

1952

# Theo W. Plescia dba Western Auto Parts Company v. Louis E. Humphries : Brief of Appellant

Utah Supreme Court

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IN THE  
SUPREME COURT

OF THE

STATE OF UTAH

JAN 26 1952

Supreme Court, UTAH

THEO W. PLESCIA, d. b. a.

WESTERN AUTO PARTS COMPANY,

Respondent,

vs.

Case No. 7775

LOUIS E. HUMPHRIES,

Appellant.

**Brief of Appellant**

ROBERT L. BACKMAN,  
BACKMAN, BACKMAN & CLARK  
*Attorneys for Appellant*

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Appellant.

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**BRIEF OF APPELLANT**

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**STATEMENT OF FACTS**

On or about the 1st day of July, 1948, appellant executed and delivered to respondent 11 promissory notes, 10 of said notes being in form demand notes in the sum of \$100.00 each,

the first being dated August 1, 1948, and the rest being dated the 1st day of the next succeeding 9 months respectively. The interest clause on each of said notes was left blank (R. 18). The 11th note was delivered in blank its purpose being to take care of the interest on the other ten notes (R. 16, 31).

Appellant was purchasing a purported Austin dealership for Salt Lake City from one Art Flowers, and the notes represented part of the consideration for said dealership, the said Flowers being in debt to respondent in the sum of \$1,000.00 (R. 15, 36, 37), which debt appellant assumed. No mention was made whether Flowers was released from his obligation (R. 41, 50).

After paying three of said notes appellant discovered that the said Flowers had no right or authority to grant him an Austin dealership (R. 38) so he refused to pay any of the remaining notes because of the failure of the consideration for their execution.

Respondent then brought this action to collect the remaining 7 unpaid notes.

The notes set forth in the respondent's complaint, and the notes themselves produced at the trial of the case, showed that they had been altered, and respondent testified that he had altered the notes in the following particulars: (1) he had written the date when the notes were delivered to him on the top of each note (R. 17, 28); (2) he had filled in the interest clause on each note to read "Six percent per annum and ten percent after due date" (R. 18, 26-27); and (3) he had written a due date on each note (R. 19, 26-27, 29). Respondent further testified that these alterations were made without the assent of the appellant (R. 19-20). Appellant

also testified that he never authorized any of the alterations (R. 48).

The court made no finding on the question of these alterations and gave judgment to respondent on the 7 notes.

### STATEMENT OF POINTS

1. The court erred in its failure to find that the notes had been materially altered by respondent without the assent of the appellant.
2. The decision of the court is against law.

### ARGUMENT

#### Point 1

THE COURT ERRED IN ITS FAILURE TO FIND THAT THE NOTES HAD BEEN MATERIALLY ALTERED BY RESPONDENT WITHOUT THE ASSENT OF THE APPELLANT.

Appellant relies on the following statute:

Section 61-1-127, UCA 1943. What Constitutes a Material Alteration.

Any alteration, which changes:

- (1) The date;
- (2) The sum payable, either for principal or interest;
- (3) The time or place of payment;

Or any other change or addition which alters the effect of the instrument in any respect;—

Is a material alteration.

By respondent's own testimony it is determined that respondent filled in the interest clauses on each note to read

“Six per cent per annum and ten per cent after due date,” when it was understood and agreed upon between appellant (the maker) and respondent (the payee) that said notes would not bear interest in and of themselves, but that the interest would be taken care of in a separate note. Quoting from *American Jurisprudence, Alteration of Instruments, Sec. 66*:

“It is a well established rule that any alteration in an instrument for the payment of money, of a clause relating to interest, is a material change discharging from liability on the instrument any parties thereto who did not consent to the alteration, except in cases where the holder may be entitled to protection as a bona fide holder for value. This is true in the case of the addition of an interest clause to an instrument which would not otherwise bear interest. . . . And if a note with interest clause blank is not regarded as an interest bearing note, the insertion of a rate of interest, even though the legal rate, vitiates the note, as it changes it from a non-interest bearing note to one bearing interest.”

And in the leading Utah case on this point, *Idaho State Bank of Twin Falls, vs. Hooper Sugar Company*, 75 Utah 24, 276 Pac 659, 68 A. L. R. 969, it was held that a change in the interest rate per annum from 6 to 7 percent, even though done in conformity with the agreement between the parties thereto, was a material alteration, and that such a material alteration constituted a defense to an action on the instrument.

Respondent further testified that he filled in a due date on each note. When the notes were delivered to him they were in form demand notes, yet, without authority from appellant, respondent added a due date thus changing the character of the notes from demand notes to notes due on a certain date.

It is submitted that these alterations constituted additions to the notes which altered the effect of the instruments in important respects and were thus material alterations.

## Point 2.

### THE DECISION OF THE COURT IS AGAINST LAW.

Section 61-1-126, UCA 1943, Alteration of Instrument;  
Effect of, reads as follows:

“Where a negotiable instrument is materially altered without the assent of all parties liable thereon, *it is avoided*, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. . . .”

American Jurisprudence, Alteration of Instruments 35, Recovery on Altered Instrument, contains a good discussion of this particular point raised by the foregoing statute:

“It is well established as a general rule that the unauthorized material alteration of a written instrument by a party thereto, or the holder thereof, so vitiates the instrument that no recovery may thereafter be had upon it as altered, by the person responsible for the alteration, or those claiming under him, even in accordance with its original tenor. The basis of the doctrine is that any material alteration destroys the identity of the contract, and, therefore, if a party to the contract who has not consented to its alteration were to be held bound by it, it would be, in effect, imposing upon him against his will a new contract to whose terms he never agreed. He is not bound by the new contract, not because it may be less advantageous to him than the original agreement, but because it is a contract which he has never made; and the one that he did make is canceled by the change.”



This court has spoken in conformity with this discussion in two leading cases; *Garner vs. Thomas*, 94 Utah 291, 75 Pac (2) 168, and in *Idaho State Bank of Twin Falls vs. Hooper Sugar Co.*, 74 Utah 24, 276 P 659, 68 ALR 969, quoted under Point 1. In the former the Utah State Supreme Court, in ruling on a case involving an alteration of the interest rate on a note from 7% to 8%, said:

“That a material alteration in a note voids it in the hands of the one who makes the change as to all parties then liable thereon who do not consent thereto, is too well established to require argument.”

And in the latter case, the Court said that a material alteration constituted a defense to an action on the instrument.

The respondent testified that the changes and additions to the notes made by him were done without authority from the appellant. It follows that if the alterations were material, as appellant contends, the notes were avoided by reason of Section 61-1-126, UCA 1943.

## CONCLUSION

The District court having erred in its failure to find that the notes had been materially altered by respondent without the assent of the appellant, and its decision being against law, the judgment of the District Court should be reversed.

Respectfully submitted,

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Attorneys for Appellant.