

1960

William K. Howard et al v. Mildred M. Howard et al : Motion and Brief for Rehearing

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 CO., as Administrator
of the Estate of L. W. Howard, Deceased.
Defendants and Respondents.

MOTION AND
BRIEF FOR
REHEARING

Case No. 9223

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Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	Page
Statement of Motion for Rehearing.....	1
Point 1. Sanctioning failure to follow Form 20 makes following of other forms unnecessary and opens door to abuse of process.....	2
Point 2. Best rule of law is to require notice and motion to be served together.....	4
Point 3. Elimination of rule requiring particularization in motion will be harmful to courts and is contrary to adjudicated cases	5
Point 4. Ruling that Abandonment cannot exist if either party may call up is reversal of established law.....	6

AUTHORITIES CITED

STATUTES:

Utah Code Annotated 1943, Sec. 104-42-3.....4, 5

Utah Code Annotated 1953, Vol. 9 page 651 (annotations) 5

RULES OF CIVIL PROCEDURE:

Rule 6 (d)..... 4

Rule 7 (b) (1)..... 5

Form 1 and 20..... 2

Forms 1, 28, 29, 31, 32, 33..... 4

CASES:

Darke v. Ireland 4 Utah 192, 196.....	6
Holton v Holton 243 P2 438.....	3
In re Application 7600. 73 Utah 50, 58; 272 P 255	5
Sharp v Bowen 87 Utah 327, 48 P2 905.....	5
Townsend v Holbrook 89 Utah 147; 56 P2 610.....	5

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Appellants respectfully move the court for a rehearing of the above entitled matter. In doing so, counsel for Appellants is compelled not only by a desire to see that justice is done to his clients, but also and primarily counsel is greatly concerned about the violence done to the Rules of Civil Procedure by the holding of the court in the above case. Appellants can readily proceed in the matter and are convinced they will eventually prevail. But the damage to the Rules of Civil Procedure will be permanent. The court, by this decision, gives its blessing to sloppy practices, sactions failure to read the rules or follow the suggested forms.

If the effect of the decision of the court were confined to this case, the result would not be so serious, but this case will become precedent and counsel would like to point out some of the dangers that can flow from it.

SANCTIONING FAILURE TO FOLLOW FORM 20 MAKES FOLLOWING OF OTHER FORMS UNNECESSARY AND OPENS DOOR TO ABUSE OF PROCESS.

Form 20 outlines the form of the motion. The court by this decision decrees that this form need not be followed. Any wording will suffice as long as the intent may be gleaned from any portion of the instrument. Form 1 is a summons. There is nothing in the rules which gives greater sanctity to Form 1 than to Form 20. Suppose we apply to Form 1 the same liberality that the court is approving as to Form 20. We would have a document somewhat as follows:

“A B (Plaintiff)

vs.

“D B (Defendant)

NOTICE OF INTENTION TO ISSUE SUMMONS

Civil No. _____

“You and each of you will please take notice that the plaintiff A B intends to issue summons against the defendant B D, etc.

“This summons is to obtain judgment on an open account for merchandise in the sum of \$_____.

“Dated _____, 19____.

Attorney for Plaintiff”

Does the court, for a moment, believe that such document would be sufficient to support a default judgment? The members of the court are probably aware of the fact that collection agencies often use forms similar to a summons to frighten debtors into paying. Suppose a document similar to the one quoted above were served on a debtor and he ignored it, and a complaint was filed and default judgment entered. Could not the attorney for the plaintiff, using such an instrument, cite as authority for the validity of the alleged summons the precedent of this case? He would be fully justified in pointing out that if the words: "Said motion with respect to the cause mentioned" constitutes sufficient compliance with Form 20, then the words "this summons is to obtain judgment" would be sufficient to comply with Form 1.

In order to extend mercy and leniency to a careless defendant, must the court subject the bar and the public to the grave dangers that may result if no semblance of compliance with the forms is required? The respondent, in serving the document which the court approves, did so either (a) to deceive, or (b) because counsel was too lazy or too cocksure of his position to open his code and follow the form therein plainly outlined. The court should not put its stamp of approval on either (a) nor (b). Equity rewards the diligent, not the slothful.

The court has said:

"Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and, unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing." *Holton v. Holton*, 243 P 2 438.

Again, counsel reiterates, by way of emphasis, if Form 20 may be completely ignored, then Form 1 or Form 28, 29, 31, 32 or 33 may likewise be ignored and the way is opened for trickery and abuse of process and careless, disorderly procedure.

BEST RULE OF LAW IS TO REQUIRE NOTICE AND MOTION TO BE SERVED TOGETHER.

To hold that the notice of hearing is not an integral part of the motion, defeats the clear purpose of Rule 6 (d). This rule is an amendment of the former Code Section 104-42-3. Section 104-42-3 did not require the service of motion and notice of hearing together. This led to abuses, and to cure this, subparagraph (d) was added to tie the two together; and, in order that there might be no mistake about it, Form 20 set it forth in detail. Then, to provide greater liberality, the compiler's added:

“The motion and notice above may be combined and denominated a 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.”

Surely this gives great leeway in form. But the intent of the compilers of the Code was still that the motion and the notice be served together.

Before the court determines that the motion and the notice need not be served together, as the wording of Rule 6 (d) and the statements of the commentators of the similar Federal Rule indicate, or at least imply, should not careful consideration be given to the question as to which is the better law? Does it not tend toward more expeditious and

orderly law to require the service of motion and notice together, than to revert to the practice under the old rule of 104-42-3?

ELIMINATION OF RULE REQUIRING PARTICULARIZATION IN MOTION WILL BE HARMFUL TO COURTS AND IS CONTRARY TO ADJUDICATED CASES.

The decision of the court that only such particularization in a motion is required sufficient to advise of the theories upon which a new trial was sought, runs directly contrary to the adjudicated cases, both of our own court and of other jurisdictions as well. What is particularity, and why is it required? It is more than a mere assertion of the theory relied upon. The decision that particularization is not necessary repeals rule 7 (b) (1), and all cases which require the particulars to be set forth, including: In re Application 7600 to appropriate water, 73 Utah 50, 58, 272 P 255; Townsend v. Holbrook 89 Utah 147, 56 P 2 610; and Sharp v. Bowen 87 Utah 327, 48 P 2 905. Appellants point out that there is no particularization whatsoever as to ground one, of the so-called "Motion", and the only particularization as to ground two, is contained in the affidavit and what particularization there is there does not in the least respect support any allegation of an irregularity in the proceeding of the court. These irregularities are annotated on page 651 of the Utah Code Annotated, 1953, Volume 9; and, merely because the court ruled against the defendant, does not constitute irregularity. For the court to approve an affidavit which does not show irregularity, is again an approval of laxity and carelessness and nullifies the clear meaning of rule 7 (b) (1). This requirement is one designed to aid the courts and should not be lightly brushed aside. This matter might be discussed at considerable length, but because counsel

regards the threat to orderly procedure already hereinabove referred to to be a far greater danger to the Bar and the public, this point as to particularity will not be further argued.

RULING THAT ABANDONMENT CANNOT EXIST IF EITHER PARTY MAY CALL UP IS REVERSAL OF ESTABLISHED LAW.

One final point appellants must mention. The court concludes that there was no abandonment of respondent's "Motion" because appellants could have called it up at any time. This holding nullifies the entire doctrine of dismissal for failure to diligently prosecute. It has heretofore been settled law that if a litigant did not press his claim diligently, his right to do so would die. The courts have heretofore had inherent power to dismiss a complaint for failure to prosecute. Is this right to dismissal now to be denied because the adverse party could have called the matter up for hearing at any time? It is the duty of the moving party to show diligence. There are no cases where the adverse party could not go forward. Must he do so when that is not his duty? Having this right, but not the duty, is he to be denied the right to a dismissal for lack of prosecution? If this be so, then the whole doctrine of diligence ceases to be a principle of law.

The decision of the court in this case must be regarded as overruling the case of *Darke v. Ireland*, 4 Utah 192, (196). There, too, both parties had the right to call up the motion, but where the moving party did not do so for 13 months, the court held that to constitute abandonment. It is respectfully submitted that if the court should reconsider this point and uphold and follow the *Darke* case, then the destruction to

the Rules of Civil Procedure required to rule in favor of the respondent, need not occur.

The committee that formulated the Rules of Civil Procedure worked long and hard. They went just as far as was considered safe in providing liberality in procedure, to free the Bar from the strictness of the old code. Now the court, for no justifiable reason, because the respondent made no effort to show justification for failure to read or follow the forms, bruskiy shuffles aside even these mild restrictions of form and indicates that any writing which "advise(s) of the theories" is sufficient. Is it advisable, in order to extend mercy and leniency, to a negligent member of the Bar, to place in jeopardy the public and the members of the Bar, by indicating that attorneys may, with impunity, disregard all rules and forms, as long as they say enough that someone may be able to surmise their intent? This case, if permitted to stand, will be precedent for all manner of laxity in civil procedure, if it does not open wide the gate to trickery and deceit.

Respectfully submitted,

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