

1958

## Jensen's Used Cars v. James T. Rice : Brief of Plaintiff and Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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JENSEN'S USED CARS,

*Respondent,*

— vs. —

JAMES T. RICE,

*Appellant.*

Clerk, Supreme Court, Utah

Case

No. 8741

Brief of Plaintiff and Respondent

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JENSEN'S USED CARS,

*Respondent,*

— vs. —

JAMES T. RICE,

*Appellant.*

Case  
No. 8741

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## Brief of Plaintiff and Respondent

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### STATEMENT OF FACTS

Some time prior to August 12, 1955, the Defendant and Appellant, James T. Rice ordered a 1955 Ford Mainline automobile from Plaintiff and Respondent. When said automobile was delivered to Appellant by Respondent's agent on either the 12th or 13th day of August, 1955, Appellant gave Respondent's agent a check in the amount of \$200.00, dated August 13, 1955, drawn on the Valley State Bank and made payable to the Respondent, Jensen's Used Cars. Said check was a down payment on said auto-

mobile, the balance of the purchase price to be subsequently arranged for and paid to Respondent by Appellant. Then on August 18, 1955, Appellant went to the First National Bank of Murray, Utah, where financing had been arranged for, and executed a promissory note and conditional sale contract on said automobile payable to Respondent Jensen's Used Cars at the First National Bank of Murray. (See Ex. 2 and 3) The contract and note were fully prepared and completed at the time they were signed and delivered by Appellant and provided for payment of a balance in the sum of TWO THOUSAND FORTY-FIVE AND 70/100 (\$2,045.70) DOLLARS in installments of not less than \$68.19 per month beginning October 2, 1955. The contract provided for an unpaid cash price balance of \$1,650.00 plus time-price differential and other charges, bringing the time balance to \$2,045.70. Appellant retained possession of the automobile until November 9, 1955, some three months after its purchase, when it was repossessed by an agent of the First National Bank of Murray due to the failure of Appellant to pay the installments provided for in the promissory note. No payments have ever been made by Appellant on the note and he stopped payment on the \$200.00 down-payment check, according to his own testimony (R. p. 68) and has never paid the check or any part thereof. In fact, there were not sufficient funds on deposit in Appellant's account at Valley State Bank to have paid said check at the time it was presented or for some five or six weeks thereafter, even if payment had not been stopped. (R., bottom p. 29 and top of p. 25)

The repossessed automobile was re-sold by Respondent for \$1,180.00 and this action was brought by Respondent to recover the deficiency of \$965.70 on said note, plus interest, and to recover the amount of the \$200.00 check given as a down payment. The Court directed a verdict in favor of Respondent for the amount of the deficiency on the note and submitted the issue as to the \$200.00 check and the attorney's fees to the jury. The jury found the issues in favor of Respondent on the \$200.00 check and awarded Respondent \$175.00 attorney's fees. Defendant appeals and asks that the judgment be reversed or that the cause be remanded for a new trial.

## STATEMENT OF POINTS

### POINT I.

THE PROMISSORY NOTE IN SUIT SPEAKS FOR ITSELF, BEING UNAMBIGUOUS AND CLEAR AND REGULAR ON ITS FACE, AND HAVING BEEN SUPPORTED BY VALUABLE CONSIDERATION IN THE FORM OF AN AUTOMOBILE IT CANNOT BE ALTERED OR VARIED BY EXTRINSIC EVIDENCE.

### POINT II.

THERE WAS NO LACK OF MEETING OF THE MINDS WITH RESPECT TO THE PROMISSORY NOTE OR CONDITIONAL SALE CONTRACT.

### POINT III.

THERE WERE NO ISSUES OF FACT TO BE

**SUBMITTED TO THE JURY REGARDING THE  
FOLLOWING:**

- (a) THE ACTUAL EXECUTION AND CONSUMMATION OF THE NOTE AND CONTRACT.**
- (b) THE QUESTION OF FAILURE OF CONSIDERATION.**

**POINT IV.**

**IF THE COURT ERRED IN INSTRUCTING THE JURY AFTER ARGUMENT OF COUNSEL, SUCH ERROR, IF ANY, WAS WAIVED BY STIPULATION AND ACQUIESCENCE OF DEFENDANT AND COUNSEL.**

**POINT V.**

**THE FAILURE OF THE COURT TO ADMIT EXHIBITS 8 AND 9 WAS NOT IN ERROR AND WAS NOT PREJUDICIAL.**

**POINT VI.**

**THE COURT PROPERLY REFUSED TO GRANT DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.**

## ARGUMENT

It is apparent that a great quantity of extraneous matter has been injected into this case, both at the trial and in Appellant's Brief.

### POINT I.

THE PROMISSORY NOTE IN SUIT SPEAKS FOR ITSELF, BEING UNAMBIGUOUS AND CLEAR AND REGULAR ON ITS FACE, AND HAVING BEEN SUPPORTED BY VALUABLE CONSIDERATION IN THE FORM OF AN AUTOMOBILE IT CANNOT BE ALTERED OR VARIED BY EXTRINSIC EVIDENCE.

To begin with, this case concerns principally the Appellant's liability on the promissory note given as evidence of debt for the purchase of an automobile. The cardinal rule of construction of any written contract is to ascertain the intention of the parties. To ascertain this intention, resort is first had to the language of the instrument; if such language appears to be perfectly plain and capable of a legal construction, then the force and effect to be given to the contract must be determined by its terms and a different construction from that imported by its terms cannot be obtained by the use of extrinsic evidence. (See 7 Am. Jur. Bills and Notes, Sec. 49, P. 815) The parol evidence rule, long regarded as a rule of evidence, has now come to be regarded rather as a rule of substantive law. In addition to the fact that the clear, complete and unambiguous note speaks for itself, the Appellant's own testimony at the trial shows a clear intention at



the time of the signing of the note to bind himself for the payment of the face amount of the note by the installments and according to the terms provided for therein. (R., p. 92)

## POINT II.

### THERE WAS NO LACK OF MEETING OF THE MINDS WITH RESPECT TO THE PROMISSORY NOTE OR CONDITIONAL SALE CONTRACT.

There can be no question as to the lack of a meeting of the minds in the execution of the contract because of any dispute as to the total purchase price of the automobile, since Appellant had already, the day before the execution of the note, stopped payment on the \$200.00 down-payment check, thus preventing Respondent from obtaining payment of the \$200.00, and with full knowledge of this fact signed a note for an amount less than the amount which he admits was the agreed price of the car, and which price he admitted at the trial he intended to pay. (R., p. 70) At that point he could have elected not to sign the note and contract and returned the automobile to Respondent or waited until the alleged difficulty was ironed out, but instead he elected to keep the automobile and to bind himself for the payment of the amount of the note irrespective of any possible dispute over what portion of the amount of the check was due and payable to the Respondent.

Sections 19 and 20, 12 Am. Jur., Contracts, p. 515 on the question of "meeting of the minds," or mutual assent, reads as follows:

“19. Generally. Although it is frequently said that there must be mutual assent or a meeting of the minds, it seems that ordinarily no more is meant than that an expression of mutual assent is necessary to form a contract. It is sometimes said that mutual assent is conclusively presumed from an expression of mutual assent. It is also sometimes said that although mutual assent is necessary, in certain cases the parties are estopped to deny that their words or acts accurately express their actual intent. It seems preferable, however, to state that an expression of mutual assent is necessary and is ordinarily alone sufficient, anything further being ordinarily unnecessary to form a contract. The entry of the parties into a contractual relationship must be manifested by some intelligible conduct, act or sign. The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from their outward expressions and acts, and not from an unexpressed intention. It is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed intentions, which may be wholly at variance with the former. The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties — that is, from a consideration of their words and acts. In some jurisdictions it is provided by statute that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting.

The expression of intention must be promissory and contractual in its nature. Therefore, a transaction does not constitute a contract if it is entered into by way of frolic and banter.

20. Binding Effect of Words and Acts. One who offers or accepts a contract of a certain character is bound by its terms as properly interpreted, even though he meant something different and thought the words conveyed his meaning. It has been said that the court must give effect to the meaning and intention of the parties as expressed in the language of their contract, in the absence of anything to show legal impediment to prevent their entering into any contract they see fit or their expressing it in the language of their own choice. Accordingly, one who accepts a written obligation is conclusively bound by its terms. Parties who have reduced their agreement to writing in plain, unequivocal terms or in terms susceptible of interpretation and construction under recognized rules of law are bound by the meaning of the contract which is reached by a proper interpretation. . . .”

Be that as it may, the question of the alleged lack of meeting of the minds is not in issue in this case, since it was not raised in the pleadings. The only defenses alleged in the Answer were that the note and contract sued upon were never executed, the Defendant allegedly having only signed some other instrument in blank; that the consideration failed when the car was voluntarily returned by Defendant to Plaintiff; and that Plaintiff agreed to cancel the contract. All these alleged defenses are dealt with elsewhere in this brief; but with regard to cancellation, it seems that an allegation of cancellation admits and presupposes a completed contract, thus refuting the first alleged defense. The simple fact remains that a clear, complete and unambiguous note and contract were executed by Appellant, and as consideration therefor he had

and retained possession of a nearly new 1955 Ford automobile and continued to hold possession of said automobile, driving it some 1,800 miles before it was repossessed (R., p. 40 and p. 56) and even attempting to sell the automobile (R., p. 64), clearly evidencing an understanding on his part that he was obligated for the purchase price of the automobile.

### POINT III.

THERE WERE NO ISSUES OF FACT TO BE SUBMITTED TO THE JURY REGARDING THE FOLLOWING:

- (a) THE ACTUAL EXECUTION AND CONSUMMATION OF THE NOTE AND CONTRACT.
- (b) THE QUESTION OF FAILURE OF CONSIDERATION.

There could be no question to be presented to the jury as to the execution of the contract by Defendant being conditional upon the return of the check, or any part thereof, since Defendant had already made it impossible for the check to be paid, so that there was nothing to be paid to Defendant by Plaintiff under any circumstances, even under the interpretation most favorable to the Defendant. The only possible question was as to how much of the \$200.00 was owing to Plaintiff, since Defendant admitted several times during his testimony that the price of the automobile was to be not less than \$1,700.00, plus license and taxes. (R., p. 71 and p. 84) The Defendant even offered to pay \$100.00 of the \$200.00. (R., p. 106)

This issue was properly submitted to the jury and resolved in favor of Plaintiff.

The Court did not err in failing to present to the jury the issue as to the execution and consummation of the note and contract since the Defendant admitted the execution of the instruments, (R., p. 102) receipt of consideration, (R., p. 71) and his intent to be bound by the contract, (R., p. 70) and did not introduce any evidence to the contrary. Thus the Court, upon considering the evidence, properly determined that there was no issue to be presented to the jury on this point.

The Court did not err in failing to present to the jury the question of failure of consideration due to the automobile having been returned to Plaintiff, since the Answer of the Defendant did not allege failure of consideration due to the return of the automobile but only due to the alleged agreement of the Plaintiff to cancel the contract. Furthermore, the evidence clearly showed that the car was *not* voluntarily returned but was repossessed after default. (R., p. 55) As to cancellation, Defendant admitted in his testimony (R., p. 102) that Plaintiff never agreed to cancel the note or contract and never notified Defendant or advised him that it would cancel said instruments.

It may be that counsel for Appellant has confused the facts of this case with the rule that where a promissory note is given as *payment* of property under the conditional sale contract and the property is returned and accepted, the consideration fails. However, the first provision on the reverse side of the Conditional Sale Contract



(Ex. 3) provides, “The delivery of the promissory note by the purchaser to the Seller or negotiation of sale thereof by the Seller shall not be deemed payment of the purchase price.” Therefore, the rule referred to does not apply in this case on account of the repossession of the automobile. Appellant has not pleaded any other basis upon which a failure of consideration could be construed and therefore there was no issue concerning this point to be presented to the jury.

#### POINT IV.

IF THE COURT ERRED IN INSTRUCTING THE JURY AFTER ARGUMENT OF COUNSEL, SUCH ERROR, IF ANY, WAS WAIVED BY STIPULATION AND ACQUIESCENCE OF DEFENDANT AND COUNSEL.

Appellant claims that the Court 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, which Appellant claims granted them in effect a contradictory instruction. It is somewhat understandable that Mr. Bettilyon’s thinking on this point might be less than clear since he was not the attorney who handled the case at the trial and was not present at the trial. However, the record discloses, in part, that Defendant’s counsel, Mr. Barclay, in the presence of the Defendant, stipulated and agreed to the correction of the previously erroneous instruction, and even where the transcript does not show his express stipulation, his mere acquiescence and failure to object would serve as a waiver of any such alleged error. Further, the final instruction

given to the jurors with respect to the special interrogatory concerning the \$200.00 check was clear and would serve to clarify and resolve any confusion in the mind of any person of ordinary intelligence, in addition to which the written form of the special interrogatory was especially clear and unambiguous and clearly stated the correct issue, as admitted by Mr. Barclay on Page 100 of the Transcript. (R., p. 122) If there was any error in the Court's action it was not prejudicial to Defendant, even had it not been waived by acquiescence and stipulation.

#### POINT V.

#### THE FAILURE OF THE COURT TO ADMIT EXHIBITS 8 AND 9 WAS NOT IN ERROR AND WAS NOT PREJUDICIAL.

Appellant contends that the Court erred in failing to allow Defendant to introduce Exhibits 8 and 9. Exhibit 8, it is submitted, is immaterial, being only a demand directed by Plaintiff's attorney to Defendant for payment of the \$200.00 check on account of its having been returned by the bank for insufficient funds. Exhibit 9 was properly excluded because in part it contained a self-serving statement by which Defendant, by the extrinsic evidence would endeavor to vary the terms of the written contract. However, Defendant was not prejudiced by its exclusion as an exhibit, since it contains damaging admissions by Defendant as to Defendant's liability on the \$200.00 check in addition to the contract balance. Also, the record will show that part of the import of the letter was introduced by Defendant's testimony on cross-examination and by representations of Defendant's counsel.

## POINT VI.

### THE COURT PROPERLY REFUSED TO GRANT DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.

With respect to Appellant's allegation that 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 could be granted, Respondent submits this question to the Court, since it is clear that the Complaint clearly stated a claim against the Defendant upon which relief could be granted, and no evidence or argument was offered by Defendant on this question.

Appellant in his Brief on Page 19, Paragraph 5, contends that since there was a \$10.00 discrepancy between the testimony of Mr. Hunsaker concerning the proceeds of the sale of the automobile at auction and the figure specified in Plaintiff's Answers to Interrogatories, this question should have been submitted to the jury, and that the Court erred in using the figures of the Plaintiff. However, a recomputation of the figures will show that the credit of \$1,080.00 was allowed, rather than the smaller credit of \$1,070.00, which gave the Defendant the benefit of the \$10.00 discrepancy, and was certainly not prejudicial. Also, it should be noted that Defendant's attorney, Mr. Barclay, (R. p. 104) stipulated as to the propriety of the credit allowed, as reflected in Plaintiff's Complaint, and no issue was ever raised by Defendant as to the amount of the resale price of the car at the auction.



Hence, there was no issue in this regard to be presented to the jury. It should be noted that Mr. Bettilyon, on Page 13 of Appellant's Brief, infers that this Stipulation by Mr. Barclay was based on a misunderstanding on Mr. Barclay's part as to whether the Court had reference to the original sale price of the automobile when sold to Defendant or to the resale of the automobile at the auction. However, a further examination of the record at that point will reveal that the Court made it completely clear and understandable as to which sale figure was meant.

In addition to all the foregoing, it should be noted that not only did testimony of the Defendant on cross-examination fail to support the allegations contained in his Answer; but also, the Defendant actually failed to put on any evidence at all, having rested at the end of Plaintiff's case in chief. The Defendant and Appellant clearly failed to sustain the burden of his defense.

## CONCLUSION

In view of all the foregoing, the judgment in favor of the Plaintiff and against the Defendant should be affirmed in all respects.

Respectfully submitted,

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