

1957

# Jensen's Used Cars v. James T. Rice : Brief of Appellant

Utah Supreme Court

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Lowry, Kirtin & Bettilyon; Verden E. Bettilyon; Counsel for Appellant

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In the Supreme Court  
of the State of Utah

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Clerk, Supreme Court, Utah

JENSEN'S USED CARS, *Respondent,*

vs.

JAMES T. RICE, *Appellant.*

Case

No. 8741

Appeal from the Third Judicial District Court of the  
State of Utah

HONORABLE RAY VAN COTT, JR., District Judge

BRIEF OF APPELLANT

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This is an action for a deficiency Judgment brought by Jensen's Used Cars against James T. Rice on a Conditional Sales Contract for an automobile purchased by the Defendant, and an action on a check given to the Plaintiff by the Defendant.

The Plaintiff, Jensen's Used Cars, is a nonentity under which Mr. Thomas Hunsaker does business as a used car dealer. On or about August 12, 1955, Mr. Victor W. Jones brought

a 1955 Ford Mainline 6 Sedan to the home of Mr. Rice. During the conversation that ensued, the price of the automobile was discussed, but Mr. Jones apparently did not have a full understanding of the terms and conditions of the sale. It was finally agreed that the automobile would be left in the possession of Mr. Rice, whereupon Mr. Rice delivered a check dated August 13, 1957 to Mr. Jones in the amount of \$200.00, and signed a contract in blank.

On or about the 17th day of August, 1955, Mr. Rice went to the Walker Bank & Trust Company of Murray and signed a Conditional Sales Contract and a Promissory Note, Exhibits 2 and 3. The cash balance was \$1850.00 of which \$50.00 represented sales tax and license plates, which were never obtained. The evidence indicates, and this is not controverted by Plaintiff's testimony, that Mr. Rice signed this Contract with the understanding that the Plaintiff, Mr. Hunsaker, was to refund to him the sum of \$100.00, and in order to protect himself and to see that this was done, he stopped payment on the \$200.00 check which had previously been delivered to Mr. Jones.

The Defendant, James Rice, operated the car for 19 days until the sticker ran out, and then parked it at his home until November 9, 1955, at which time it was picked up in front of his home by Mr. A. J. Carter, a representative of the Walker Bank & Trust Company in Murray, and returned to the Hunsaker automobile lot. Thereafter it was sold across the Salt Lake Auto Auction.

On December 7, 1955, the Plaintiff paid off the contract to Walker Bank & Trust Company paying the amount of

\$1,860.00, and thereafter commenced this action for recovery on the deficiency represented by the difference between the amount claimed for the car as received from the Salt Lake Automobile Auction and the amount paid to the bank, and for the \$200.00 represented by the check which has never cleared the Bank.

The trial court directed a verdict in favor of the Plaintiff and submitted the question of attorney fees and the matter of the \$200.00 check to the jury for a decision upon interrogatories.

## STATEMENT OF ERRORS

### Relied on for Reversal

1. The Court erred in refusing to grant Defendant's Motion to Dismiss on the grounds that the Complaint failed to state a claim against Defendant upon which relief can be granted.

2. The Court erred in having directed a verdict for the Plaintiff and against the Defendant upon its own Motion in the following particulars:

(a) That there was sufficient evidence to be presented to the jury on the basis of whether a contract was ever executed by the Defendant since delivery of the executed contract to the Walker Bank & Trust Company as agent for the Plaintiff was conditional upon the refund to the Defendant of \$100.00 by the Plaintiff, or installing a radio in the automobile.

(b) That there was sufficient evidence to go to the jury on the matter of failure of consideration in as much as the whole consideration for the contract was returned to the Plaintiff.

(c) That there was sufficient evidence to go to the jury on the question of whether a contract had ever in fact been executed since there was a dispute in the evidence as to whether there had been a meeting of the minds of the parties on the amount of the purchase price of the automobile.

3. The Court erred in failing to allow the Defendant to introduce Exhibits 8 and 9.

4. The Court erred in instructing the jury on the special interrogatories in that it failed to set forth the Defendant's theory of the case, and further erred in instructing the jury after argument of Counsel and allowing the Attorney for the Plaintiff to discuss the instructions in front of the jury and thereby granting them in effect a contradictory instruction.

## STATEMENT AND ARGUMENT

The fundamental questions to be determined here as the writer sees them are:

1. Whether the Court on its own Motion should have granted a directed verdict in favor of the Plaintiff.

2. That the Court erred in the other instructions and in the manner and time the instructions were given.

## ARGUMENT

It is our main contention that the Court erred in directing a verdict in favor of the Plaintiff and that on the basis of any one of three theories there was sufficient evidence to take this matter to a jury.

The evidence shows that the night the automobile was delivered to the Defendant, that a Contract was signed in blank; however, this contract was apparently never used, and was either destroyed or is still in the files of the Plaintiff. The actual contract sued upon was signed by Mr. Rice at the office of the Walker Bank & Trust Company in Murray in the presence of Mr. Frank Nelson. However, even though the contract did not state the purchase price as understood by Mr. Rice, he signed the document with the reservation that the Plaintiff was to refund to him \$100.00 or install a 6 tube radio in the automobile. That this was Mr. Rice's understanding of the contract is clearly indicated throughout the record of his testimony. On direct examination he testified as follows: (Trans. 68):

A. "On the 17th of August. I signed the stop payment order on that at the same time Mr. Jones called me and told me that he had made arrangements at Murray Bank with Frank Nelson to finance this car. I immediately called Mr. Nelson for what amount he was making this note for and he told me and I went right directly to my bank at that moment and stopped payment on that check. I checked with my bank to be sure."

Q. "Yes. On the 17th of August, is that right?"

A. "Yes."

Q. And the day after, on the 18th, you went into the Murray Bank, the day following you went into the bank and signed a contract and by the terms of which you agreed to pay \$2045.70, is that right?"

A. "Yes, sir."

Q. "Did you tell Mr. Nelson that you had placed a stop payment on that check?"



A. "Yes, sir."

Q. "You told him at that time?"

A. "Yes, sir. I told Mr. Jones also. I called Mr. Jones the same day and told him I had stopped payment on his check."

Q. But in any event you agreed to pay \$2045.70, didn't you?"

A. "I agreed to do that a dozen times."

On another occasion, on cross examination, Mr. Rice again testified (Trans. 83):

A. Mr. Jones called me and he said that he had got Mr. Frank Nelson to agree to take the contract on this Ford and wanted me to call Frank. I called Frank and he said that he was making the contract and wanted me to come down and sign it. I asked him for what amount. He said it was for \$1600.00 plus the tax, sales tax, title, and license, and I told him then that I had bought an insurance policy for it and I would have Valley State Bank make him a loss payable clause and send him the policy. Well, then in that same conversation Mr. Jones told me he was taking it for \$1600.00 and I told him at that moment and I said, "I am going right down and stop payment on my check unless you want to meet me at the bank and pay you the hundred dollars and take up the check." He said, "Well you understand the car is \$1800?" And I said, "I do not. I understand the car is \$1700.00 unless you put a six tube radio in it." I said, "The car is \$1700.00, exactly the same price I had before." He said, "We've got your check and we're going to keep it." I went and put a stop payment on it. I offered him a hundred dollars for it and I offered to release it at the bank for

it. In fact, I went in the bank and offered to make these payments and leave the money for them.”

It is true that both Mr. Jones and Mr. Hunsaker disagreed with Mr. Rice on many of the facts of the case; however, on one point, both Mr. Jones and Mr. Hunsaker agree, and that is that they never at any time discussed the purchase price of the vehicle directly with Mr. Rice. Mr. Jones on cross examination testified with regard to the purchase price as follows (Trans. 34):

- Q. Was there anything said at that time about the purchase price of this car would be \$1700.00 without a radio or \$1800.00 with a radio?”
- A. He had made arrangements with another one of Mr. Hunsaker’s men about the price and I told him I didn’t know anything about that. That he made the arrangements. All I told him—.”
- Q. Well then answer again was there anything said, Mr. Jones, by Mr. Rice to you at that time that there was an understanding or an agreement that the car was to be \$1700.00 without radio or \$1800.00 with a radio?”
- A. No, sir. He did state that he would ask the price of a radio and I didn’t know, and I told him that I would get him one at our cost.”
- Q. “And how much did you tell him that you wanted of that price before you delivered the car?”
- A. “I wanted \$500.00 but I said I would settle for \$200.00.”
- Q. “You wanted \$500.00? You were supposed to collect the full amount for the car, weren’t you?”
- A. “It was left to my discretion. He told me to bring the money back. He had arranged with the bank

and I assumed there would be a cashier's check waiting for me."

Q. "Do you know how much the cashier's check would be?"

A. "No, sir."

Q. "Did Mr. Hunsaker tell you at any time how much you were to bring back?"

A. "No, sir."

Q. "All right. When you arrived there at the home of Mr. Rice you were to bring back the money but you didn't know how much you were to bring back, is that right?"

A. "That's right."

Q. All right. Now at the time you arrived there, Mr. Jones, did you at any time tell Mr. Rice any specific amount that he was being charged for this car?"

A. "No."

The Plaintiff, Mr. Hunsaker, testified regarding personal arrangements with Mr. Rice as follows (Trans. 109):

Q. "Yes. Mr. Hunsaker, did you personally make this arrangement with Mr. Rice?"

A. "Not personally, but I told the fellows that were helping me what the deal was."

And on cross examination he testified (Trans. 110):

By MR. BARCLAY:

Q. "Mr. Hunsaker, did you ever at any time tell Mr. Rice that the price was \$1850.00?"

A. "No."

Q. "Did you ever have any conversation with him at all?"

A. No. Not before that. He had taken delivery."

Q. "And did you ever have any conversation with Mr. Rice at all about purchasing this Ford Mainline?"

A. "Not until after it was purchased."

The record is quite confused on many points, but on the point that there was never any meeting of the minds with regard to the exact amount of the purchase price there can be no doubt. On this basis, the Court should have allowed the matter to be taken to the jury in accordance with the issues framed in the Answer of the Defendant to the Plaintiff's Complaint.

The Answer sets forth a denial that the Contract was executed, except in blank; however, the facts clearly show that the Contract in question was executed at the Walker Bank & Trust Co. But, the Answer does go on to set forth the claim that the purchase price was to be \$1700.00 without a radio or \$1800.00 with a radio, and by reason of this misunderstanding, there was an issue as to whether there was ever a Contract executed. In addition, the Answer goes on to set forth that there was a failure of consideration by reason of the Plaintiff's taking the automobile back, and this was a proper issue for the jury to decide: Whether in the first place there was a Contract, and whether there was a failure of this Contract by reason of failure of consideration. The Defendant in his Answer then goes on to set forth that by reason of the foregoing facts, Defendant is entitled to cancellation of any and all indebtedness which Plaintiff alleges to be due it from

Defendant, and that Defendant is entitled to cancellation of such notes acknowledged by Plaintiff to be in existence since the consideration for such instrument wholly failed and was returned to Plaintiff.

It is also clear from the evidence that when Mr. Rice signed a contract at the Bank, this executed Contract was delivered to Mr. Frank Nelson conditionally upon Mr. Rice being refunded \$100.00 out of the \$200.00 check on which he had stopped payment or in the alternative that a six tube radio was to be installed in the vehicle. Neither of these things was done.

The general principle of law is stated in 3 American Jurisprudence, 439, paragraph 886:

“Where the trial Court directs or refuses to direct a verdict in favor of the Defendant (Plaintiff in this case) the question of law before the reviewing Court is not as to the weight of the evidence, but whether there was any evidence which would have warranted a verdict in favor of the Plaintiff (in this case the Defendant) . . . For the purpose of determining the correctness of the trial court’s ruling, the Appellate Court will consider the evidence in its most favorable aspect for the opposing party. The evidence of the one against whom the verdict is directed in the trial court must be accepted as true.”

In the case of Boskovitch vs. Utah Construction Company, 259 Pac. (2d) 885, at page 886, the Court has set out the basis on which a trial Judge should grant a directed verdict:

“In deciding a motion for a directed verdict, the Court must consider the evidence in the light most favorable to the party against whom the Motion is

directed and must resolve every controverted fact in his favor. (Cites cases.) The inquiry, then, must be directed toward whether reasonable minds could disagree in this case on the evidence presented so as to provide a question for the jury."

The Court in directing this verdict took the attitude that the only questions presented by the Answer of the Defendant was whether the Plaintiff had ever *agreed* to a cancellation of the Contract. There was no evidence on this point, but the Court failed to give consideration to the other defenses set out in Defendant's Answer, so that the Defendant might be entitled to a cancellation by reason of the premises stated above. The Court at one point questions counsel for the defense on this matter, and asks the question (Trans. 104):

Court . . . "As I say to the price of the car, you have never raised an issue against that so I presume that that is satisfactory to you. Isn't that right?"

A. "That's right."

We submit that the way the question was put, that counsel for the defense misunderstood the question directly, and that the issue was before the Court was clearly stated in the Answer, and should have been presented to the jury. To substantiate this further, we call to your attention that later on the counsel for the defense clearly sets forth his contention in a further conversation between him and the Court (Trans. 103):

THE COURT: "Well, of course, now there is no pleading of thought here. Nobody pleads thought. You don't plead it, do you, Mr. Barclay?"

A. "I don't plead thought, no."

THE COURT: "You just claim that there is a different contract for \$1700.00, that is what you allege?"

A. "A different understanding, yes."

THE COURT: "Well the fact of the matter is this is the one that was signed on the 12th which I have admitted is the one he says was destroyed, isn't it?"

A. "Yes."

Even the Defendant understood the theory of his case as indicated by the answers given to Interrogatories from the Court and Attorney for the Plaintiff (Trans. 100):

THE COURT: "You just answer his question. That is the trouble. There has been too much talk here."

Q. "Has anyone—well now, I'll make it more specific—has Mr. Hunsaker or Mr. Jones or Mr. Nelson, or any officer or agent of the bank ever cancelled this note and contract, or agreed to cancel it with you?"

A. "Well, I stated before that I went into the bank and offered to make these payments—

THE COURT: "No. Just answer the question. Don't tell us about your virtues."

Q. "Has anyone ever told you that you wouldn't have to pay those?"

A. "No."

Q. "No one has ever told you that they would cancel them and you wouldn't have to pay that note and contract, have they? Answer the question."

A. "My note and contract was with Walker Bank."

Q. "Was what?"

A. "Was with Walker Bank and when I went in to agree to make the payments on the note and the



contract it was with an understanding that the car came to me at the price represented in the original deal."

Q. "Well, did anybody ever tell you that they would cancel that note and contract that you didn't have to pay it? Now you can answer that yes or no."

THE COURT: "Mr. Rice, let me just read your answer that you filed in this case. "Defendant further alleges that the only instrument he at any time executed and delivered to plaintiff was delivered by him to one Oliver executed in blank by defendant with the understanding that such instrument would be filled in for the sum of \$1700.00 as the purchase price for an automobile without aradio and for the sum of \$1800.00 as the purchase price of said automobile with the radio." Now that is what you allege as your defense."

A. "Yes, sir."

Q. "Then you allege that that deal that you made, that I have just read, was canceled by these people when they took the car back. Now that is your pleadings that your attorney has filed here. Now let's find out about that. Is that correct?"

A. "Well, your Honor, it is gross misrepresentation, if you want to be frank about it, from the very beginning."

THE COURT: "Well, now let's get down to this. Is it correct that you signed a note and a contract in bank with the understanding that it would be \$1700?"

A. "Yes, sir."

THE COURT: "Without a radio and \$1800.00 if it did have a radio?"

A. "Yes, sir."

THE COURT: "Is that correct?"

A. "Yes, sir."



3. The Court erred in refusing to allow Exhibits 8 and 9 to be introduced into evidence. In the first place, when these exhibits were first offered, the Court refused to accept them on the basis that they were self serving. They were next used by counsel for the Plaintiff in his direct examination of Mr. Hunsaker (Trans. 110), and in spite of the fact that the Court indicated that they had not been accepted in evidence, counsel for the Plaintiff used Exhibit 8 in his examination of his witness. This was immediately called to the attention of the Court, but the Court still refused to allow the document in evidence. In spite of the fact that the letter was not offered in evidence, the record indicates at page 91 that it was an offer on the part of Mr. Rice to pay \$100.00. This letter should have been admitted on the basis that there was a conflict as to the actual terms of the written agreement and this served to substantiate the position of Mr. Rice in the matter.

4. The Court upon the stipulation of counsel gave oral instructions which are unnumbered except for the first. The instructions as given prior to the argument of counsel are improper in that the Court failed to cover the theories of both parties in his instructions. In the case of Startin vs. Madsen, 237 Pac. (2d) 834, at page 836, this Court made the following statement:

“It was the duty of the Court to cover the theories of both parties in his instructions. (Citing cases.) If the instructions are considered as a whole, as they must be, (Citing cases) the Court adequately discharged his duty and fairly presented the issues to the jury.”

In this particular case, after all of the instructions were given, the Court then stated (Trans. 121):

"Now the findings that I will submit to you and that will be in writing will be as follows:

That will be in a form of a question. Is the amount of the \$200.00 check to be deducted from the balance of the Exhibits 3 and 2? Answer yes or no, depending upon your findings or deliberations. Sign blank line, foreman."

The question as submitted was proper, except that in no place in the instructions does the Court attempt to explain to the jury the theory of the Plaintiff's case as explained above.

After the Attorneys argued their respective cases, the Court then undertook to instruct the jury further, which is in specific violation of Rule 51, Utah Rules of Civil Procedure, which states in the last paragraph:

"Arguments for the respective parties shall be made after the Court has instructed the jury."

At page 121 and 122 of the record, the Court made the following instruction after the Attorneys argued their cases:

THE COURT: "There is one other matter with regard to these other matters that have been here before submitted and have been set forth in these pleadings that I have indicated to you. By virtue of the evidence that has been produced here I will conclude as a matter of law, and the finding will be made by me as a matter of law, or other subjects relative to this matter. There is no disputable question for you to determine other than these that I have submitted to you."

"Ladies and Gentlemen, I am going to have the Clerk prepare a directed verdict, which I will require, and direct the foreman of the jury to sign for the amount prayed for by this plaintiff, adding to or deducting this \$200.00 that I have mentioned to you, depending upon

what your finding is and this verdict that I will also hand to you will be with or without attorney's fees, depending upon what your findings are on that verdict that I will submit to you for your deliberations at the end of this case."

It is to be noted that this instruction relative to the form of the question to be submitted is changed from the form quoted above. This undoubtedly contributed to the confusion of the jury, but even more confusing there ensued a discussion by Counsel for the Plaintiff and the Court as to whether the instruction secondly given was proper. The jury was dismissed without the point being resolved and the effect was contradictory instructions being given to the jury. After the jury retired to deliberate upon the verdict, the Court then asked the parties to stipulate with regard to the correct issue in reference to the check. However, at this point the damage was done and it was too late to correct it by stipulation of Counsel. The proper issues were never presented to the jury for their consideration.

It can be argued that in as much as the Defendant failed to object or take exception to the instructions before they were submitted to the jury, he waived his rights to do so thereafter.

Utah Rules of Civil Procedure, Rule 51, does not specifically refer to Interrogatories submitted to the jury. However, this Court in the case of *Cooper vs. Evans, et al.* (262 Pac. (2d) 278), 1 Utah (2d) 68, at page 70, made the following statement:

"The Rule 51 does not expressly refer to special interrogatories but generally speaking, the same principle is undoubtedly sound as applied to them also."

The Court then goes on to point out that in that particular case counsel were given no opportunity to object to such interrogatories, and we feel that the same argument applies in this case. The writer was not the Attorney who tried this case in the District Court; however, it appears upon reading the record that at no time were the Attorneys given an opportunity to object or take exception to the interrogatories, or to the instructions, and therefore, we believe that it cannot be said that the Defendant has waived his right to object to the interrogatories or to the instructions given. At page 123 the Court stops the discussion, so that the jury could be sent out.

It would appear that the Court in making additional instructions after the argument of counsel and by allowing counsel for the Plaintiff to discuss the instructions, that the jury was plainly impressed that the only answer that could be given to the interrogatories finally submitted was yes. The whole procedure was completely contrary to the requirements of Rule 51, U.R.C.P.

5. Finally, we wish to call to your attention the discrepancies in the evidence with regard to the testimony concerning the sum of money received for the automobile when it was sold across the Salt Lake City Auction. In the first place, in the answers to the Interrogatories, Answer No. 12, the sum given was \$1,080.00. Secondly, Mr. Vic Jones, who apparently was the person who handled the sale at the Salt Lake City Auction, testified that the amount received was \$1,170.00, and finally Mr. Thomas Hunsaker, the Plaintiff, testified that the sum of \$1,070.00 was recovered. From the verdict given, it is obvious that the figures testified to by Mr. Hunsaker were

used, although the matter is not called to the attention of the jury, except that the Court in its first instruction refers to the Plaintiff's Complaint, and uses the figures of Plaintiff. It would seem that thereby the Court instructed the jury to accept this figure and disregard the testimony and this matter was taken from the hands of the jury. The jury should have been left to determine which of the statements it would believe, but it had no opportunity to do so.

WHEREFORE, the Defendant prays that the said Judgment in said entitled cause be reversed and that the Defendant have its costs herein incurred or in the alternative that the case be remanded to the District Court for a new trial.

Defendant prays for such other and further relief as may be meet in the premises.

Respectfully submitted,

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