
the following described tract of land in Salt Lake
State of Utah: Containing a point 2.07 ch. W. & S 52° 30' E 5.24 ch

from Northeast cor. of Northwest 1/4 of sec 10 T2SR.1E S.4. B+M
thence running there N 56° E 3.55 ch. thence S 39° E 4.15 ch thence
thence S 47° W 5.88 ch thence S 54° 15' W 214.25 ft. thence N 46° 25' W
404 ft more or less to a point which is South 55° 30' W 405 ft
thence S 46° 25' E 154 ft. thence S 43° 35' W 180 ft more or less
from beginning

Less roads
Less Temple & Woods

Less Theatre

contains 2.75 acres more or less

WITNESS, the hand of said grantor, this 9th day of May, A. D. 1945

Signed in the Presence of

Ronald N. Spradling

L. W. Howard

STATE OF UTAH,

County of Salt Lake

ss.

On the 9th day of May, A. D. 1945
personally appeared before me L. W. Howard
the signer of the within instrument, who duly acknowledged to me that he executed the

Ronald N. Spradling
Notary Public.

My commission expires 8/22/45

Residing in

Murray - Utah