THE UNILATERAL ALTERATION OF INSTRUMENTS

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This article is prompted by the decision in a recent Australian case, which is worthy of attention in that, in respect of at least two of the main issues, there were no direct precedents in English or Australian law, although there were some elsewhere. In view of this, and because, paradoxically, the fact situation disclosed by the decision is, at a guess, one that may not infrequently occur, it is sought to point out some of the implications of the decision, and the desirability of amending the relevant law.

The case, *Vacuum Oil Co. Pty Ltd v. Longmuir*,[1] may well serve as a dire warning both to legal practitioners and to the commercial world. The plaintiff company claimed from the defendant the payment of the sum of about £1,800 as a balance of money lent. This sum was alleged to have become payable to the plaintiff under an agreement under seal between the parties dated 17 April 1952. In his defence, the defendant admitted that he executed this document, but pleaded *(inter alia)* that, after its execution, it was 'altered in a material particular (a) by a clerk or servant or agent of the plaintiff entrusted with its custody, and/or (b) while it was in the custody of the plaintiff, a person entitled thereunder', and that it was thereby rendered void.

This plea was an amendment of the original defence allowed by the judge to be made at the hearing. It was based on the evidence of L, an employee of the plaintiff. At the trial, duplicate originals of the document were proved, each executed by the defendant and by a nominee on behalf of the plaintiff. The document acknowledged the receipt by the defendant of £2,500 which the evidence showed to have been paid to him at the time of execution. One original was unstamped. The other bore a threepenny duty stamp, which purported to have been cancelled on 25 May 1952. The evidence showed that both originals were unstamped at execution, and remained in that state until some time in 1955, when L put a stamp on the one which was in the plaintiff's custody, and also put on what the judge was satisfied, despite L's denial, purported to be the defendant's initials. He added the date 25 May 1952, which he then, for reasons unknown, believed to have been the approximate date of execution.

It is necessary to consider first the document to which the stamp had been affixed (referred to as Exhibit A), upon which the plaintiff

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[1] [1957] V.R. 456. Supreme Court; Sholl J.

primarily relied to prove its case. This original document, which had been signed by the defendant, delivered to the plaintiff, signed on behalf of the plaintiff, and retained by it, ought to have been stamped as a receipt,[2] in accordance with sections 50-53 and Part II of the Third Schedule of the (Victorian) Stamps Act 1946.[3] Section 30 of the Act prevents, in effect, the admissibility in civil proceedings in Victoria of any instrument 'unless it is duly stamped in accordance with the law in force at the time when it was first executed'. With regard to certain unstamped or insufficiently stamped instruments produced during civil proceedings, however, there is provided, in section 29, an exception to this rule. By section 29 (2), if

> the instrument is one (other than a bill of exchange or promissory note) which may legally be stamped after the execution thereof, it may, on payment . . . of the unpaid duty and the penalty payable by law . . . and of a further sum of One pound be received in evidence, saving all just exceptions on other grounds.[4]

With regard to the prohibition contained in section 30, it may be observed that, although the cases are not uniform, the general pre-1891 Act rule in England was that an unstamped document might be given in evidence to prove a collateral fact.[5] Even some of the post-1891 Act decisions are to the same effect,[6] although *Fengl v. Fengl*[7] is usually cited as an authority to the contrary. In the latter case, however, it was the judge's opinion that the tendering of the document 'was for the purpose of proving something more than a collateral issue',[8] so it can hardly be regarded as the last word on the matter. It still remains to be seen, therefore, to what extent, if at all, the earlier cases will be followed at the present time. Nevertheless, it

[2] It did not require to be stamped as an agreement under the Victorian Act. A threepenny duty stamp is necessary for a receipt.

[3] As amended (see now Stamps Act 1958 in new Consolidation). Stamp provisions generally similar to those mentioned in this article are in force in England and the other countries mentioned in this article. In view of the variations between the Acts of the several jurisdictions of the federal countries, comparisons, where required, are drawn only between the Victorian Act and the Stamp Act 1891 (Eng.).

[4] This section 'has its origin in ss. 28 and 29 of the Common Law Procedure Act 1854 (Eng.). It was enacted so that stamp objections might be cured without the necessity of sending the instrument to the Stamp Office during a trial, a practice then often adopted . . .': *Shepherd v. Felt & Textiles of Australia Ltd* (1931) 45 C.L.R. 359, 381, *per* Dixon J.

[5] *Matheson v. Ross* (1849) 2 H.L.C. 286; *Evans v. Prothero* (1852) 1 De G.M. & G. 572, the facts in which are very similar to those in the *Vacuum Oil* case (additional stamp was improperly affixed to insufficiently stamped receipt), but no point as to alteration was taken, and it was held that the document was receivable as evidence of an agreement, although not as a receipt; and *Grey v. Smith* (1808) 1 Camp. 387.

[6] *Mason v. Motor Traction Co. Ltd* [1905] 1 Ch. 419; *Birchall v. Bullough* [1896] 1 Q.B. 325. The latter case was distinguished in *Dent v. Moore* (1919) 26 C.L.R. 316, in which the High Court of Australia unanimously held (on language similar to that used in the Victorian Act and the English pre-1891 Acts) that the contents of an unstamped instrument may not be proved *aliter* (such as by an admission by the defendant), the instrument being struck 'with sterility' (*ibid.*, 324, *per* Isaacs J.).

[7] [1914] P. 274; and see *Ashling v. Boon* [1891] 1 Ch. 568.

[8] [1914] P. 274, 276, per Evans P.

must be admitted that it is difficult to see how the comprehensive words of, at least, the English statute may be overcome.[9] In view of the other issues in the *Vacuum Oil* case, this question was not debated in the judgment, although it was incidentally referred to.[10]

How does a receipt fit into the framework of sections 29 and 30, particularly with regard to the limitation of section 29 (2) to instruments 'which may legally be stamped after the execution thereof'? Under section 51, if the duty upon a receipt is not denoted by an impressed stamp, such duty may be denoted by an adhesive stamp which should be cancelled by the person by whom the receipt is given, *before he delivers it out of his hands.* Nevertheless, a receipt may be stamped after execution, for, by section 52, a receipt given without being stamped may be stamped at any time thereafter[11] with an *impressed* stamp, on payment of the duty and a penalty varying according to the time at which the receipt is stamped.

Thus, the position was that Exhibit A, which was unstamped at execution, could not, in the *Vacuum Oil* proceedings, 'be pleaded or given in evidence or admitted to be good useful or available in law or equity',[12] unless it were stamped, before its production in court, under section 52 (total maximum cost £10 os. 3d.), or received in evidence, during the proceedings, in accordance with section 29 (total actual cost £11 os. 3d.).[13] The plaintiff had not acted in accordance with either section. In fact, section 52 requires an impressed stamp, and L had affixed an adhesive stamp to the document. Exhibit A had, consequently, to be regarded as being completely unstamped for the purposes of the Stamps Act 1946.

But, in any event, could Exhibit A now be stamped under the above-noted provisions of the Act, and be admitted in evidence, or was the affixing of the stamp by L an alteration such as would have the effect of rendering it void? This meant an inquiry into the materiality of the alteration, and a consideration of the problem whether the plaintiff should be prejudiced by the action of its

[9] S. 14 (4) of the Stamp Act 1891 (Eng.) goes so far as to prohibit the use of an unstamped document 'for any purpose whatever'. *Cf.* s. 30 of the Victorian Act ('. . . admitted to be good useful or available in law or equity . . .', which were the words used by the English pre-1891 Acts). [10] [1957] V.R. 456, 460; *infra*, p. 67, n. 47.

[11] *Cf.* Stamp Act 1891, s. 102 (Eng.) (latest time for stamping receipt with impressed stamp is one month after receipt is given). The result appears to be that, in England, the receipt must be produced in evidence within one month after being given, if it is to be received in evidence under s. 14 (1) of the English Act, which corresponds to s. 29 (2) of the Victorian Act.

[12] S. 30. Stamp objections are looked upon with some disfavour, especially by the Bar, but it is not now in England a breach of etiquette for Counsel in revenue cases to take a stamp objection: *Annual Statement of the General Council of the Bar* (1956) 28.

[13] These provisions operate retrospectively, so as to make the instrument just as efficacious from its execution, as if it had never fallen within the operation of s. 30: *Shepherd v. Felt & Textiles of Australia Ltd* (1931) 45 C.L.R. 359; and *Alcock v. Delay* (1855) 4 E. & B. 660.

employee, L. Further, if the document was thereby vitiated, what was the effect of this on the transaction between the parties, and, in particular, on the second duplicate original (referred to as Exhibit S)? These were the key questions in this case, questions on which there is remarkably little decided law in point. It is intended to consider each of these problems in turn, both from the aspect of the particular judgment and from the wider viewpoint of an examination of the legal principles involved, as found in various jurisdictions.[14]

THE MAZE OF MATERIALITY

The old and well-known authority on these matters is *Pigot's Case*[15] in which it was held that all alterations in a deed made after execution rendered it void. Later cases extended the rule to all written instruments. Thus, in *Master v. Miller*,[16] negotiable instruments were brought within its scope. Although *Pigot's Case* was not so expressed, it is essentially a matter of unauthorized alterations; alterations made with the consent of all parties do not necessarily avoid an instrument, which may take effect as altered,[17] though it may require restamping.[18] A further limitation is that, notwithstanding that one of the propositions laid down in *Pigot's Case* was that an immaterial alteration by an obligee avoided the deed, yet, since *Aldous v. Cornwell*,[19] it may be taken that the rule applies only to material alterations.[20] It is now also well settled in the United States that an immaterial alteration of an instrument does not affect its validity.[21]

Sholl J., in his reserved judgment in the *Vacuum Oil* case, held the wrongful affixing of the stamp to Exhibit A to be a material alteration, inasmuch as it purported to make the document admissible and

[14] This article does not purport to cover the entire extensive field of the alteration of instruments.

[15] (1614) 11 Co. Rep. 26b. There are even earlier cases, *e.g.*, *Gilford v. Milles* (1511) Keil. 164, *pl.* 7; *Anon.* (1567) 3 Dyer 261b; *Markham v. Gonaston* (1598) Cro. Eliz. 626.

[16] (1791) 4 Term Rep. 320; (1793) 2 H.Bl. 141. See now Bills of Exchange Act 1882, s. 64 (Eng.); Bills of Exchange Act 1909-1958, s. 69 (Cth.); Bills of Exchange Act R.S.C. 1952, ss. 145, 146 (Canada); Bills of Exchange Act 1908, s. 64 (N.Z.); Uniform Negotiable Instruments Law 1896, ss. 124, 125 (the Uniform Negotiable Instruments Law was universally adopted in the U.S.A., but it has been replaced in some States by the Uniform Commercial Code 1954).

[17] *Markham v. Gonaston, supra*, n. 15; *Adsetts v. Hives* (1863) 33 Beav. 52; *Commercial Banking Co. of Sydney v. Strauss* (1877) Knox 524; *Bolster v. Shaw* [1917] 1 Western Weekly Reports 431; (1917) 11 Alberta L.R. 76; and *Pease v. Randolph* (1911) 21 Manitoba L.R. 368 (presumed authority to affix seal).

[18] *French v. Patton* (1808) 9 East 351; *Reed v. Deere* (1827) 7 B. & C. 261.

[19] (1868) L.R. 3 Q.B. 573.

[20] *Bishop of Crediton v. Bishop of Exeter* [1905] 2 Ch. 455.

[21] But see the following statement in *Hunt v. Gray* (1871) 35 N.J. Law 227; 10 Am. Rep. 232 (a leading case on the general subject of alteration of instruments): 'Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper in any degree with the written contract of another in his possession.' This is regarded as too severe a statement of the principle on which the modern law is based: *American Jurisprudence* (1936) ii, 598; *Williston on Contracts* (revised ed. 1936-1938) vi, 5325.

enforceable, whereas previously section 30 made it, as it stood, inadmissible and unenforceable. The question of materiality (which is one of law)[22] is obviously difficult, and it is hazardous to attempt to abstract general principles from the multiplicity of inconsistent cases. Halsbury gives several definitions of 'material alteration'. Thus, under the title 'Contract', it is said simply to be 'one which alters the legal effect of the instrument',[23] while the article on 'Deeds and Other Instruments' states more fully that a material alteration is

> one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.[24]

These definitions are not exactly similar, and this divergence, or rather ambiguity, is seen also in the numerous judicial expressions on the subject. Thus, in *Mollett v. Wackerbarth*,[25] it was laid down as a general rule that an alteration in a *material part* of a written contract, without the consent of both parties, is a material alteration which avoids the contract, although it may not have altered the duty of the party sought to be charged. On the other hand, Walsh M.R. in *Caldwell v. Parker*,[26] in which the erasure of the signatures of certain covenantees (on whom no liability was imposed), in a deed of indemnity to sureties, was held to be immaterial, was of the opinion that

> 'material' . . . means . . . having an effect on some contract or right contained in or arising out of the instrument itself. It does not mean capable of possibly affecting some right or contract which is not created by the instrument. It means material for the purpose of the deed.[27]

Shorter, but vaguer, is the remark of Cussen J. in *Sims v. Anderson*[28] that an alteration is material 'if it makes it [the instrument] operate differently'. This is very similar to the most frequently cited *dictum* of all on this subject, that of Brett L.J. in *Suffell v. The Bank of England*:[29] 'Any alteration of an instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose.'

Less certain of itself is the following quotation from *Norton on Deeds*,[30] cited approvingly in *Keysen v. Gregg*:[31] 'An alteration which, if made before execution, would have affected the position,

[22] *Vance v. Lowther* (1876) 1 Ex. D. 176, 178, *per* Kelly C.B.
[23] *Laws of England* (3rd ed. 1954) viii, 177. [24] *Op. cit.* (3rd ed. 1955), xi, 368.
[25] (1847) 5 C.B. 181, 193, *per* Maule J. [26] (1869) I.R. 3 Eq. 519.
[27] *Ibid.*, 526. [28] [1908] V.L.R. 348, 351.
[29] (1882) 9 Q.B.D. 555, 568; and see *Thornes v. Eyre* (1915) 34 N.Z.L.R. 651.
[30] (2nd ed. 1928) 44. [31] (1932) 32 S.R. (N.S.W.) 288, 292, *per* Davidson J.

rights or obligations of any person claiming under the deed, is material: *possibly other alterations may be material.*' The latter words[32] illustrate the doubtfulness of the validity of applying normal explanatory processes to common law doctrines, and, especially to those doctrines about which the common law itself has never been too sure. It is easy enough to produce succinct and precise definitions, as some of those cited on the problem under consideration appear to be. They fail, however, in so far as it is well-nigh impossible to predict from any of them with a reasonable degree of certainty whether, in many cases, a particular interference with an instrument is or is not a material alteration within the rule. Such definitions should merit attention only if they seek to reinterpret the cases themselves in the light of modern experience, and of legal, commercial and social progress. In other words, they should be framed with a view to influencing legislators and lawyers, and their framers should not hesitate to borrow from other legal systems.

An examination of the actual decisions and *dicta* (including those cited) on the materiality of the many varieties of possible alterations shows that the main line of cleavage is on the issue 'whether an alteration is only material when it affects the contract between the then existing parties to the contract, or also when it makes the instrument different in its operation either with regard to those parties or others'.[33] Thus, there appears to be little conflict on the matter, when the contract between the original parties may be affected by the alteration, although the earlier cases seem to have concentrated, as may be expected, rather on the physical aspects of alteration.[34] What is controversial, however, is whether variation of the contract is the only type of material alteration.

The relevance of this controversy to the fact situation arising from the wrongful affixing of a duty stamp is clear. While there was no direct authority to be found in English law on this point, there was cited as a near authority the case of *Suffell v. The Bank of England.*[35] There, the alteration of the numbers of Bank of England notes was held material, on the ground that, although the actual terms of the contract were not varied, the notes were part of the currency and the number was a material part of each note.[36] On the question of material alteration, Cotton L.J. observed[37] that 'contract' in the cases is ambiguous; it may mean either the instrument containing the contract or the contract contained in the instrument. Later, he expressed the opinion that

[32] Italicized by the writer. [33] *Sims v. Anderson* [1908] V.L.R. 348, 351, *per* Cussen J.
[34] Thus *Pigot's Case, supra,* n. 15. [35] (1882) 9 Q.B.D. 555.
[36] See also *Leeds & County Bank, Ltd v. Walker* (1883) 11 Q.B.D. 84 (position of Bank of England note not affected by Bills of Exchange Act 1882, s. 64 (Eng.)).
[37] (1882) 9 Q.B.D. 555, 573.

> the question whether an alteration . . . is a material one must . . . depend on the nature of the instrument and the uses to which it is to be put, and, although [in certain cases cited to the Court] the proper test may have been whether the contract contained was altered or not, it by no means follows . . . that the rule is that the alteration in the contract is essential and that no other alteration will do. In my opinion that conclusion would be incorrect. The question here is whether the alteration, although not an alteration of contract, is nevertheless an alteration of the instrument in a material way.[38]

The views of Jessel M.R. and Brett L.J. were somewhat similar, and all three disapproved of the meaning given to materiality by the Master of the Rolls in Ireland in *Caldwell v. Parker,*[39] when he confined 'material' to 'having an effect on some contract or right contained in or arising out of the instrument itself', Jessel M.R. restricting himself to saying, '. . . I decline to say anything disrespectful of that case, except that I disagree with it.'

That the plaintiff, an innocent holder of the notes, was by this decision deprived of the value which he had given for them did not weigh heavily with the Court of Appeal, in reversing the decision of the lower court. In the latter court, Lord Coleridge C.J. had said:

> In the sense in which the word 'material' has been used in all the cases I have been able to refer to . . . the alteration has been held material because it varied or attempted to vary the contract. Here the alteration is nothing of the sort. It is material in a popular sense, because it interposes some difficulty in the way of the Bank of England detecting or helping to detect the original fraud, by making it harder to trace the notes or to stop them at the bank. But this is a wholly collateral matter. An alteration material in this popular and collateral sense has never yet been held to vitiate an instrument in the hands of an innocent holder. . . .[40]

While this may be going, perhaps, rather too far, there is no doubt that the weight of authority in the nineteenth century was on the side of the Lord Chief Justice, and that his decision was at least consistent with good sense and sound justice. It certainly would have been more satisfactory for the commercial world had his view been accepted without reservation by the Court of Appeal.

However, whatever one may think of *Suffell v. The Bank of England,* it must be recognized that the decision of the Court of Appeal turned upon the peculiar character of Bank of England notes. This circumstance was clearly brought out in the judgments, particularly that of Jessel M.R., who emphasized that a Bank of England note is something more than a mercantile instrument, or an ordinary commercial contract to pay money. He expressly left open the question whether in the case of such a contract it was possible for an

[38] *Ibid.*, 574. [39] *Supra,* n. 26.
[40] *Suffell v. The Bank of England* (1881) 7 Q.B.D. 270, 272.

alteration to be material which did not affect the contract. However, he surely indicated some attitude on the matter when he said: 'Whenever it becomes necessary so to decide it will become necessary also to consider whether in the case of such contract there is anything that can by any rational person be treated as material which does not affect the contract.'[41] He found it difficult to think of such a case. Similarly Brett L.J. was 'inclined to admit that if the instrument contains nothing but a contract, . . . that then there could be no material alteration in the document unless that alteration did alter the contract.'[42]

The special circumstances of this case were further pointed out by the Privy Council in *Hong Kong & Shanghai Banking Corporation v. Lo Lee Shi,*[43] in which the holder of a bank-note which was not legal tender was held not disentitled to recover on it from the bank, even though the number had been torn off. The number was not regarded as material on this occasion.[44] Unfortunately, this important qualification on *Suffell v. The Bank of England* has not been sufficiently realized, and that case has assumed an undeserved importance in the eyes of too many, the judgments of Jessel M.R. and Brett L.J., in particular, being misunderstood.

In the *Vacuum Oil* case, there was no interference with the terms of what was 'an ordinary commercial contract', nor even with any essential part of the document. There was, however, an addition thereto which sought to make it admissible in the courts. This may have been *prima facie* 'an alteration of the instrument in a material way', and, if the decision on the Bank of England notes was to provide the correct test, that would be the end of the matter. Such an alteration would not be, of course, so obviously material as in another common example of physical addition to a document. Where seals are affixed or cancelled by a party to a document without the consent of another party, that is regarded as a 'material' alteration, bearing in mind the different legal effects of a deed and an instrument merely under hand.[45] This is not the same as the stamp case, where only admissibility is sought to be achieved.

In any event, it is submitted that the right view of 'material', so far as the vast majority of contracts is concerned, is that there must be a change in the apparent legal effect of the obligation, as illustrated by so many cases, including *Suffell v. The Bank of England,* if one is to read correctly the opinions (admittedly *obiter*) of the Court of

[41] (1882) 9 Q.B.D. 555, 563. [42] *Ibid.*, 571. [43] [1928] A.C. 181.

[44] In fact, the note was accidentally mutilated in laundering a garment, and thus the promisor would not, in any case, have been discharged: *infra.*

[45] It is held otherwise in those American jurisdictions where legal effect is no longer ascribed to seals; and see *Richardson v. Tiffin* [1940] S.C.R. 635; [1940] 3 D.L.R. 481, 499.

Appeal, as indicated above. This is also the generally held American view, as seen in Williston, who suggests that the legal effect of an instrument is not altered in such circumstances as the alteration of the number of a bond or bank-note, and that alterations which affect merely the mode of proof are not material.[46] Williston disagrees with *Suffell v. The Bank of England* and cites numerous American cases to the contrary, as well as a case almost identical with the *Vacuum Oil* case, *Rowe v. Bowman*,[47] where it was held that the affixing by the holder of a promissory note of a stamp, and his cancellation thereof in the name of the maker, did not amount to a material alteration. There is some difference between the two cases, in that in the American one the instrument would have been admissible in the state (Massachusetts) courts without a stamp, although not in the federal courts. The addition, nevertheless, did purport to enlarge the rights of the holder by affording evidence legal in the federal courts, yet the plaintiff recovered.

Sholl J. in the *Vacuum Oil* case joined issue with Williston as to the grounds of the decision in *Rowe v. Bowman*, and, in any event, he was not prepared so to limit the rule in the way indicated by Williston. He was of the opinion that

> if a document lacks, whether wholly, or in some courts only, legal enforceability and effect because it lacks a stamp, the affixing of a stamp (otherwise than in accordance with any enabling statutory provisions which may contemplate and permit stamping after execution) in such a way as to purport to give it the force and effect theretofore lacking does purport to alter the legal effect of the instrument, and is a material alteration. Alternatively, it purports to alter the legal status and force of the instrument, and the courts *ought to hold*,[48] and I do hold, that this is a material alteration.[49]

If it is a question of what the courts *ought* to do, it is respectfully submitted that it is equally possible to argue that the courts should not so hold.[50]

While not adverting directly to the point under discussion, Corbin seems favourable to the view that an alteration which merely changes the evidence or mode of proof is immaterial, for he refers in his definition of material alteration only to 'an interlineation, erasure or other physical alteration of the terms of a written contract'.[51] Similarly, the *Restatement of the Law* regards an alteration as material with reference to any party to a contract 'if such an alteration duly authorized by him would vary his rights against or duties to

[46] *Op. cit.*, vi, 5339-5341. There are contrary decisions in Pennsylvania, *e.g.*, holding the addition of an attesting witness material. [47] (1903) 183 Mass. 488; 67 N.E. 636.
[48] The writer's italics. [49] [1957] V.R. 456, 460.
[50] A stamp is not even part of the document to which it is affixed: *R. v. Inhabitants of Keighley* (1846) 8 Q.B. 877 (stamp need not be set out in copy of indenture).
[51] *Contracts* (1951) vi, 235.

the party making the alteration. . . .'[52] It is suggested that, in the instant case, the rights and duties of the defendant would have been in no wise varied had he agreed to the invalid affixing of the stamp, especially in view of the fact that the contract was unstamped when he handed it to the plaintiff. If the decision of Sholl J. is correct, why should it not logically follow that the lawful stamping, pursuant to statute, of a receipt, by the person to whom it was given, without the other party's assent, is a material alteration? This *reductio ad absurdum* would be no less deplorable a result of the doctrine than is achieved in so many other cases of its application.

The truth is, of course, that the rule is no longer in accordance with the spirit of the times. The evil effects of the doctrine can be seen in the case under discussion, where the plaintiff was in danger of losing a large sum of money rightfully due from the defendant merely because of an antiquated technicality which may impose an intolerable penalty on an unfortunate party often through no fault of his own.[53] Surely, despite the innumerable inconsistencies in the law relating to what is and is not material, it is not beyond the scope of forward-looking courts to revise the doctrine of materiality in relation to alterations without legislative aid, even within the framework of the existing cases.

After all, that is what the courts have been doing with legal doctrines throughout the years, but more slowly in some matters compared with others. Thus the common consent necessary for a binding contract already provides a useful test of materiality without departing from any sacred principles. It has been mentioned above that a party is not discharged from his obligations by an alteration that he has authorized, and, of course, on principle, there is no reason why he should not subsequently assent to or ratify an unauthorized alteration.[54] Similarly, a unilateral alteration which merely expresses that which would otherwise have been implied,[55] or which carries out the original intention of the parties,[56] or corrects

[52] *Contracts* (1932) 817. Also *American Jurisprudence* (1936) ii, 599; Uniform Commercial Code—Commercial Paper, s. 3-407 (1950 draft) ('Any alteration of an instrument is material which changes the contract of any party thereto in any respect. . . .').

[53] This aspect is considered further, *infra*.

[54] *Hudson v. Revett* (1829) 5 Bing. 368 (blank filled up after execution of trust deed for benefit of creditors); *Henderson v. Vermilyea* (1868) 27 Upper Canada Q.B. 544 (ratification implied from conduct).

[55] *Aldous v. Cornwell, supra*, n. 19 (' on demand' added, without maker's assent, to promissory note with no time of payment expressed thereon). *Gogain v. Drackett* (1909) 11 Western Law Reporter 643; 2 Saskatchewan L.R. 253; *Barker v. Weld* (1884) 3 N.Z.L.R. 104 (indorsement after execution on memorandum of mortgage under Torrens System of a note stating that the document was subject to a prior mortgage). *Cf. Brunker v. Perpetual Trustee Co. (Limited)* (1937) 57 C.L.R. 555 (facts similar to those in *Barker v. Weld, supra* but alteration held material).

[56] *Wood v. Slack* (1868) L.R. 3 Q.B. 379 (addition of names of creditors in schedule to trust deed); *Adsetts v. Hives, supra*, n. 17 (filling up date for redemption in mortgage); and see *Luth v. Stewart* (1880) 6 V.L.R. (L.) 383 ('without recourse' inserted in bill of exchange).

a mistake,[57] is considered immaterial.

It is interesting to note that such obvious qualifications of the strict alteration rule, as the immateriality of the correction of mistakes or making the instrument conform to the actual contract made by the parties, do not find unanimous favour in the United States. There is a division of judicial opinion there, often in the same jurisdiction even, and this extends to the construction of the Uniform Negotiable Instruments Law 1896 in this connection. Some courts consider it unwise to permit the correction of mistakes or the supplying of omissions by an interested party. They take the view that, unless the parties mutually consent, this can be effected only through the aid of a court of equity. These courts, therefore, have held that if the alteration is material, the instrument is vitiated, even though it is made with an honest intent,[58] and in order to make the instrument consistent with the actual agreement of the parties.

The majority of courts in the United States, however, adopt the English view that such a correction is not such an alteration as will vitiate the instrument.[59] The reason usually given for this majority view is, as in the English cases, that, under the circumstances, the alteration is immaterial. However, other cases hold that the alteration is material, but that the assent of the parties will be presumed or implied.[60]

While all this is not strictly relevant to the stamp problem, it does suggest a helpful avenue of approach. Surely it was the intention of both parties that the contract should be properly stamped and, consequently, admissible and enforceable. It is unreasonable to assume that it was within the purview of either party at the time of execution that the stamp laws should be infringed. L presumably thought that he was stamping the document properly.[61] If this was so, his mistake of law was unfortunate for the plaintiff, for an alteration made under a mistake of fact will not discharge the promisor,[62] nor will accidental alteration.[63] It is contended, however, that, as a matter of principle, if an alteration, however material and however made, is immediately ineffectual, so that there is no possibility of a change in the apparent legal effect of the instrument or its mode of proof, supposing the

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[57] *Kershaw v. Cox* (1800) 3 Esp. 246; *Jacob v. Hart* (1817) 6 M. & S. 142; *Sommerville v. Rae* (1881) 28 Grant 618; *Bolster v. Shaw, supra,* n. 17. But *cf. Sutton v. Blakey* (1897) 13 T.L.R. 441.

[58] The problem of motive is considered *infra.*

[59] *Klundby v. Hogden* (1930) 73 American L.R. 648; 202 Wis. 438; 232 N.W. 858 is an example.

[60] This whole matter is dealt with at length in the Annotation: (1931) 73 American L.R. 652; and see *American Jurisprudence* (1936) ii, 609-611.

[61] This is not clear from the report. The question of mistake was not adverted to.

[62] *Prince v. Oriental Bank Corporation* (1878) 3 App. Cas. 325. As to discharge where an alteration is made under mistake of law as to the legal effect of the document, see *Bank of Hindostan, China & Japan v. Smith* (1867) 36 L.J.C.P. 241.

[63] *Hong Kong and Shanghai Bank v. Lo Lee Shi, supra,* n. 43.

alteration not to be discovered, and if the original state of the instrument can be ascertained and independently established, there is no commonsense reason why the instrument should be deemed void. Rather does conscience dictate to the contrary, particularly if the alteration is rendered inoperative and ineffective by virtue of a statutory provision, as in this case.[64] It can be argued that the very fact that the stamp showed a wrong cancellation date proved that it did not purport to alter the legal effect or the legal status of the instrument.

It may be asked what the position would have been if L, on realizing his mistaken view of the law as to stamp duty, had skilfully removed the offending stamp without leaving any trace thereof, and the plaintiff had then proceeded to act under section 52 or section 29, and, furthermore, it was elicited in the course of the cross-examination of L that the stamp had been so affixed and removed. Would the plaintiff in these circumstances have been debarred from its remedy on foot of the document? Ignoring for the present the question of alterations by strangers, the American answer, at any rate, is that restoration of a materially altered document to its original form, without the assent of the obligor, will not restore the legal obligation.[65] The Canadian position is the same.[66] It is not thought that the English view would be different,[67] for the principle is that, once there is a technical alteration, then, if it is considered a material one, the document is void as from the time of the alteration.[68]

There is one further reason for criticizing the *Vacuum Oil* decision. Section 30 provides sufficient penalty in the case of an instrument not duly stamped—it is inadmissible in civil proceedings. But section 29 is a way out and can always be used by the party relying on the instrument in the cases to which the section applies. The decision in the *Vacuum Oil* case goes further than section 30, and takes away the protection of section 29. the instrument being then absolutely vitiated.

[64] In *White Sewing Machine Co. v. Dakin* 86 Mich. 581; 49 N.W. 583; 13 Lawyers' Reports Annotated 313, it was held that for this reason the interlineation in a bond of an agreement to pay attorney's fees was not a material alteration which would avoid the deed.

[65] *Ruwaldt v. McBride* (1944) 155 American L.R. 1209; 57 N.E. 2d 863; 388 Ill. 285 (the alteration, consisting of an insertion, was in fact crossed out within half an hour after it had been inserted); and Annotation: (1945) 155 American L.R. 1217. The alteration must have been such as to vitiate the document; this may raise questions of motive: *infra.*

[66] *Banque Provinciale v. Arnoldi* (1901) 21 Canadian Law Times (Occasional Notes) 582; 2 Ontario L.R. 624 (here, the maker of an altered note did not even know of the alteration until after the alteration was cancelled).

[67] The only case on the point, and then not directly, seems to be *Price v. Shute* (1681) *Beawes's Lex Mercatoria: Rediviva* (2nd ed. 1761) *pl.* 222, in which it was held that unilateral alterations consisting of the acceleration of the time of payment of a bill of exchange and the subsequent restoration of the original date did not destroy the bill. It received unfavourable comment in *Master v. Miller* (1793) 2 H.Bl. 141.

[68] It is not void *ab initio,* even under the existing rules, so as to nullify any conveyancing effect which the document has already had: *infra.*

It is believed that this goes beyond what was intended by the statute. Section 53 of the Stamps Act 1946, indeed, envisages a prosecution against a person who 'gives any receipt liable to duty and not duly stamped',[69] that is to say, it was the defendant who was primarily at fault in not stamping Exhibit A, and it was the plaintiff who was primarily injured when it was handed an unstamped receipt. Why then should the plaintiff suffer if the effect of section 30 can be lawfully avoided? Even the supposition that the parties were possibly *in pari delicto* would still provide no sufficient basis for disturbing their original legal (and *lawful*) relationship. It was indeed only the defendant's illegality which was in any sense effective, and it is therefore he, rather than the plaintiff, who would be affected by the principle that no one shall be permitted to take advantage of his own wrong.[69a]

In this respect, one observes that no attempt was made by the plaintiff to justify the alteration and to attempt to negative materiality, by claiming that it would have been for the defendant's benefit, had the alteration been successful. The argument might run thus: admittedly, the plaintiff had at its disposal two perfectly legitimate channels for the admission of the document. On the other hand, the unlawful method chosen might well have been the means of avoiding the possibility of an information being laid against the defendant for failing to give a duly stamped receipt. This argument may not seem very sound, but it is one that has been raised by plaintiffs from time to time, either in the form of a benefit alleged as accruing to the defendant, or a detriment suffered by the plaintiff. An indirect suggestion of this approach is found in Halsbury's second definition of material alteration, previously quoted, in the use of the words '. . . or may otherwise prejudice the party bound by the deed as originally executed'.[70]

It is doubtful, however, whether there is any judicial basis for this distinction, or for Halsbury's reference to prejudice to the defendant as an ingredient of materiality. In *Gardner v. Walsh*,[71] the addition of another surety to a joint and several promissory note was held to be a material alteration, which, if made after the note was issued, would avoid it.[72] Lord Campbell C.J. said:

[69] S. 53 (1) (a); Stamp Act 1891, s. 103 (Eng.).

[69a] *Cf.* contracts and trusts for illegal purposes.

[70] *Supra*, n. 24.

[71] (1855) 5 E. & B. 83.

[72] The discharge of a bill of exchange in similar circumstances occurred in *The Oriental Bank Corporation v. Beilby* (1870) 1 V.R. (L.) 66 even though the person whose name was added was the acceptor's wife and therefore incapable (at the time) of contracting, Stawell C.J. emphasizing that the primary object of the rule is the preservation of the original instrument, and that the test is not liability, but materiality (*ibid.*, 69). *Cf. Stacey v. Fritzler* (1938) 119 American L.R. 887; 160 Oregon Reports 231; 84 Pacific Reporter 2d 97, 499 (additional maker of note held liable thereon). See Annotation: (1939) 119 American L.R. 898. In *Bolster v. Shaw*, *supra*, n. 17, the addition of a signature to a note as a maker was held not material; *cf.* addition of payee held material in *Gill v. Doey* [1934] 3 D.L.R. 274.

> There would be no difficulty in showing that, under certain circumstances which might have supervened, this alteration might have been prejudicial to the defendant. But we conceive that he is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, *whether the alteration be or be not to his prejudice.*[73]

He proceeded to give as examples of material alterations the date of payment of a promissory note being changed by the payee from three months to six months, or the amount from £100 to £50.[73a] Similarly, in *Colonial Bank of Australasia v. Moodie,*[74] the test was stated to be not whether the alteration is for the benefit of the party charged, but whether it alters the operation of the instrument.[75] The proposition that the question must not be looked at from the point of view of the benefit or detriment of the parties found unanimous support also from the Court of Appeal in *Koch v. Dicks.*[76] Furthermore, the American cases are practically unanimous that this is not the test of materiality.[77]

This was not, apparently, the view of Latham C.J.[78] in *Brunker v. Perpetual Trustee Co. (Limited),*[79] in which he dissented from a majority opinion of the High Court of Australia that the insertion by a transferee of the notification of a mortgage, to which the land contained in a transfer was subject at the time of the execution of the transfer, was a material alteration, as converting an unregistrable into a registrable document, the transferor having intended that the land should be discharged from the mortgage. After arguing that the alteration was not material, he went on to say that if, contrary to the view he had expressed, 'the insertion of the reference to the mortgage did alter the legal effect of the document', in any event, 'the alteration was for the benefit of the transferor. . . .'[80] The authority cited for this proposition, *Lord Darcy and Sharpe's Case,*[81] was older even than *Pigot's Case.* Unfortunately, it cannot be regarded

[73] (1855) 5 E. & B. 83, 89.

[73a] These would appear to be specifically material alterations under the Bills of Exchange Acts.

[74] (1880) 6 V.L.R. (L.) 354.

[75] *Per curiam* (Stawell C.J. and Barry J.). See also *Shaw v. Brodie* (1891) 17 V.L.R. 760, 764, where counsel's suggestion, that it must be shown that the alteration had been made for the plaintiff's benefit, seems to have been ignored.

[76] [1933] 1 K.B. 307, 320 (*per* Scrutton L.J.), 324 (*per* Greer L.J.), 328 (*per* Slesser L.J.) (inland bill changed into foreign bill).

[77] The American cases are practically unanimous in holding that benefit or prejudice to the defendant is not the test of materiality, *e.g. Keller v. State Bank* (1920) 9 American L.R. 1082; 292 Ill. 553; 127 N.E. 94 (reducing amount of cheque); *Klundby v. Hogden, supra,* n. 59. As to Canada, see *Langley v. Lavers* (1913) 13 D.L.R. 697 (provision for interest struck out); *Bellamy v. Porter* (1913) 13 D.L.R. 278; 4 Ontario Weekly Notes 1171; 28 Ontario L.R. 572 (rate of interest decreased). An alteration to the disadvantage of the party making it will rarely be fraudulent, and this may be very relevant in the U.S.A.: *infra.*

[78] Some oblique support for this view may be found in *Keysen v. Gregg* (1932) 32 S.R. (N.S.W.) 288, 294, *per* Halse Rogers J.

[79] (1937) 57 C.L.R. 555.

[80] *Ibid.,* 592.

[81] (1584) 1 Leon. 282.

as very persuasive,[82] and, in any event, the alteration was in an immaterial place.

In the other case mentioned by Latham C.J. in this connection, *Aldous v. Cornwell*,[83] the alteration of a promissory note was held to be immaterial, the alteration having expressed only the effect of the note as it originally stood.[84] But this is no support for the suggestion of Latham C.J., and is really a return to a previous argument of his that the alteration only made apparent on its face the true legal effect of the transfer. He quoted from the judgment in *Aldous v. Cornwell* the remark: 'We are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice anyone destroys the validity of the note. . . . [So to hold would be] repugnant to justice and common sense. . . .'[85] This, admittedly, goes a little further than the actual decision in that case, but it is an unobjectionable statement, and may well be considered as being applicable to the circumstances in the *Vacuum Oil* case.

It is submitted, indeed, that it is of the utmost importance that the courts should consider, in determining materiality, whether the party sought to be charged has been or could be injuriously or beneficially affected. The weight of authority to the contrary is a result of the strictness of the doctrine of materiality, which is too much concerned with the question whether the contract in its altered form is the contract which the defendant entered into, and with the external trappings of contract. For this reason, little mitigation may be expected from the courts until the entire doctrine of material alteration is rigorously reformed.

DEATH FROM A STRANGER

Pigot's Case went so far as to lay down that a material alteration, even by a stranger, would invalidate a deed. This severe and remarkable rule has retained its vigour for far too long a period. Its rationale was expounded in *Davidson v. Cooper*[86] by Lord Denman C.J., who said:

> The strictness of the rule on this subject as laid down in *Pigot's Case* can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its

[82] It seems never to have been followed, and another vintage case is directly to the contrary: *Markham v. Gonaston, supra*, n. 15 ('though alteration is for advantage of obligor, he may plead *non est factum*').

[83] *Supra*, n. 19.

[84] Conversely, the elimination of words which had no legal effect at the time the contract was signed and delivered is not a material alteration: *Cities Service Oil Co. v. Viering* (1949) 13 American L.R. 2d 1448; 404 Ill. 538; 89 N.E. 2d 392.

[85] (1868) L.R. 3 Q.B. 573, 579, *per* Lush J.

[86] (1843) 11 M. & W. 778; affirmed by Exch. Ch., (1844) 13 M. & W. 343, 352; and see *Croockewit v. Fletcher* (1857) 1 H. & N. 893, 912, 913, *per* Martin B.; *The Oriental Bank Corporation v. Beilby* (1870) 1 V.R. (L.) 66, 68, *per* Stawell C.J.

> original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain since there cannot be any alteration except through fraud, or laches on his part.

The only modification which has been allowed is in the case where the alteration is made without the promisee's knowledge or consent, when the instrument was not in the latter's custody. Thus, in *Henfree v. Bromley,*[87] Lord Ellenborough C.J. felt that he could 'no more consider this [act of stranger] as avoiding the instrument than if it had been obliterated or cancelled by accident.' Otherwise, the rule remains as it was. In *Davidson v. Cooper,*[88] seals were added to a guarantee, previously executed under hand only, by some person unknown,[89] while the document was in the plaintiff's hands. This appears to have been done intentionally, though under a mistake of law, and the guarantee was held to be avoided. A document in the custody of the obligee's servant or agent is regarded as being in the obligee's custody.[90] Furthermore, as the English rule, subject to the qualification already mentioned, is that a material alteration of an instrument, no matter by whom made, operates to avoid it, it follows *à fortiori* that if the alteration is by the agent of the obligee, the instrument will be nullified, and this without regard to whether the agent is authorized to make the change.[91]

This is, perhaps, easy enough to understand where the alteration was at the instance of the obligee, as in *Powell v. Divett,*[92] but not where, as in *Croockewit v. Fletcher,*[93] the plaintiff's agent, a broker, who altered a charter-party, had no authority to make the alteration, and it was held to be avoided as against the plaintiff. There, Martin B. stated:

> It is, no doubt, apparently a hardship, that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract. . . .[94]

[87] (1805) 6 East 309, 311 (alteration of award by umpire); and see *Waugh v. Bussell* (1814) 5 Taunt. 707 (where, however, the alteration was immaterial). Also *Loranger v. Haines* (1921) 50 Ontario L.R. 268; 64 D.L.R. 364.

[88] (1843) 11 M. & W. 778; affirmed by Exch. Ch., (1844) 13 M. & W. 343.

[89] Apparently a clerk or servant of the plaintiff.

[90] *Bank of Hindostan, China & Japan v. Smith, supra,* n. 62; *Croockewit v. Fletcher* (1857) 1 H. & N. 893.

[91] See cases cited *supra,* n. 90. (As to alteration by obligor's agent, see *infra.*) The Canadian rule is apparently the same: *Fitch v. Kelly* (1879) 44 Upper Canada Q.B. 578; *Royal Bank of Canada v. Frank* [1923] 4 D.L.R. 1213. *Davidson v. Cooper, supra,* n. 86, was referred to as a 'stringent, if salutary, rule' in *Loranger v. Haines* (1921) 64 D.L.R. 364, 370, *per* Riddell J.

[92] (1812) 15 East 29; and see *Willing v. Currie* (1874) 36 Upper Canada Q.B. 46; *Thorne v. Williams* (1887) 13 Ontario Reports 577.

[93] (1857) 1 H. & N. 893. [94] *Ibid.,* 912.

These words were not, regrettably, spoken censoriously, for he went on to justify the 'apparent hardship' by declaring that 'to permit any tampering with written documents would strike at the root of all property, and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts. . . .'[94a]

It is possible that the nature of the public interest had changed to some extent thirty years later, for in 1887 we find an expression of judicial doubt (the only serious one, it is to be feared), and then only in relation to a very obvious case of oppression resulting from the inequitable state of the law. In *Lowe v. Fox*,[95] Lord Herschell, in what seems to have been an unconsidered judgment, expressly reserved his opinion upon the point whether 'in every case an alteration which would invalidate [a] document when made with the privity and knowledge of the person having the custody of it and relying upon it, would invalidate it if made in fraud of him and against his will'.[96] There is some reassurance in the fact that this point still seems to be open to review by the House of Lords, and it is confidently expected that the answer would be against the invalidation of the document in such circumstances.[97]

What were the relevant facts in the *Vacuum Oil* case? L stated in evidence that he acted as he did, because litigation involving the document was imminent, and he considered that difficulty would be encountered in proving the document if unstamped. He had not consulted with the plaintiff, or (so far as the evidence showed) with any of his superiors. The judge, therefore, found on the facts that L had no express or implied authority from the plaintiff to affix and cancel the duty stamp in question. On the other hand, he had access to the document, which was in the possession and custody of the plaintiff, and authority to handle and deal with it for the purpose of negotiations with or litigation against the defendant. '[L] cannot be regarded, therefore, as a stranger to the plaintiff: he was an employee who was put in the position where he had the opportunity to take the steps he did take.'[98] Later on the judge pointed out that even if L were 'a stranger within the meaning of the rule [relating to material alterations]' that rule would still apply, in view of the fact that the plaintiff had the custody of the document.[99]

This reasoning is very similar to that of Martin B., just one century earlier, in *Croockewit v. Fletcher*:[1] 'It was said that [the broker] was

[94a] *Ibid.*

[95] (1887) 12 App. Cas. 206, 217. (This is a remarkable case in that the female appellant, a former inmate of mental homes, capably argued difficult legal points before the House of Lords in person.)

[96] The alteration in question in this case was, in fact, held to be immaterial.

[97] *Cf.* n. 16, *infra*.

[98] *Vacuum Oil* case [1957] V.R. 456, 458.

[99] *Ibid.*, 459.

[1] (1857) 1 H. & N. 893, 913.

a stranger to the plaintiff; he certainly was not, for he was the agent of the plaintiff to deliver the charter-party to the defendant; but even if he were, the rule in *Pigot's Case* [would apply].' It is obvious that there may be some confusion in the use of the word 'stranger'. It has been defined as 'a person not a party to or claiming through a party to a deed',[2] and as 'one who is neither a party nor entitled thereunder'.[3] This is the generally understood meaning as applied in the law of contract.[4] A person is either a stranger to the contract or he is not. Quite a separate matter is the question whether a principal or master is liable for the acts of his agent or servant. It is presumably in relation to agency that the expression 'stranger to the plaintiff' is used, and yet there is inconsistency even in this use of the term. Thus, in the *Vacuum Oil* case, while it was obvious that L was 'not a party to or claiming through a party', and it was held, as stated above, that L had no express or implied authority from the plaintiff to act as he did, yet it was said that he could not be regarded as a stranger to the plaintiff. In fact, as the contract was in the plaintiff's custody, all the latter findings were *obiter,* in view of the strict rule already enunciated.

In the United States, this matter has been worked out with more logical consistency and, not surprisingly, with more true justice. There, if the alteration is made by a stranger to the contract without the knowledge or consent, direct or indirect, of the obligee, the obligation is enforceable according to the original tenor,[5] even though the person making the alteration was, for other purposes, an agent of the obligee, and this is the law irrespective of the custody of the instrument.[6] As contrasted with the alteration of a written instrument in the legal sense, this latter situation is called a 'spoliation', that is to say, an unauthorized change by a stranger, which has no effect.[7] There is no such rule as in English law which, in effect, lays down that a person must keep a document safe at his peril.

It may happen, of course, in the United States, that, in accordance with normal and familiar principles, the alteration of an instrument

[2] C. E. Odgers, *Construction of Deeds and Statutes* (3rd ed. 1952) 21.

[3] Halsbury, *op. cit.*, xi, 369.

[4] *Cf.* avoidance of contract for fraud (fraud of stranger is insufficient).

[5] The mode of proving the contents of the instrument may, of course, be affected.

[6] See American works cited *supra.* But under the provisions of the Uniform Negotiable Instruments Law 1896, s. 124, a material alteration of a negotiable instrument, even though by a stranger, destroys the obligation except as against a subsequent holder in due course (and motive is ignored—as to motive, see *infra).* Corbin, *op. cit.*, vi, 236-237, strongly criticizes the Law on this score. The rule before the Uniform Negotiable Instruments Law was that such an alteration would not avoid the instrument, and the Uniform Commercial Code—Commercial Paper, s. 3-407 (1950 draft), seeks to restore that rule.

[7] Spoliation is also given the wider meaning of 'a change made accidentally or unintentionally, or by one having no special interest in the instrument, which does not invalidate it or change the rights or liabilities of the parties in the interest, so long as the original writing remains legible': *American Jurisprudence* (1936) ii, 597.

by an agent of a party will be, in legal effect, the act of his principal. This will occur only if such alteration is within the express or implied authority of the agent, acting within the scope of his authority;[8] otherwise it will be regarded as the act of a stranger, constituting a mere spoliation.[9] The spoliation may, however, be subsequently ratified, thus avoiding the instrument. In *Singer Sewing Machine Co. v. Barger*,[10] it was held that where the agent of the payee of a note altered it without authority, and the payee with knowledge of the alteration sued on the note in its altered form, the payee thereby ratified the alteration and could not recover. Ratification seems, indeed, to be the basis of several of the American cases where the agent has been held to be acting with authority, although not apparently authorized to make the alteration in question.[11] If these rules were applied to the facts in the *Vacuum Oil* case, it would appear that, in view of the judge's findings, L's act would be regarded as that of a stranger to the transaction, which would not affect the nature of the instrument as it originally existed. The question of ratification might arise, but it is not sufficiently clear from the report of the case whether the position was similar to that in *Singer Sewing Machine Co. v. Barger*.[12]

It surely cannot be denied that the American attitude to alterations by strangers to transactions is wholly more sensible than the English one, which appears to be quite out of keeping with modern legal thought.[13] It is unfortunate that English equity, unlike American, was never prepared to give relief in such cases. It is not easy to understand why a party should be bound to use more care to prevent the alteration of an instrument by a stranger than to prevent its total loss or destruction.[14] It is recognized, however, that if there must be a rule relating to material alterations there may well be a viewpoint that, as a matter of public policy, a custodian-party (and particularly, perhaps, if it is a corporate body[15]) should not be allowed to assert that an alteration by a servant or agent was made without his authority, and this argument would have even more force where the servant or agent was entrusted with the custody of the instrument.

[8] As in *Luckenbach v. McDonald* (1908) 164 Fed. 296.

[9] As in *Clyde S.S. Co. Whaley* (1916) Lawyers' Reports Annotated 1916F, 289; 145 Circuit Court of Appeals Reports 264; 231 Fed. 76.

[10] (1912) 92 Nebraska Reports 539; 138 N.W. 741; Ann. Cas. 1914A, 57.

[11] There is a useful collection of cases on alteration by agent in the Annotation: (1927) 51 American L.R. 1229.

[12] *Supra*, n. 10.

[13] Lord Herschell's *dictum* in *Lowe v. Fox*, *supra*, n. 95, supports this view within its limited scope; and see comments of Sholl J. in *Vacuum Oil* case [1957] V.R. 456, *passim*.

[14] As to this, and equity's attitude towards alterations generally, see *infra*.

[15] In *Bank of Hindostan, China & Japan v. Smith*, *supra*, n. 62, alteration by bank's secretary discharged defendant who was one of bank's directors, it being held that the document was in the custody of the bank as distinct from the individual directors.

It is submitted, nevertheless, that the fairer rule in such cases is not to penalize the employer, and give an unearned increment to the obligor, but to decide the matter solely by reference to whether there was authorization, express or implied, of the alteration. There is, naturally, even less justification for the present English rule where the alteration is made for the agent's own fraudulent purposes.[16]

OBLIGATION—DEAD OR ALIVE?

Justice was in fact done in the *Vacuum Oil* case, but only because of the mere accident of there being in existence, in the hands of the defendant, a *deus ex machina* in the form of a duplicate original agreement, signed by both parties, and not in any way altered (Exhibit S).[17] As a matter of evidence and ignoring for the moment the matter of the alteration, this unstamped duplicate could be admitted, provided that the necessary steps under section 29 or section 52 were taken before judgment was finally entered.[18] But, in view of the alteration, this would not necessarily help the plaintiff. It depended on whether the rule relating to material alterations had the effect merely of excluding the altered document from proof, or otherwise preventing its being relied upon, or had the effect of avoiding the whole contract or obligation which it embodied or evidenced. It is surprising to what little extent this important point has been considered in recent times in the common law jurisdictions. As already seen, and as will be seen further below, almost all the cases and commentaries speak of the extinction of an obligation, or the avoidance of a contract. They proceed on the assumption that no other possibility exists.

The position in early law was colourfully stated by Holmes J. to be that 'the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the body when the latter was destroyed or changed in its

[16] *Cf.* Lord Herschell's *dictum* in *Lowe v. Fox, supra,* n. 95; and see *Ruben v. Great Fingall Consolidated* [1906] A.C. 439 (company not responsible for its fraudulent secretary who issued forged share certificates). In *Chao v. British Traders & Shippers, Ltd* [1954] 1 All E.R. 779, the alteration of certain bills of lading was by the defendant's agent, who had the custody thereof, and on the issue of damages for fraud it was held (applying earlier cases) that, as the agent was deceiving his own employer, the agent's knowledge was not the defendant's knowledge, and the latter was not guilty of fraud; this point was not, however, considered in relation to the alteration issue, it being assumed, apparently, that the defendant was responsible for his agent's act in such circumstances.

[17] This document was produced by the defendant as a result of the usual notice, served on him before the hearing, to produce at the trial all relevant documents in his possession.

[18] *Cf. Paul v. Meek* (1828) 2 Y. & J. 116 (original lease unstamped, counterpart admitted). It was contended by the plaintiff in the *Vacuum Oil* case that Exhibit S was admissible without any stamp, as only Exhibit A was intended by the defendant to be delivered as a receipt to the plaintiff, but the court held that each should have been stamped as a receipt.

identity for any cause.'[19] This is not quite accurate, as it was only the party held responsible for the alteration who could not enforce the instrument against a party who was not so responsible. Even in the early law, where a deed was altered by a person subject to a liability under it, the person entitled under the deed, provided that he had not given his consent to the alteration,[20] was allowed to obtain relief in equity, and so to enforce the liability, on the principle (referred to previously in connection with materiality) that no one will be permitted to take advantage of his own wrong.[21] Presumably, that is still the position with regard to a document under seal. Although there is a dearth of authority, it seems that the alteration of a simple contract by the promisor or by someone for whose acts he is responsible, does not avoid the contract, but the other party is entitled to enforce it according to its original tenor.[22]

Thus, it is reasonably safe to assume that an alteration that discharges a party from further obligation does not also terminate his rights under it. He can enforce the contract just as if there were no alteration. But English law, unlike American,[23] does not appear to have laid down definitely that if the injured party asserts a right under the contract his duties are revived, and it is just as if there had been no alteration, at least where the contract consists of mutual promises.[24] This seems sound law and logic, and is consistent with equitable doctrine.[25] If this view is correct, then, whatever the true answer to the problem posed above as to the destruction or otherwise of the obligation, it can at least be put forward that a bilateral contract in English law is not rendered void[26] by a material alteration, but is, at the most, voidable, at the option of the injured party, who must either perform his obligation as if it had not been altered, or rescind both obligations.[27]

There appears to be no reported decision, outside America, on the

[19] *Bacon v. Hooker* (1901) 177 Mass. 335, 337; 58 N.E. 1078.

[20] As to alteration by consent of all parties, subsequent ratification, *etc.*, see *supra.*

[21] *Brown v. Savage* (1674) Cas. *temp.* Finch 184.

[22] *Pattinson v. Luckley* (1875) L.R. 10 Ex. 330; see Annotation: (1927) 51 American L.R. 1229, from which it appears that, in the U.S.A., an alteration by the promisor's agent, acting without authority, will be treated as the act of a stranger, operating as a mere spoliation. As to Canada, see *Waterous Engine Works v. McLean* (1885) 2 Manitoba Reports 279. The English rule may possibly be different, if the instrument was in the promisee's custody.

[23] Corbin, *op. cit.*, vi, 238; *Restatement of the Law of Contracts* (1932) 819.

[24] See *Chao v. British Traders & Shippers, Ltd* [1954] 1 All E.R. 779, 788, *per* Devlin J., for view lending indirect support to this proposition; and see *Pattinson v. Luckley, supra,* n. 22 (innocent party can only enforce the contract subject to any restrictions or conditions originally contained).

[25] *Cf. restitutio in integrum.*

[26] *Cf. Pelchat v. Bernier* [1950] Quebec Official Reports, Superior Court, 42, in which it was held that the material alteration of a bill results in its being void and not merely voidable under s. 145 of the Bills of Exchange Act R.S.C. 1952 (Canada).

[27] See Williston, *op. cit.*, vi, 5352, where it is stated that, subject to this qualification, he may keep the consideration which he has received without giving any equivalent for it.

specific question whether it is a good defence to allege and prove that one of two duplicate originals has been materially altered by the obligee. In the *Vacuum Oil* case, Sholl J. did refer to some English cases relating to bought and sold notes, which might in some respects be regarded as duplicate originals. In each of these cases[28] one of the notes had been materially altered, but none of them expressly dealt with the point under discussion, although there are a few vague *dicta,* on which no real reliance may be placed. In any event, bought and sold notes are not a true comparison with identical duplicate original documents, having regard to the special position of bought and sold notes as evidence of a contract—it seems that both notes together constitute a memorandum of the contract.[29]

On the other hand, as is to be expected, we may turn for more assistance to the prolific jurisdictions of the United States, where there have been a number of relevant cases. Williston points out that while

> the doctrine of alteration was applied only to obligations under seal, there was no question that if the validity of the document was destroyed by alteration, the debt represented by the document was equally destroyed, and in no form of action could the holder get relief. But with the extension of the doctrine of alteration to writings which are only evidence, and perhaps not the sole evidence, of the obligation, the technical reason for regarding the obligation as totally destroyed does not hold good, for the existence of a simple contract obligation is not in theory dependent on the evidence by which it is proved. If, therefore, in such a case the obligee is held to lose all rights, even though it would be possible to prove the obligation by legal evidence, it is because the policy requiring that the purity of written evidence shall be maintained demands the imposition of a severe penalty on those who tamper with such evidence.[30]

In this connection, it may be noted that Sholl J., in his judgment, did not advert to the position with regard to bills of exchange and other negotiable instruments where, despite alteration, recovery on the original debt or consideration has been allowed in certain circumstances. It has been held in some cases that, as between the original parties, the alteration does not extinguish the liability on account of which the instrument was given.[31] But these mostly have been cases

[28] *Powell v. Divett, supra,* n. 92; *Mollett v. Wackerbarth* (1847) 5 C.B. 181; *White v. Benekendorff* (1873) 29 L.T. 475.

[29] *Sievewright v. Archibald* (1851) 17 Q.B. 103. *Cf.* Bills of Exchange Act 1882. s. 71 (Eng.); Bills of Exchange Act 1909-1958, s. 76 (Cth.); Bills of Exchange Act R.S.C. 1952, s. 158 (Canada); Bills of Exchange Act 1908, s. 71 (N.Z.); Uniform Negotiable Instruments Law 1896, s. 178 (bills drawn in a set). In *In Re United Ports & General Insurance Co., Wynne's Case* (1873) 8 Ch. App. 1002, a variation between the two parts of an amalgamation agreement was held to render it invalid.

[30] *Op. cit.*, vi, 5348.

[31] *Atkinson v. Hawdon* (1835) 2 A. & E. 628; *Sloman v. Cox* (1834) 1 Cr. M. & R. 471; *Re Thompson* [1931] Ontario Reports 714; [1931] 4 D.L.R. 573. But see *Alderson v. Langdale* (1832) 3 B. & Ad. 660 (party sued deprived by alteration of remedy over against acceptor).

where the instrument was given in conditional satisfaction of a debt already in existence,[32] or they can be otherwise explained away.[33] In any event, it is always dangerous to generalize from cases on negotiable instruments,[34] although they do provide a high proportion of the alteration cases.

If it were not that a bill of lading has so many of the characteristics of a negotiable instrument, and that there were other special circumstances present, the decision in *Chao v. British Traders & Shippers Ltd*[35] might be regarded as highly relevant to this discussion. In that case, certain bills of lading were altered in order to show incorrect date of shipment. It was held that the bills were not nullities, although materially altered, and that the plaintiff was not entitled to the return of his money.[36] The chief interest, however, in this case lies in remarks in the judgment of Devlin J., which show a more enlightened attitude than is apparent in the earlier cases on material alteration. After referring to the plaintiff's claim that the bill of lading, because it was a forgery, was a nullity, and to the case of *Kreditbank Cassel G.m.b.H. v. Schenkers,*[37] *dicta* from which had been cited as authority for the assertion that a forged document is null and void,[38] he went on to say:

> But such general *dicta* must be related to the circumstances in which they are made. If someone forges the signature to a document, that document is wholly fictitious from beginning to end, and it is, of course, null and void as soon as forgery is proved, but I do not think that there is any authority for the view that any material alteration to a document

[32] Thus, in *Payana Reena Saminathan v. Pana Lana Palaniappa* [1914] A.C. 618, one of the issues was whether a materially altered promissory note was given in conditional or absolute discharge of a debt. This is a question of fact and depends on the intention of the parties: *Re Romer & Haslam* [1893] 2 Q.B. 286.

[33] Chalmers, *Bills of Exchange* (11th ed. 1947) 216, suggests in fact, that, in the case of the alteration of a bill while in the custody of the holder, there must have been, *inter alia,* no fraudulent intention on his part if he is to recover on the consideration in respect of which the bill was negotiated to him, but the only authority cited is an American case (*infra,* n. 71). See also *O'Brien v. Brennan* (1915) 9 Western Weekly Reports 277. As to motive, see *infra.*

[34] There are inconsistent statements of the law in Halsbury, *op. cit.,* xi, 380 ('Deeds and Other Instruments') and iii, 233, 234 ('Bills of Exchange'), the latter referring to Chalmers, *op. cit.,* on reading which it is obvious that the position is not very certain (and see n. 33, *supra*). See Bills of Exchange Acts (noted *supra,* p. 46, n. 16) regarding alteration of bill and protection given to holders in due course in the case of *non-apparent* material alterations (such protection is not so limited in the U.S.A.: Uniform Negotiable Instruments Law 1896, s. 124), the advantageous consequences of which are to some extent diminished by the effect of the stamp laws (see *supra,* p. 46, n. 18). The statutory definition of material alteration is not exhaustive: *Sims v. Anderson* [1908] V.L.R. 348; *Clement v. Renaud* (1956) 1 D.L.R. 2d 695. [35] *Supra,* n. 16.

[36] The claim here was for the return of money as for a consideration which had wholly failed. The rule that money paid under a mistake of fact may be recovered in an action for money had and received to the use of the plaintiff would appear to apply to the case of money paid on an altered instrument without knowledge of the alteration: *Leeds & County Bank, Ltd v. Walker,* *supra,* n. 36; *Imperial Bank of Canada v. Bank of Hamilton* [1903] A.C. 49; *American Jurisprudence* (1936) ii, 662-663. For considerations peculiar to negotiable instruments, see Chalmers, *op. cit.,* 201-205.

[37] [1927] 1 K.B. 826. [38] *Ibid.,* 835, *per* Bankes L.J.

> destroys it and renders it null and void. Deciding the matter in the absence of authority and on principle, I think the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument, or not. If it does, and if the forgery corrupts the whole of the instrument or its very heart, then the instrument is destroyed, but if it corrupts merely a limb, then the instrument remains alive, though, no doubt, defective. For example, if a man adds two noughts to a cheque, that is the end of it. It is no longer a cheque for, let us say, £10, because the original figure of £10 has been destroyed by the addition of the two noughts. It is not a cheque for £1,000, because the figure of £1,000 is a forged figure. There is, therefore, nothing left of it, and it must go. I do not think, however, that the same result would necessarily follow if a man were, for example, to forge the date on a cheque because he thought that, as it was overdue, there was a possibility that awkward questions might be asked.[39]

It is respectfully submitted that the learned judge was not correct in the latter example, as it is specifically provided by statute[40] that any alteration of the date of a bill of exchange, including a cheque,[41] is just as much a material alteration avoiding the bill, as, *inter alia,* an alteration of the sum payable. That does not derogate from the attractiveness of his argument, and it is a matter of regret that it did not fall to be considered in the *Vacuum Oil* case, in which the invalid stamping of the contract did not, it is suggested, 'go to the essence of the instrument'. Consistent with this view may be said to be that of Brett and Cotton L.JJ. in *Suffell v. The Bank of England*[42] that the number even of a Bank of England note is not part of the contract, and its alteration does not affect the contract.[43]

Williston[44] takes the specific point which was in issue in the *Vacuum Oil* case as an illustration of the problem whether the rule against alteration is wider in its effect than a rule of evidence. In the case of a contract executed in duplicate, one part of which is thereafter fraudulently[45] and materially altered, Williston instances, if the requirement of the law is merely that the altered writing shall not be given in evidence, the fraudulent party may still prove his right by the unaltered part, for each part is an original. But if the fact that he has fraudulently altered a writing which embodies the

[39] *Chao* case [1954] 1 All E.R. 779, 787.

[40] See Acts noted *supra,* p. 46, n. 16; and see *Vance v. Lowther* (1876) 1 Ex. D. 176; *Clement v. Renaud, supra,* n. 34.

[41] Bills of Exchange Act 1882, s. 73 (Eng.); Bills of Exchange Act 1909-1958, s. 78 (Cth.); Bills of Exchange Act R.S.C. 1952, s. 165 (Canada); Bills of Exchange Act 1908, s. 73 (N.Z.); Uniform Negotiable Instruments Law 1896, s. 185.

[42] (1882) 9 Q.B.D. 555.

[43] The bank-notes were, as mentioned *supra* held to be void. This proposition of Brett and Cotton L.JJ. could not, in any event, have been of any assistance to the plaintiff in the circumstances of that case.

[44] *Op. cit.,* vi, 5348, 5349.

[45] Nothing apparently hangs on this word so far as English law is concerned; *cf. supra,* n. 33. As to its importance in American law, see *infra.*

contract is, as a matter of substantive law, a defence, there can be no recovery.

The American decisions do not leave the matter free from doubt. The 'evidence' view is supported by four cases relating to duplicate leases.[46] The fact that they relate to leases obscures the issue. The normal rule in both English and American law is that the conveyancing effect of an instrument is not affected by its subsequent cancellation or alteration, as contrasted with covenants or contracts contained in the conveyance, to be carried out after the property has vested in the grantee,[47] and there is thus no reconveyance or revesting of the estate assured by the instrument.[48] As it was said in not very dissimilar circumstances, '. . . for God forbid that a man should lose his estate by losing his title deeds.'[49] This rule extends beyond estates in land, and applies to any right which has once vested under an executed, or partly executed, contract,[50] and the altered document may be put in evidence for this purpose, or indeed, to prove any fact, other than that there is in existence an executory obligation sought to be enforced.[51] Difficulties arise in applying these principles to leases, in view of their hybrid character as partly bilateral contracts.[52] As a lease is at common law both a conveyance and a contract, it is, perhaps, natural that there should be some confusion in the cases.[53]

[46] *Phillips v. Sipsey Coal Mining Co.* 218 Alabama 296; 118 Southern Reporter 513; *Jones v. Hoard* (1894) 59 Ark. 42; 26 S.W. 193; 43 Am. St. Rep. 17; *Lewis v. Payn* (1827) 8 Cowen (N.Y.) 71; 18 American Decisions 427; *Stine v. Oasis Oil Co.* 290 S.W. 302. It may be noted that duplicate leases are not always exactly similar, in that frequently each party takes one executed by the other party only; *cf.* bought and sold notes.

[47] In so far as the contract is executory, the obligation is said to be discharged altogether, even if the alteration relates only to one of several distinct covenants: *Pigot's Case* (1614) 11 Co. Rep. 26b; *Mollett v. Wackerbarth* (1847) 5 C.B. 181, 193, *per* Maule J. The latter case was cited by the judge in the *Vacuum Oil* case to counter the plaintiff's argument that the alteration purported to remove the effect of s. 30 of the Stamps Act 1946 only in relation to a possible use of the instrument not material in that action.

[48] *Doe d. Lewis v. Bingham* (1821) 4 B. & Ald. 672, 677, *per* Holroyd J.; *Davidson v. Cooper* (1843) 11 M. & W. 778, 800, *per* Lord Abinger C.B. *Cf. De Chateau v. Child,* [1928] N.Z.L.R. 63. Equity early gave relief in such cases: *Leech v. Leech* (1674) 2 Rep. Ch. 100. As to Canada, see *Fraser v. Fraser* (1864) 14 Upper Canada C.P. 70; *Wilson v. Owens* (1878) 26 Grant 27. As to American Law, see works previously cited.

[49] *Bolton v. Bishop of Carlisle* (1793) 2 H. Bl. 259, 263, *per* Eyre C.J.

[50] *Agricultural Cattle Insurance Co. v. Fitzgerald* (1851) 16 Q.B. 432, 440-441, *per* Lord Campbell C.J.

[51] *Enthoven v. Hoyle* (1853) 13 C.B. 373, 394, *per* Parke B.; *Chao v. British Traders and Shippers, Ltd, supra,* n. 16. As to conflict in U.S.A. regarding use of executed instrument as evidence, see *American Jurisprudence* (1936) ii, 626.

[52] As to independence of covenants in leases, see Williston, *op. cit.,* iii, 2519-2522; *cf.* Corbin, *op. cit.,* vi, 388, citing *dictum* from *Whitaker v. Hawley* (1881) 25 Kan. 674 (lease considered as *wholly* bilateral agreement).

[53] In favour of avoidance of lease: *Hutchins v. Scott* (1837) 2 M. & W. 809, 815, *per* Lord Abinger C.B.; *Keysen v. Gregg* (1932) 32 S.R. (N.S.W.) 288; *Ruwaldt v. McBride, supra,* n. 65 (this was an 'oil and gas lease' to which special considerations apply: *American Law of Property* (1952) ii, 543 ff.); and *cf. Lapp v. May* (1856) 14 Upper Canada Q.B. 47. For view that leasehold estate is still in existence, see *Rudd v. Bowles* [1912] 2 Ch. 60, 65, *per* Neville J.; *Edgecumbe v. The Mayor, etc., of Hamilton* (1902) 21 N.Z.L.R. 599; *Jones v. Hoard, supra,* n. 46; *Lewis v. Payn, supra,* n. 46 (the latter case, however, contains the statement 'Had [the lessee] altered both, then he would

This confusion results from failure to understand the true nature of a lease, and to distinguish its executed from its executory aspects.

On balance, it appears that a lease is treated primarily as a conveyance, and so Williston is apparently prepared to distinguish the four American cases on leases on this ground. It is, however, clear that in at least one of them executory obligations were upheld, the unaltered duplicate being held sufficient to sustain the contract.[54] In the case of purely executory contracts, there are three American decisions enabling an unaltered duplicate original to be proved,[55] and one in which the alteration of one copy prevented recovery.[56] There is also a Canadian case[57] in which one of the judges stated that the plaintiff was entitled to rely on an unaltered duplicate agreement, although this was wholly *obiter,* as the alteration in the altered duplicate was held to be not material. In an earlier case,[58] in which seals had been affixed to one part of an agreement completed in triplicate, the trial judge had, during the proceedings, given his opinion that the alteration of one part should not prevent recovery on the other or others, but had then taken the opposite view, and concluded by declaring the principle to be that the 'deed and the duplicate are one, and the principle that precludes the use of the one will prevent the wrongdoer from relying on the other copy'.[59] His decision was reversed on appeal, on grounds irrelevant to the present issue, although there was a reference to the general trend in the United States as being in accordance with the trial judge's original views, 'at all events when the alteration is not made fraudulently'.[60]

So far as one can establish then from this small number of cases, the tendency seems to be in favour of recovery on unaltered duplicate original documents, and, therefore, necessarily in support of the continued existence of the obligation, although this is certainly not consistent with the language used in so many American cases and texts in discussing the general effects of alteration, where there is no question of duplicates.

have lost his estate', indicating that, for want of evidence, the lessee may have difficulty in enforcing his title). For early discussion of effect of alterations on leases, see *Miller v. Manwaring* (1635) Cro. Car. 397. Considerations of a difficult nature also arise in the case of mortgages: Williston, *op. cit.*, vi, 5309-5311.

[54] *Jones v. Hoard, supra,* n. 46.

[55] *Barkley v. Atlantic Coast Realty Co.* (1915) 170 N.Car. 481; 87 S.E. 219 (following *Jones v. Hoard, supra,* n. 46); *Hayes v. Wagner* (1906) 220 Ill. 256; 77 N.E. 211, the latter being followed in *Morris v. Levin* (1926) 236 Mich. 490; 211 N.W. 107 (contract restricting the use of land). For statutory provision allowing recovery, see Okl. Stat. Ann., 1937, Title 15, s. 240.

[56] *Koons v. St Louis Car Co.* (1907) 203 Missouri 227; 101 S.W. 49.

[57] *Richardson v. Tiffin* [1940] S.C.R. 635; [1940] 3 D.L.R. 481.

[58] *Loranger v. Haines, supra,* n. 87.

[59] (1921) 64 D.L.R. 364, 365, reporting the decision of Middleton J.

[60] *Ibid.,* 367, *per* Meredith C.J.C.P., who, in any event, plainly did not regard the obligation as destroyed by the alteration, as he held, *inter alia,* that the plaintiff could succeed without reference to any written contract, despite the fact that the latter had been put in evidence.

However, whatever the trend may be, as in the case of negotiable instruments, so in the case of American law, it is not safe for one reared in English law to assume that 'like cases demand like remedies.' We have so far assumed a false major premise, in so far as we have predicated that American law and English law are, apart from the distinctions already drawn, similar in their basic attitudes to alterations. They have in fact followed rather different paths. The great distinction in the United States seems to be between fraudulent and non-fraudulent material alteration. The development of the law there is succinctly described by Grismore,[61] who, after stating the original rule, originating in *Pigot's Case,* proceeds:

> As time went on there also developed the so-called best evidence rule. As a result of this development the basis of the rule that the obligation was destroyed by alteration of the instrument became obscured, and it apparently sometimes came to be believed that it had its origin in the best evidence rule.[62] This misconception seems to have had two effects. In the first place, since the best evidence rule applied to all written contracts, and to memoranda required to satisfy the Statute of Frauds, the result was that the rule in regard to the effect of an alteration was similarly extended. In the second place, since the best evidence rule, as usually applied, prevented proof of the transaction by secondary evidence, only when the best evidence had been destroyed with fraudulent intent, the rule in relation to alteration was similarly liberalized by most of our courts. As a consequence it has come to be the generally accepted view in this country that the alteration of a written contract, made without the authority of the obligor, discharges the contract only if the alteration is material, and if it is made with fraudulent intent, either by the obligee himself, or by someone else, with the obligee's knowledge or consent.

It is, perhaps, as has been shown, not quite accurate to say that the contract is discharged, and thus Corbin's view may be preferred, when he states the present law to be as follows:

> The general rule today is that a material alteration of a written contract by one who asserts a right under it extinguishes his right, if the alteration was with fraudulent intent, and the duty of the party against whom the right is asserted is discharged.[63]

With regard to 'fraudulent intent', it may be observed that a minority of American courts still adhere to the rule that a non-fraudulent material alteration avoids the instrument,[64] and, further-

[61] *Contracts* (1947) 361-362. For a generally accepted statement of the present law, see *Restatement of the Law of Contracts* (1932) 815-830.

[62] See Williston, 'Discharge of Contracts by Alteration' (1904-1905) 18 *Harvard Law Review* 105, 165.

[63] *Op. cit.*, vi, 235.

[64] *American Jurisprudence* (1936) ii, 608, the *general* rule is stated to be that a 'material alteration of an instrument by a party thereto will vitiate, though made with no fraudulent intent whatever and with an entirely honest motive', and the effect of decisions to the contrary is sought to be minimised. This is in direct conflict with the views of the leading American text authors, some of whom have been cited *supra*, and also with the *Restatement of the Law of Contracts* (1932) 815. It is pointed out, however,

more, that is the general statutory rule relating to negotiable instruments,[65] although, at common law, American courts had generally held that non-fraudulent alterations would not avoid such instruments.[66] But even where such recovery is barred, relief is, in the United States, granted by allowing recovery on the original debt or consideration for which the instrument was given,[67] and it seems, according to Williston,[68] that the same result would probably be reached, although no debt had ever existed before the transaction of which the delivery of the instrument was a part. Relief is granted to the obligee in such cases by allowing recovery on quasi-contractual principles, that is to say, if the party whose rights are extinguished has rendered a performance of value to the party discharged by the alteration, he may obtain compensation to the extent of the value so conferred.[69] It is quite clear, however, that if the alteration is fraudulent, no recovery can be had by the guilty party, either on the instrument or on the original debt or consideration.[70] These rules are, perhaps, the source of certain misleading statements by English writers.[71]

The American courts have, therefore, in the matter of motive, as in the case of alterations by strangers, adopted a far more equitable attitude than have the English courts, the accent in the United States being generally on 'fraudulent intent' as the vitiating factor, and relief being allowed in all jurisdictions in every case save the fraudulent one. However, it would be wrong to assume that fraud has been entirely neglected in the English cases. Thus, the principle underlying the cases has been stated to be that 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected'.[72] But the present English law

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in *American Jurisprudence* (1936) ii, 623, that the intent or motive prompting the alteration is of great importance in determining the right of recovery upon the original consideration: see *infra*. In at least some of the American cases in which recovery was allowed on an unaltered duplicate original (*Jones v. Hoard, supra* n. 46; *Lewis v. Payn, supra*, n. 46; *Hayes v. Wagner, supra*, n. 55), the alteration of the other original was apparently not made fraudulently, the issue being thus further obscured. This fact reduces the authority of those cases.

[65] Uniform Negotiable Instruments Law 1896, s. 124. *Cf.* Uniform Commercial Code —Commercial Paper, s. 3—407 (1950 draft) (discharge by fraudulent alteration only).

[66] *Williston on Contracts* (rev. ed. 1936-1938) iv, 3428. The courts are apparently divided on the interpretation of the Uniform Negotiable Instruments Law 1896 on this point.

[67] *American Jurisprudence* (1936) ii, 623-624; and *Perry v. Manufacturers National Bank* (1940) 127 American L.R. 339; 305 Mass. 368; 25 N.E. 2d. 730; Annotation: (1940) 127 American L.R. 343. *Cf.* English cases cited *supra*, n. 31.

[68] *Op. cit.* (n. 66), vi, 5350.

[69] Corbin, *op. cit.*, vi, 238, 239.

[70] See cases for the foregoing propositions in the various American works previously cited.

[71] Thus Chalmers, *op. cit.*, 216; he cites on the fraud point one case only, an American one: *Hunt v. Gray* (1871) N.J. Law 227; 10 Am. Rep. 232; see n. 33, *supra*.

[72] *Master v. Miller* (1791) 4 Term Rep. 320, 329, *per* Lord Kenyon C.J. It has even been suggested, or implied, that an immaterial alteration, if fraudulent, would avoid an instrument: *Caldwell v. Parker* (1869) I.R. 3 Eq. 519, 526, 527; *Re Howgate & Osborn's Contract* [1902] 1 Ch. 451, 453.

as already indicated, is not founded on fraud or concerned with motive, and the rule is an absolute one, at least where the alteration is intentional.[73]

In any event, a distinction based on fraud is not wide enough to cover the English law relating to alterations by strangers. Thus the rule was said to be founded on 'fraud, or laches'.[74] This brings in an alternative ground. Further, in another case, it was claimed that the original rule 'was not intended so much to guard against fraud, as to insure the identity of the instrument and prevent the substitution of another, without the privity of the party concerned.'[75] Whether or not English law was concerned with motive, it was, doubtless, the idea that an alteration was due, if not to wrongdoing, at least to carelessness on the part of the obligee, that was behind the refusal of courts of equity to give the obligee relief in such cases, whilst at the same time they had no scruples about granting relief in cases of accidental loss or destruction.[76] Similar policy considerations did not apply here, even though the original reason why a sealed instrument was discharged by alteration applied equally to the loss or accidental destruction of such an instrument.

An illustration of equity's attitude towards an altered document is seen in *Duke of Chandos v. Talbot*,[77] where the Chancellor, in deciding that a bond, which was not good at law because of an interlineation after execution, was also not good in equity, said: '. . . for you yourselves have destroyed its being as a bond, so it is as if it never had been. . . .'[78] On the other hand, little note has been taken of some of the observations in the early cases which show a less rigid approach to the existence of the debt or obligation than appears to be enshrined in the present rules. Thus in the case last mentioned, the words quoted were preceded by the sentence, 'This at most can be a charge [on an estate] by simple contract.' Further, in another case during the same period, a bond, which was similarly void at law by reason of an interlineation after execution, was held 'good in equity for so much money as was really secured thereby',[79] but only as a simple contract debt. There are possibly other examples of this intelligent exercise of

[73] *Bank of Hindostan, China & Japan v. Smith* (1867) 36 L.J.C.P. 241; *Croockewit v. Fletcher* (1857) 1 H. & N. 893.

[74] See *dictum* of Lord Denman C.J. in *Davidson v. Cooper, supra,* n. 86, previously cited.

[75] *Sanderson v. Symonds* (1819) 1 B. & B. 426, 430, *per* Dallas C. J. (this case illustrates the application of the rule to an insurance policy).

[76] *E.g., Griffin v. Boynton* (1661) 1 Nels., 82 (loss); *Wilcox v. Sturt* (1682) 1 Vern. 77 (destruction). Later, equitable relief became unnecessary when courts of law also began to accept secondary evidence in such cases: *Read v. Brookman* (1789) 3 Term Rep. 151 (deed may be pleaded as lost without a *profert*).

[77] (1725) Sel. Cas. Ch. *temp.* King 24.

[78] But, as noted, *supra,* an altered instrument may be given as proof that a title passed prior to the alteration.

[79] *Anon.* (1725) 2 Eq. Cas. Abr. 286.

equitable jurisdiction, which, if it had continued, might have gone far towards relieving the judge in the *Vacuum Oil* case[80] from his finding it

> difficult enough to explain on any strictly logical grounds why, for example, when there is only one original of a document under hand, and a clerk of the obligee, under a mistake of law, purports to add seals to the parties' signatures, the obligee should be unable, even though the facts clearly appear, to recover upon it as a simple contract.[81]

Thus, at least in some cases, the Court of Chancery was prepared to regard an obligation arising under an altered instrument as being still in existence, albeit of a lower order than before the alteration. It is not, however, clear whether the original instrument was admitted in evidence, or whether recourse was had to secondary evidence. Whatever the position was, these gropings of equity towards the granting of relief in the case of alterations are obscure, and they finally disappeared in the reports. It may still be open for relief to be given in such cases, at least where the alteration was without fraudulent intent, if open-minded judges are prepared to resurrect old and honourable principles at the cost of sacrificing archaic doctrines of the common law. It has been done in America.

OBLIGATION—ALIVE (BUT ONLY JUST)

In this situation, with no clear guidance from the cases, a difficult problem faced Sholl J. in the *Vacuum Oil* case. In effect, he had to choose between conflicting principles of public policy. In the event, he came down in favour of the admission of Exhibit S, the unaltered duplicate original, subject to payment by the plaintiff of the stamp duty and penalties under s. 29 of the Stamps Act 1946.[82] This decision was not, however, a simple, clear-cut one, but was compounded of many different factors, each one carrying its own weight. It was profoundly influenced by his obvious distaste for the English rule relating to alterations by strangers to the obligation, and this, although laudable, is naturally a limitation on the value of the actual decision.

The judge stated that he did not find in the modern rule, or in the authorities for it, or in such principles as it is said to be based upon, any sufficient justification for holding that an alteration in a material part of a written agreement, made by a servant of the obligee, apparently of his own motion, though with a desire to assist his master, in a duplicate original of the agreement, held by the obligee in his

[80] [1957] V.R. 456, 465.

[81] *Cf. Davidson v. Cooper, supra,* n. 86. This is, of course, a different matter, as it implies recovery according to the original tenor.

[82] *Semble,* the plaintiff can recover this sum from the defendant: *Shenstone v. Hewson (No. 2)* (1928) 29 S.R. (N.S.W.) 39.

own custody, prevented the obligee from putting in evidence and succeeding upon the other unaltered duplicate original held by or on behalf of the obligor. 'At least there seems to me', he observed, 'to be no reason of policy or of common sense why the courts should so hold when the alteration is not made fraudulently by the promisee, even though it be made by the unauthorised fraud of his servant or agent.'[83]

While this view is admittedly hedged around by many qualifications arising from the particular fact situation, it does seem, in some ways, to be coming very close to the American position which, as we have seen, in general allows no question of avoiding the obligation to arise unless the alteration was made fraudulently either by the promisee or by someone else with the promisee's knowledge or consent. But it is also a distortion of the American position, as it allows the obligation to be proved only by the admission of the *alter ego* of the altered agreement, but not of the altered agreement itself, despite the non-existence of the circumstances which would cause the application of the rule in America.

The decision is, nevertheless, an implied criticism of the English doctrine relating to alterations, and this is taken further in the final stages of the judgment. Thus, one may note the following remarks:

> ... it would seem a strong thing to hold that because of [L's] action, the whole right of the plaintiff to the moneys agreed to be paid by the defendant should be lost. If that were right, the same result must follow if the document in question were a contract of sale involving property worth a million pounds.[84]

This is just what would happen under the rule, unless, if the *Vacuum Oil* decision is correct, there happens, by the great good fortune of the plaintiff, to be an unaltered duplicate original in existence.[85] The law should not suffer the humiliation of having to admit to the dependence of justice on a gamble.[86]

Sholl J. rightly felt that

> a rule which may have operated justly enough as a protection against imposition on the courts in a past era, when a minority only could read or write, but which extends even to the acts of a stranger while a document is in the custody of a party to it, ought not in this day and

[83] [1957] V.R. 456, 464.

[84] *Ibid.* For general principle as between vendor and purchaser in case of alteration, see *Shaw v. Brodie* (1891) 17 V.L.R. 760.

[85] Legal practitioners may well be worried about this matter, especially where, as so often happens, blanks in a contract are filled in; see *Keysen v. Gregg* (1932) 32 S.R. (N.S.W.) 288 (lease rendered void by reason of blanks filled in). The rules relating to the filling in of blanks are associated with special problems in relation to various types of instrument: see works on company law, negotiable instruments, *etc.*

[86] In view of the *Vacuum Oil* case, practitioners would be well advised to 'load the dice' by ensuring that all instruments are executed in duplicate.

age to be extended beyond the area to which binding authority compels its application.[86a]

It is suggested that, as it is, this area is far too extensive, and, as a matter of policy, it should be restricted, if necessary by legislative action. Even the American viewpoint is, in many ways, too strict. If it be argued that, in a case of fraudulent alteration, the courts must punish a party for his attempted fraud, it is suggested that the punishment aspect best be left to other branches of the law, if the fraud can be brought within their scope.[87]

Certainly, so far as civil proceedings are concerned, it should be sufficient that the successful plaintiff may be deprived of his costs. As Sholl J. pointed out, that is all the courts could do to punish a plaintiff who fraudulently sues for £500 money lent when he is owed only £250.[88] But he cannot be refused judgment for £250, when he is seeking a purely common law remedy.[89] The illustration is even stronger, if the reason for the excessive claim is merely the unauthorized fraud of the plaintiff's servant or agent. But if the money is lent on foot of an unduplicated contract in writing, then the plaintiff will be debarred from recovery, if he or his servant or agent, or even anyone else if the document is in the plaintiff's custody, has altered the amount in the contract from £250 to £500.[90] This is a distinction which does no credit to our legal system.

CONCLUSION

While it is felt that the *Vacuum Oil* case should have been decided differently on the materiality and 'stranger' issues, and that Exhibit A should therefore not have been held vitiated, it is recognized that, in the matter of Exhibit S, Sholl J., notwithstanding that he was not in agreement with Williston's test,[91] was, whether he liked it or not, lending support to the view that the obligation does not die with the writing, and that the rule against alteration is no wider in its effect

[86a] [1957] V.R. 456, 464.

[87] Forgery is a statutory crime, and every fraudulent alteration is forgery, whether or not the statutes contain the word 'alter': *R. v. Elsworth* (1780) East *P.C.* ii, 986.

[88] See *Huxley v. West London Extension Railway Co.* (1889) 14 App. Cas. 26; *cf. Wootton v. Central Land Board* [1957] 1 W.L.R. 424; [1957] 1 All E.R. 441.

[89] If equitable relief is being sought, the position may well be different: the plaintiff may not have come 'with clean hands'.

[90] This is a different matter from alteration of the *consideration,* which, according to *Williston, op. cit.* (n. 66), vi, 5339, may be immaterial, as it does not ordinarily change the apparent legal effect of an obligation (although it would be material in the case of a memorandum under the Statute of Frauds requiring a statement of the consideration); and see *Murray v. Klinzing* (1894) 64 Conn. 78; 29 Atlantic Reporter 244. But Williston's test is, as mentioned *supra,* not wholly accepted in English law, and such an alteration may, therefore, be material: *Knill v. Williams* (1809) 10 East 431; *Suffell v. The Bank of England* (1882) 9 Q.B.D. 555, 570, 571, *per* Brett L.J.; and see *Nykiforuk v. Conroy* [1931] 2 D.L.R. 407.

[91] *Supra* ('evidence' or 'defence'); and see the *Vacuum Oil* case, [1957] V.R. 456, 461, 462.

than a rule of evidence. This follows the apparent trend of the American cases, at least when the alteration is not fraudulent, but is not borne out by the underlying attitude of English courts, if one omits the few exceptional cases referred to earlier. On the other hand, the judge seemed to think that he was not changing the rule that alteration amounts to a defence, and is not just a ground for objection to evidence.

Whatever the true basis of this part of his decision, it is to be wholly commended, as are also the *dicta* of Devlin J. previously cited,[92] as an attempt to limit an outworn and pernicious doctrine which has too long persisted in the common law, and, it should be observed, in the common law alone; it is apparently unknown in other legal systems. It is important to note, however, that no decision was given in the *Vacuum Oil* case, and indeed it would have been *obiter* if it had been given, on the real question posed by Williston and on which there is not yet sufficient weight of authority in America, namely, whether an obligee should be allowed to recover on foot of an unaltered duplicate original, if the alteration in the other part has been made by the personal fraud of the obligee or by fraud to which he is privy.

It is encouraging, however, to note that some inroads have been made into the old rule, and that the latter part of Sholl J.'s decision was a courageous and proper one, ensuring that justice was done, in spite of the serious obstacles in its path. But this should not blind us to the fact that the existing law of alterations will not be consistent with justice in many other cases, and, as this case shows us, not least where the contract has not been made in duplicate. The question of materiality alone is full of hair-splitting and invidious distinctions. Further, the question of alteration by a stranger bedevils the issue, as also does the possible complication of fraud. In addition, the rights of *bona fide* holders and innocent purchasers may be affected.[93] It was not without justification that Jessel M.R. said: 'The cases are all of extreme hardship, because they assume that the plaintiff is a *bona fide* holder for value, and they all assume that the defendant, without any merit of his own, gets rid of an obligation, at all events as regards that plaintiff, on that instrument.'[94]

It is admittedly difficult to suggest a satisfactory solution, short of total abolition of the existing common law rules, to the problem of what the textbooks describe, not quite accurately, as 'discharge of

[92] *Chao v. British Traders & Shippers, Ltd, supra,* n. 16.

[93] *Burchfield v. Moore* (1854) 23 L.J.Q.B. 261; as seen *supra,* some protection is now given to holders in due course of negotiable instruments.

[94] *Suffell v. Bank of England* (1882) 9 Q.B.D. 555, 562. In *Koch v. Dicks* [1933] 1 K.B. 307, Scrutton and Greer L.JJ. both emphasized the lack of merit in the defence of material alteration put forward therein.

contract by alteration'. If there is hesitation about applying this drastic remedy (although English legislators do not appear to have had such inhibitions recently about changing the common law), a start might be made by introducing the American distinction between alteration and spoliation. Further, full protection should be given to *bona fide* holders and innocent purchasers to enable recovery by them, according to the original tenor. Whether the Americans should be followed in their differing treatments of fraudulent and non-fraudulent alterations is not so obvious, especially in view of the dangers long associated with the concept of 'fraud'. It should, perhaps, be declared definitely that objections on the ground of alteration should in all cases be matters solely of evidence and not of substance. If there is to be vitiation, it should be of the instrument rather than of the obligation. This should not only answer Williston's query in the affirmative, but also, if taken to its logical conclusion, enable secondary evidence of the altered instrument to be admitted, even where no unaltered duplicate is in existence. Thus would the importance of the materiality concept be reduced, but it might further be specifically provided, in view of the *Vacuum Oil* case, that stamp alterations should be deemed immaterial.[95]

One can only hope, at any rate, that law reform committees will now take up a matter which, while not, fortunately, of frequent occurrence, is yet one which, as the *Vacuum Oil* case has shown, may arise in a simple and unexpected form, and may possibly cause grave injustice.

[95] This last suggestion may be unnecessary so far as England is concerned, if legislation follows the strong views expressed in recent years by the Supreme and County Courts Practice and Procedure Committees to the effect that unstamped or insufficiently stamped documents should be admissible in proceedings (subject to the impounding of the document and its transmission to the Commissioners of Inland Revenue for appropriate action with regard thereto).