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Law Reform Commission

Report

97

The rule in Pigot's Case

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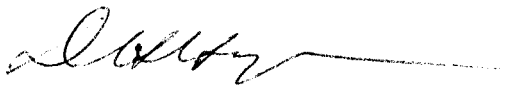
New South Wales
Law Reform Commission

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

The rule in Pigot's Case

We make this final Report pursuant to the reference to this Commission dated 8 December 1998.



The Hon Justice David Hodgson
Commissioner-in-Charge

Mr Craig Kelly

Professor Michael Tilbury (until 30 June 2000)

January 2001

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Terms of reference

In a letter to the Chairperson of the New South Wales Law Reform Commission dated 8 December 1998, the Attorney General, the Hon J W Shaw QC, MLC, required the Commission to review:

> the Rule in Pigot's case to determine whether the rule should be abolished or restated in a more restricted way.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice David Hodgson*
Mr Craig Kelly
Professor Michael Tilbury (until 30 June 2000)

(* denotes Commissioner-in-Charge)

Officers of the Commission

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THE COMMISSION'S RECOMMENDATION

Recommendation (page 66)

The law deriving from the rule in Pigot's Case should be abolished by legislation.

1. Introduction

- The place of the rule in the law of contracts
- The original rule
- Reasons for the rule

1.1 On 8 December 1998 the Attorney General, the Honourable J W Shaw, QC, MLC, asked the New South Wales Law Reform Commission to review:

> the Rule in Pigot's case to determine whether the rule should be abolished or restated in a more restricted way.

This reference was made in response to a call by Justice Young that "some Law Reform body might seek to have it abolished or at least restated in some less draconian form".[1]

THE PLACE OF THE RULE IN THE LAW OF CONTRACTS

1.2 The rule in *Pigot's Case* is a part of the law of contracts. The rule's practical application is in contracts that are written, whether under seal or not, it being essentially concerned with the consequences of an alteration made to a written contract after it has been signed. It does not apply to negotiable instruments which are covered by legislation.[2]

Types of contracts

1.3 A contract is formed when one party (the promisor) makes a promise which the law will enforce because certain conditions have been met. The party to whom the promise is made is called a promisee.[3] When parties enter into a contract, they do not necessarily have to reduce their agreement to writing. However, sometimes (either by choice or by necessity) the terms are reduced to writing and signed ("executed") by the parties. The writing can be in many forms. The two broad categories which are relevant to the issues considered in this Report are deeds and simple written contracts – although there are other special forms such as negotiable instruments which are considered when the need arises:

- ***Simple written contracts.*** Simple contracts generally do not need to be in writing and parties may choose to reduce their agreements to writing

1. P Young, "Recent Cases: The Rule in Pigot's Case" (1997) 71 *Australian Law Journal* 117 at 118.
2. See para 4.2-4.6.
3. See J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at para 201.

(either in whole or in part) or not. Simple contracts require some consideration to be effective.

- ***Deeds.*** Deeds, or formal contracts under seal, are documents in which certain formalities are followed with the result that they can be enforced even if consideration is absent from the agreement. Traditionally the formalities (derived from practices in the Middle Ages) have been that the document be sealed and delivered with the intention that it take effect as a deed. In some cases these formalities have been altered[4] by legislation[5] and in others by judicial interpretation.[6] Deeds are chiefly used in New South Wales to deal with interests in property, for example, the conveyance of interests in land,[7] establishing charges over real or personal property, the granting of options, and the granting of guarantees by third parties.

THE ORIGINAL RULE

1.4 The rule in *Pigot's Case*[8] is derived from a judgment handed down in 1614. The case involved an action of debt on a bond for appearance brought by Benedict Winchcombe Esq, the Sheriff of the County of Oxford, against Henry Pigot. Pigot entered the deed on 2 March 1611. However, between then and the commencement of the action in 1614, a stranger, without the permission of Winchcombe inserted some extra words in the deed (which was in Latin) namely, the words "*Vicecomiti Comitatus Oxon*" (that is, "Sheriff of the County of Oxford") between the words "*Benedicto Winchcombe armig*" ("Benedict Winchcombe, Esq") and "*in sexaginta libris*"

4. See N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Australian edition, Butterworths, Sydney 1997) at para 4.2, footnote 5.
5. For example, legislation in New South Wales governs when such instruments will be deemed to be sealed: *Conveyancing Act 1919* (NSW) s 38 which deals with signing and attestation. See also J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at para 312.
6. For example, delivery is now a matter of intention: *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80 at 87.
7. As required by *Conveyancing Act 1919* (NSW) s 23B; and *Real Property Act 1900* (NSW) s 41.
8. *Pigot's Case* (1614) 1 CoRep 26b; 77 ER 1177. *Pigot's Case* is reported elsewhere in English as *Winchcombe v Pigot* (1614) 2 Buls 246; 80 ER 1096, and in law French as *Winscombe v Piggott* (1614) 1 Roll Rep 39; 81 ER 311 and *Anon* (1614) Moore (KB) 835; 72 ER 937.

("in the sum of £60"). As a result, Pigot, relying on an earlier line of authority, pleaded *non est factum*, that is, because of the alteration the deed was not, in fact, the one he originally entered into. The words inserted by the stranger were found to be not material since nothing turned on them – the bond was found to be an ordinary bond and not one taken by Winchcombe in his capacity as Sheriff of the County of Oxford. The result was that the bond was enforceable.

1.5 The principles arising from this case were stated by Lord Coke to be that:

> when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void.[9]

It was also resolved that:

> if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but ... if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed.[10]

1.6 The decision of the court can be summarised as follows:

- a deed is void if it is altered in any way by the promisee (the one to whom the deed is made);

9. *Pigot's Case* (1614) 1 CoRep 26b at 27a; 77 ER 1177 at 1178.
10. *Pigot's Case* (1614) 1 CoRep 26b at 27a; 77 ER 1177 at 1178.

- a deed is also void if altered in a material way by a stranger (that is, a third party) to the transaction; however
- a deed is not void if it is altered in a way that is not material by a stranger to the transaction.

1.7 The decision in *Pigot's Case* actually modified a harsher earlier line of authorities which can be illustrated by the decision in *Elliott v Holder.*[11] In that case it was held that any alteration of a deed made it "utterly void" whether the alteration was in a material place or not:

> For the deed is entire, and when after the delivery it is altered in any point, otherwise than it was at the time of the delivery, it has become void in its entirety and is not his deed in every part as he delivered it.[12]

1.8 Since the alterations by the stranger in *Pigot's Case* were found not to have been material, much of Lord Coke's judgment (covering as it did material alterations by strangers and alterations by parties to the agreement) was not necessary to the final decision.[13]

1.9 The rule as developed throughout the succeeding four centuries continues to apply in New South Wales.

Relationship to the defence of non est factum

1.10 The rule in *Pigot's Case* was originally closely related to the defence of *non est factum*. At common law, the defence of *non est factum* (which means literally "it is not his/her deed"[14]) was available to persons seeking to disown a document which it was alleged they had signed or sealed either on the ground that they did not sign the document at all or in a limited number of situations where the document had been signed by those who, through no fault of their own, were unable to understand the contract's effect.[15] This

11. (1567) 3 Dyer 261b; 73 ER 580. A more comprehensive report of the decision is now available in J H Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer* (Selden Society, London, 1994) at 129-131.
12. J H Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer* (Selden Society, London, 1994) at 130.
13. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 243.
14. The defence was originally phrased: *scriptum predictum non est factum suum.*
15. See A W B Simpson, *A History of the Common Law of Contract:*

included situations where the document had been altered.[16]

1.11 *Pigot's Case* was decided on a plea of *non est factum*.[17] This was highlighted by Justice Grose in *Master v Miller* who said that *Pigot's Case* stood for the proposition that:

> the obligor may plead *non est factum* and give the matter in evidence, because at the time of plea pleaded it was not his deed... the effect of [the determination in Pigot's Case] is, that a material alteration in a deed causes it no longer to be the same deed.[18]

A successful plea of *non est factum*, like a successful invocation of the rule in *Pigot's Case*, renders the contract expressed in the document void.[19]

1.12 The use of the plea has become rare as courts have become more reluctant to allow persons to disown documents they have failed to understand than were the courts in periods when the parties were less likely to be literate.[20] Other doctrines have also developed to protect weaker parties to contracts.

1.13 In more recent times the two pleas have come to be quite distinct so that now, in relation to altered documents, it is simply the rule in *Pigot's Case* that is pleaded as a defence rather than *non est factum*.

The Rise of the Action of Assumpsit (Clarendon Press, Oxford, 1975) at 98; J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at para 1267; R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 35. See also *Saunders v Anglia Building Society* [1971] AC 1004 at 1024-1025 (Lord Wilberforce); and *Gallie v Lee* [1969] 2 Ch 17 at 42-43 (Salmon LJ).

16. See *Markham v Gonaston* (1598) Cro Eliz 626; 78 ER 866; and J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 282.
17. See also *Suffell v Bank of England* (1882) 9 QBD 555 at 560-561 (Jessell MR).
18. *Master v Miller* (1791) 4 TR 320 at 345; 100 ER 1042 at 1055 (Grose J).
19. See J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at para 1267.
20. On the modern use of the plea, see *Petelin v Cullen* (1975) 132 CLR 355 at 359; and J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at para 1267-1275. See also accounts of the development of the plea in *Gallie v Lee* [1971] AC 1004 at 1024-1025 (Lord Wilberforce); and *Gallie v Lee* [1969] 2 Ch 17 at 42-43 (Salmon LJ).

Purely a common law issue

1.14 Traditionally, equity played no role in relation to documents that have been altered. At Common Law an obligor could plead *non est factum* if a deed was lost, destroyed or altered. However equity only granted equitable relief where the deed was lost or destroyed.[21] Glanville Williams suggests that the failure to grant relief in cases of alteration is "inexplicable".[22] However, it has also been suggested that the English view that alterations would be due to either fraud or carelessness is the reason behind equity's refusal to grant relief, whereas it "had no scruples about granting relief in cases of accidental loss or destruction."[23]

REASONS FOR THE RULE

1.15 As already noted, the rule, as developed by the courts over the last four centuries, continues to apply in New South Wales. Many reasons have been suggested for the continued existence of the rule over the years. These are outlined here, though these reasons will be discussed in more detail in Chapter 3.

The document is the obligation

1.16 The prime reason for the rule is thought to lie in its original application to deeds only and the inability of the law at the time to separate the obligation from its physical evidence as manifested by the parchment, wax and ink of the old deeds.[24]

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21. J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 282.
22. G L Williams, *Joint Obligations* (Butterworths, London, 1949) at para 67.
23. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 71. See also S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 113.
24. See J W Salmond and J Williams, *The Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945) at 573; G L Williams, *Joint Obligations* (Butterworths, London, 1949)

Evidential value

1.17 The need to preserve the evidential value or authenticity of a document has been often suggested as a reason for the continuation of the rule. Indeed, the need for certainty is seen as one of the reasons why parties choose to record agreements in writing in the first place. A particular outcome of this point of view is that the party with custody of the document is bound to preserve it against alteration.

Punishment of fraud

1.18 Another reason which continues to enjoy some support (and is possibly the strongest reason for the continuation of the rule in some form) is that the rule is there to punish a party who has fraudulently altered the contractual document.

at para 67. See the discussion below at para 3.3-3.4.

2. Development of the rule

- Types of documents covered
- Classification of alterations
- The person making the alteration
- Effect of alteration

2.1 The rule has developed in many ways since its original statement four centuries ago. The areas considered in the Chapter are:

- the types of documents covered;
- classification of alterations;
- types of persons making the alteration; and
- the effect of the alterations.

TYPES OF DOCUMENTS COVERED

2.2 The rule initially applied only to deeds. It was first extended to other contractual documents in 1791 when Lord Kenyon noted, in *Master v Miller*,[1] that previous cases had expressly applied to deeds simply because at the time most written "engagements" were by deed:

> Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all written instruments which were altered or erased, should be thereby avoided.[2]

Master v Miller, however, dealt with bills of exchange,[3] which can be treated as a separate category to other instruments,[4] so the rule was not clearly extended to all written instruments until *Davidson v Cooper*[5] in 1843.

2.3 Commentators have considered that there was little reason for extending the rule to include documents other than deeds (and possibly bills of exchange),[6] although some have acknowledged that the move was

1. (1791) 4 TR 320; 100 ER 1042.
2. *Master v Miller* (1791) 4 TR 320 at 330; 100 ER 1042 at 1047.
3. These are now governed by statute in any case: see *Bills of Exchange Act 1909* (Cth). See also para 4.2-4.6.
4. See *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 282.
5. *Davidson v Cooper* (1843) 11 M&W 778; 152 ER 1018; on appeal: (1844) 13 M&W 343; 153 ER 142.
6. O W Holmes, "The Path of the Law" (1897) 10 *Harvard Law Review* 457 at 473; S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 112. See also *Zisti v Ryde Joinery Pty Ltd* (1996) 7 BPR 15,217 at 15,225; and *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978)

justifiable on the grounds of public policy.[7] One has suggested that the rule ought to have been confined to those "deeds and other instruments which constitute obligations, as opposed to merely evidencing them".[8]

2.4 This can be contrasted with the position in the United States where the rule is limited to documents that are "integrated" agreements (that is, subject to the parol evidence rule[9]) or documents that satisfy the *Statute of Frauds*.

2.5 The question of the application of the rule to documents other than deeds has not come up in New South Wales in recent times. Of the New South Wales cases in the last ten years where the rule in *Pigot's Case* has been raised as an issue (whether successfully or not) all have been in relation to contracts that can be classed as deeds – whether a guarantee,[10] a lease[11] or a deed of settlement of a dispute.[12]

2.6 The extent to which the enlarged coverage of the rule has caused problems will be discussed below (in relation to the effect of alterations).[13]

CLASSIFICATION OF ALTERATIONS

2.7 Since the decision in *Pigot's Case* not all alterations have been subject to the rule. The basic distinction is between alterations that are found to be "material" and those that are judged to be "immaterial". In *Pigot's Case* it

17 SASR 259 at 274-275 (Bray CJ).

7. J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 283.
8. J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 282.
9. On the parol evidence rule, see below at para 2.70.
10. *Citibank Savings Ltd v Executors of the Estate of Vago* (New South Wales, Supreme Court, No 50443/1991, Cole J, 1 May 1992, unreported); *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636; and *Woods v Commonwealth Bank of Australia* (New South Wales, Supreme Court, No 4252/1988, Needham J, 30 January 1990, unreported).
11. *Zisti v Ryde Joinery Pty Ltd* (1996) 7 BPR 15,217; *Ryde Joinery Pty Ltd v Zisti* (1997) 7 BPR 15,233; and *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313.
12. *Dahlenburg v Dahlenburg* (New South Wales, Supreme Court, No 2605/1996, Young J, 24 July 1996, unreported).
13. Para 2.63-2.87.

was held that an immaterial alteration by a stranger was not subject to the rule. However, it was still the case that immaterial alterations by a party to the contract were subject to the rule.

2.8 The first significant departure from this original statement of the rule occurred in 1868 when it was held that an immaterial alteration to a document by the promisee could not render it void since the material added would have been supplied by the law in any case. The case in question involved the addition of the words "on demand" to a promissory note which did not state a time for payment.[14]

2.9 It is now the case that immaterial alterations, even if by the promisee, will not avoid an instrument.[15] This brings the law with respect to immaterial alterations by promisees into line with the law with respect to alterations by strangers. The question of materiality is, therefore, in issue in just about every instance of alteration of a document after execution.

Materiality

2.10 Whether an alteration will be treated as "material" depends on the circumstances of the individual case, including amongst other things, the nature of the instrument altered. There is a vast collection of case law and commentary relating to materiality.[16] For example, *Norton on Deeds* defines a material alteration as including:

14. *Aldous v Cornwell* (1868) LR 3 QB 573. See also *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455; J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) at para 26-021; and C E Odgers, *Odgers' Construction of Deeds and Statutes* (5th edition, Sweet & Maxwell, London, 1964) at 21.
15. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 244; *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 639-640, 649; *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 265 (Bright J) and at 275 (Bray CJ). See also R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 46; A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 289; L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 270.
16. See, for example, H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 46-57.

> An alteration which, if made before execution, would have affected the position, rights or obligations of any person claiming under the deed.[17]

Halsbury's Laws of Australia makes the following statement:

> The question of materiality depends on whether the altered writing purports to affect the legal relations previously existing, that is, whether the alteration would result in a change in the contractual obligations between the parties, as they previously existed, so as to vary injuriously the rights against, and the duties to, the party making the alteration.[18]

Another often quoted statement is that of Lord Justice Brett in 1882:

> Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used.[19]

Alterations held to be material have included, in certain circumstances, the insertion of a date as the expressed date of execution;[20] and, in respect of a guarantor, an alteration increasing the interest payable on a mortgage.[21]

2.11 It is possible that the statements outlined above may be departed from in some circumstances, for example, where a promisee has made a material alteration that has not been detrimental to the promisor.

Effect on the liability of the person against whom the alteration is made

2.12 The traditional position appears to be that it is not relevant that the alteration is to the benefit of the party seeking to avoid the document.[22] This

17. R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 44. See also *Keysen v Gregg* (1932) 32 SR(NSW) 288 at 292.
18. *Halsbury's Laws of Australia* (Butterworths) at para 140-250.
19. *Suffell v Bank of England* (1882) 9 QBD 555 at 568. See *Birrell v Stafford* [1988] VR 281 at 285; *Keysen v Gregg* (1932) 32 SR (NSW) 288 at 292; and *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 6.
20. *Birrell v Stafford* [1988] VR 281 at 287.
21. *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 649-650.
22. *Gardner v Walsh* (1855) 5 E&B 83 at 89; *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 281. See also H Tarlo, "The Unilateral Alteration

is still the case in Victoria where in 1988 Justice Tadgell of the Victorian Supreme Court[23] considered himself bound by an 1880 decision of the Victorian Full Court:

> The question is really... whether the altered instrument would operate differently from the original, whether to the prejudice of the other party or not. The argument that this alteration would be to the advantage of the defendant is not tenable. The question is, will the instrument, as altered, have a different operation from that of the instrument in its original condition? [24]

2.13 However, the commentary in Halsbury's *Laws of Australia* states that "in Australia it appears that an alteration which does not prejudicially affect any party liable will be regarded as immaterial and as such will not render the deed void".[25]

2.14 This was supported in South Australia by Chief Justice Bray[26] who did not consider the traditional position to be well founded. He preferred to follow *Darcy and Sharpe's Case*[27] and rely on Chief Justice Latham's (dissenting) judgment in *Brunker v Perpetual Trustee Company Ltd.*[28]

2.15 *Darcy and Sharpe's Case*, a decision from 1584, seems to have turned on the point that the alteration was in favour of the obligor.[29] The South Australian Full Court concluded that a party should not be "entitled to avoid a written instrument because of an alteration made in good faith to that

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of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 55-56. This can be compared to the situation where a creditor and debtor have agreed to vary materially a loan agreement to the prejudice of the guarantor: See *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 559-560. But see *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 25.

23. *Birrell v Stafford* [1988] VR 281 at 285-286.
24. *Colonial Bank of Australasia v Moodie* (1880) 6 VLR (L) 354 at 356.
25. *Halsbury's Laws of Australia* (Butterworths) at para 140-250. See also *Walsh v Westpac Banking Corporation* (1991) 104 ACTR 30 at 35.
26. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 281-282.
27. (1584) 1 Leon 282; 74 ER 257.
28. (1937) 57 CLR 555 at 592.
29. There is, however, another case from the same period to the contrary, that is, an alteration even where it is to the advantage of the obligor, allowed a plea of *non est factum*: *Markham v Gonaston* (1598) Cro Eliz 626; 78 ER 866.

document by the other party wholly in the interests of the would-be avoider".[30]

2.16 Another key case is that of *Aldous v Cornwell*[31] which has been stated by Chitty to stand for the proposition that the rule in *Pigot's Case* does not apply where the alteration does not "impose a greater liability on the promisor".[32] In *Aldous v Cornwell* the Court concluded:

> We think we are not bound by the doctrine in *Pigot's* case, or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note.[33]

Anson has also suggested that "in most cases ... a material alteration will be one which imposes a greater liability on the promisor".[34]

2.17 In *Farrow Mortgage Services Pty Ltd v Slade* the New South Wales Court of Appeal held that the question of the legal effect of documents is "to be determined by reference to the principles relating to the alteration of deeds, and other written contracts, after execution":

> Considerations which are relevant to those principles include the materiality of the alteration, the circumstances in which it occurred, and whether it operated in any way to the disadvantage of the party sought to be made liable.[35]

In that case the sum stated in the mortgage and deed of guarantee was altered, without the guarantor's knowledge, after execution from $3,804,100 to $3,760,000. The alteration reduced the guarantor's financial exposure and since the reduction would in no way threaten the financial viability of the project that was being financed, the alteration was held not to be a material

30. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 280-281.
31. (1868) LR 3 QB 573.
32. J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) at para 26-021. See also *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 283 (Walters J).
33. *Aldous v Cornwell* (1868) LR 3 QB 573 at 579.
34. W R Anson, *Anson's Law of Contract* (27th edition, Oxford UP, 1998) at 554. See also *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 640.
35. (1996) 38 NSWLR 636 at 639 (Gleeson CJ).

one.[36]

2.18 By the same token, an alteration which prejudices one of the parties will most likely be considered material. So Chief Justice Gleeson in *Farrow* agreed with Justice Giles at first instance that "a variation of the agreement between a creditor and a debtor, of a kind which could prejudice a surety, will discharge the surety from liability".[37]

2.19 This position has now also received the support of the English Court of Appeal when Lord Justice Potter in 1999 reviewed the above authorities and concluded:

> In light of the conflict apparent in the authorities... to take advantage of the rule, the would-be avoider should be able to demonstrate that the alteration is one which, assuming the parties act in accordance with the other terms of the contract, is one which is potentially prejudicial to his legal rights or obligations under the instrument.[38]

2.20 At least one commentator has construed the principles laid down by Chief Justice Bray as requiring materiality and the impact on a party's liability to be considered separately.[39] A reading of some of the authorities could lead to the conclusion that the question of the impact on the promisor must be considered quite separately from the question of materiality. Certainly the statement in *Farrow* (above) could be interpreted as saying that materiality is a separate consideration to the impact on a party's liability.

2.21 However, this is hardly of consequence because in either case the operation of the rule is defeated. This is rightly observed to be a matter of "mere semantics".[40]

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36. *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 649 (Cole JA). See also A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 295.
37. *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 637 (Gleeson CJ).
38. *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 27.
39. S MacCallum, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274 at 279. But see also *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 284-285 (Walters J).
40. S MacCallum, "A New Approach to the Unilateral Alteration of Instruments"

Alteration of document or its legal effect?

2.22 There has been some debate as to whether an alteration must affect the terms of the instrument itself or whether an alteration can also be material if it changes the legal effect of a document.[41] For example, in the Victorian case of *Vacuum Oil Co Pty Ltd v Longmuir*[42] the addition of a duty stamp to make a document admissible in evidence was held to have materially altered its legal effect and therefore to have materially altered it for the purposes of the rule.[43] This was confirmed in Victoria by Justice Tadgell who, in *Birrell v Stafford*[44] distinguished the decision in *Vacuum* without over-ruling it. One commentator has noted that:

> it seems ironic that the honest acts of a person to make a document legally enforceable render the document unenforceable.[45]

Indeed, the conclusion in *Vacuum* was rejected by Chief Justice Bray in *Armor* on the grounds that the promisee had implied authority to do what was necessary to make the document legally effective.[46] It has been suggested that this position and further developments in the area of implied authority[47] may solve some of the problems in the area.[48]

Intention of the alterer: fraud and good intentions

2.23 The question of intention is clearly relevant, in the opinion of some, to the issue of materiality. Some have argued that the presence or absence of

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(1981) 7 *Adelaide Law Review* 274 at 279.

41. *Sims v Anderson* [1908] VLR 348 at 351 (Cussen J); and *Birrell v Stafford* [1988] VR 281 at 285. See also A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 290.
42. [1957] VR 456.
43. See *Birrell v Stafford* [1988] VR 281 at 286.
44. *Birrell v Stafford* [1988] VR 281.
45. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 290. See also H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 53-54.
46. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 278-279.
47. See para 2.54-2.60.
48. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 290.

fraud is an indication of materiality. However, others have suggested that motive is an irrelevant consideration.[49] Indeed it has been suggested that the materiality test itself can be interpreted "as merely an expression of concern for possible fraud".[50] It has also been argued that the question of whether an alteration was to the advantage of the promisor, which is seen by some as relevant to materiality,[51] is also relevant to the detection of fraud.[52]

2.24 The British Columbia Court of Appeal has suggested that while fraud may be justly penalised by the operation of the rule, the intention of the person altering the instrument may be relevant:

> But, if it is apparent from all the evidence that the purpose was innocent and well-intentioned, then it seems too simple, in today's welter of documents, to release the promisor from an obligation for which he is likely to have received a commensurate benefit, just because a clerk in the employment of the promisee fills in a blank in a way that causes some alteration in the legal effect of some clause in the document.[53]

This view can also find some support in a judgment of the South Australian Full Court:

> There is authority both ways, but none, I think, that binds me to hold that a party is entitled to avoid a written instrument because of an alteration made in good faith to that document by the other party wholly in the interests of the would-be avoider.[54]

The Queensland Supreme Court has also suggested that the rule should not

49. See, for example, *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 29.
50. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 272.
51. See para 2.12-2.21.
52. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 274.
53. *Canadian Imperial Bank of Commerce v Skender* [1986] 1 WWR 284. See also L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 273. But see *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 29.
54. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 280-281.

extend to non-fraudulent alterations.[55]

2.25 There is also some support for a related position, namely that "immaterial alterations fraudulently made by a party to the deed seem to be treated as material".[56]

2.26 In most jurisdictions in the United States the operation of the rule historically depended on the absence of fraudulent intent from the party making the alteration.[57] In general an alteration has not invoked the rule if it has been done innocently to express the intention of the parties more clearly or to correct a real or supposed mistake.[58] The reason traditionally given for this approach was that such alterations are immaterial.[59] More recently this approach has been adopted in the American Law Institute's *Restatement of the Law of Contracts* which states that an alteration must be both fraudulent and material for an agreement to be discharged.[60]

2.27 Notwithstanding the statements about alterations made in good faith, some modern writers have considered that there is still a danger that alterations made in good faith may void written agreements.[61] Certainly history shows that the law in England relating to alterations has not been solely concerned with punishing fraud, but has at least also been concerned with carelessness and ensuring the identity of documents.[62] There has even

55. However, in this case it was found that the alteration had been made by consent and the rule, therefore, had no operation: *Kaffe Pty Ltd v Vasta* (Queensland, Supreme Court, No 949/1992, Kiefel J, 4 August 1994, unreported) at 22. See also J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 285.
56. R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 47.
57. See S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 115; and H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 53.
58. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 115 and annotation to *Klundby v Hoyden* 73 AmLR 648 (1930) at 657.
59. See annotation to *Klundby v Hoyden* 73 AmLR 648 (1930) at 659.
60. American Law Institute, *Second Restatement of the Law of Contracts* (St Paul, 1981) at § 286. See para 4.9.
61. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 302.
62. See H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne*

been a 1992 case in New South Wales in which Justice Cole noted:

> the disinclination of the Court of Appeal in *Warburton* formally to reject *Pigot's Case* as qualified by *Aldous v Cornwell*, or adopt the position in the [American Law Institute's *Restatement of the Law of Contracts*[63]] (which discharges an instrument only where the alteration is both fraudulent and material).

and held that a material alteration, although neither "fraudulent nor criminal", rendered a guarantee void.[64] The English Court of Appeal has also recently held that the motive of the person making the alteration is broadly irrelevant.[65]

2.28 However, most of the support for the continued operation of the rule generally seems to be on the basis that it operate only with respect to alterations made with a fraudulent intention.[66] There is certainly a strong argument that the penal aspects of the rule are inappropriate in cases not involving fraud.[67]

2.29 In any case it has been suggested that the law already is that accidental cancellation does not affect a deed.[68] This position appears also to extend to alterations to written contracts.[69] This sits well with the general approach to

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University Law Review 43 at 71. See also para 3.5-3.16.

63. American Law Institute, *Second Restatement of the Law of Contracts* (St Paul, 1981) at § 286.
64. *Citibank Savings Ltd v Executors of the Estate of Vago* (NSW, Supreme Court, No 50443/1991, Cole J, 1 May 1992, unreported) at 24-25.
65. *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 29.
66. See *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 244; S M Waddams, *The Law of Contracts* (4th edition, Canada Law Book, Toronto, 1999) at para 351; and L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 274.
67. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 302.
68. An intention to cancel it is required: R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 47-48.
69. According to J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) at para 26-019, relying on an English decision under the *Bills of Exchange Act 1882* (UK): *Hong Kong and Shanghai Banking Corporation v Lo Lee Shi* [1928] AC 181. See also L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 278-279.

fraudulent alterations since the party who has accidentally altered the document can show that the alteration was made without fraudulent intent.[70]

2.30 Some commentators have argued against the complete abolition of the rule, suggesting that the carelessness or well-meaning ignorance of some parties to a contract, even when not fraudulent, should not be a reason for risking the possibility of fraud.[71] This, however, overlooks the possibility of the operation of the rule being restricted to situations involving fraud.

THE PERSON MAKING THE ALTERATION

2.31 When discussing the persons making alterations it is convenient to consider them in two broad situations, namely in situations where the alterations have been made with the consent of the parties to the agreement and where they have been made without the consent of the parties to the agreement.

Alterations without consent

2.32 There are four categories of person to consider in relation to alterations without consent: the promisor; the promisee; a delegate of the promisee; and strangers to the transaction.

Alteration by the promisor

2.33 It probably goes without saying that a promisor cannot escape his or her obligations under an agreement simply by altering the document.[72] This would also be true if an agent of the promisor were to make the alteration.[73]

Alteration by the promisee

2.34 It also goes without saying that, on the current state of the law, when a promisee makes a unilateral material alteration to a document after execution,

70. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 279.
71. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 270.
72. *Chilcott v Goss* [1995] 1 NZLR 263 at 269; and S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 115.
73. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 115-116.

that alteration will avoid the agreement against the promisor.[74]

Alteration by an agent of the promisee

2.35 Sometimes an alteration can be made by a person who is not the promisee but an agent or employee of the promisee. This is one type of "third person" to an agreement between two parties. Situations where the third person is a complete stranger to the parties are discussed below.

2.36 An apparently anomalous situation arises where an agent or employee of the promisee makes a material alteration to a document after execution by the parties. From recent New Zealand authority it would seem to be the case that a promisee may be liable for the acts of his or her agent or employee even when the agent or employee is acting independently without direction from the promisee.[75] This also seems to have been the basis on which the earlier Victorian judgment of *Vacuum Oil Co Pty Ltd v Longmuir* proceeded.[76]

2.37 This means that a contract can be declared void even when the promisee has no intent (fraudulent or otherwise) in relation to the alteration because the acts of his or her agent or employee are imputed to the promisee. This is the case even when the employee or agent has been fraudulent to his or her own ends.[77]

2.38 In Canada it also seems to be the case that alteration by an agent renders a contract void "despite an absence of proof of fraudulent intent on the part of the agent's principal"[78] although the courts there appear to be

74. See *Birrell v Stafford* [1988] VR 281 at 285; and *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 637.
75. *Chilcott v Goss* [1995] 1 NZLR 263 at 271-272. See also A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 291.
76. *Vacuum Oil Co Pty Ltd v Longmuir* [1957] VR 456. Sholl J noted that there was no evidence that the employee "had any express or implied authority" to alter the document in question. However, the employee had been put in the position of handling and dealing with the document.
77. P Butt, "Conveyancing: Restitution and the Rule in Pigot's Case" (1996) 70 *Australian Law Journal* 872 at 872; and H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 61.
78. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 270. See also G H L Fridman, *The Law of Contract in Canada* (3rd edition, Carswell, Ontario, 1994) at 474.

cautious in finding agency.[79]

79. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 283.

2.39 The situation is clearly anomalous and the application of vicarious liability to an employer in this situation, at least where there is no damage, may be unfair. Part of the difficulty seems to lie with the approach of the English law which does not see fraud as a necessary element to the operation of the rule. This has implications also for situations where a stranger makes a material alteration to a document.[80]

2.40 The Court of Appeal in British Columbia recognised the problems caused by imputing the acts of an employee to the promisee, taking the example of clerks dealing with a large volume of documents and making alterations in the course of their daily work.[81] In such circumstances it was suggested:

> in addition to considering whether there was any alteration in the legal effect of the document, there should be some additional balancing of the interests of justice; some flexibility in the concept of materiality of the alteration; and some recognition of the principles of unjust enrichment.

2.41 It has been suggested that the real question should be whether there was express or implied authorisation from the promisee.[82]

Alteration by strangers

2.42 Sometimes an alteration will be made by a person who is not the promisor, promisee or an agent of either. The alteration is then said to be by a "stranger".[83] It appears to be generally accepted that a material alteration to an instrument by a stranger, while the instrument is in the custody of the promisee, will bring the rule into operation. This arises from the original statement of the rule:

> when any deed is altered in a point material ... by any stranger, without

80. See para 2.42-2.52.
81. See *Canadian Imperial Bank of Commerce v Skender* [1986] 1 WWR 284 at 288.
82. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 62.
83. Although some commentators would treat all third parties as "strangers": see L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 284. See also H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 60.

> the privity of the obligee ... the deed thereby becomes void.[84]

This position was confirmed by Lord Denman in *Davidson v Cooper*:

> 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 original state... The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part.[85]

This was despite submissions that it could not be the case that "a right of action already vested can be taken away by the tortious or careless act of a stranger".[86]

2.43 The application of this aspect of the rule to alterations by a stranger who can be characterised as an "officious burglar" has been consistently questioned over the past two centuries.[87] Text book writers have particularly called for its abolition at least in this respect.[88]

2.44 Glanville Williams has commented on the absurdity of this aspect of the rule when compared with situations where a document is totally lost or otherwise destroyed:

> If a burglar steals a written contract, secondary evidence of its contents can be given. But if the burglar, with a perverted sense of humour, adds a nought to some material figures in the contract, he makes it hopelessly void (at the option of the promisor), and the promisee can,

84. *Pigot's Case* (1614) 11 CoRep 26b at 27a; 77 ER 1177 at 1178.
85. *Davidson v Cooper* (1844) 13 M & W 343 at 352; 153 ER 142 at 146.
86. *Davidson v Cooper* (1844) 13 M & W 343 at 344; 153 ER 142 at 143.
87. See argument before Martin B in *Crookewit v Fletcher* (1857) 26 LJ Exch 153 at 159. The question was expressly reserved by Lord Herschell in *Lowe v Fox* (1887) 12 App Cas 206 at 217.
88. J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) at para 26-019; S M Waddams, *The Law of Contracts* (4th edition, Canada Law Book, Toronto, 1999) at para 351; G L Williams, *Joint Obligations* (Butterworths, London, 1949) at 143; W R Anson, *Anson's Law of Contract* (26th edition, Clarendon Press, Oxford, 1984) at 487 (but see W R Anson, *Anson's Law of Contract* (27th edition, Oxford UP, 1998) at 554). See also H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 57.

> for all that the authorities show, do nothing about it.[89]

This is still apparently the position in Australia. In the recent Victorian case of *Birrell v Stafford* Justice Tadgell accepted the position in *Davidson v Cooper* that the rule applied to the case of a material alteration by a stranger while the instrument was in the custody of the promisee.[90] However, Justice Tadgell's statement in this regard was not necessary to the decision.

2.45 In New South Wales Justice Cole, after a discussion of the issue by the New Zealand Court of Appeal in *Chilcott v Goss*,[91] concluded:

> There is no reason in principle why a lender receiving a validly executed guarantee which has been altered, prior to delivery to him, by a stranger to the transaction should bear the loss of the security. Responsibility for delivery of a deed in the form in which it was executed by a promisor should lie with that promisor.[92]

This judgment again did not deal directly with the situation where the document was in the custody of the promisee. And in any case it was found that there was no material alteration so the rule as regards strangers did not apply.

2.46 Notwithstanding the Victorian decision, *Halsbury's Laws of Australia* notes that it has been suggested that "if an alteration is made in fraud of, and against the will of, the party having custody of the instrument, and who is entitled to benefit under it, the document will not necessarily be invalidated".[93] This has been derived from *Halsbury's Laws of England* and is a reference to the question ultimately left unanswered by Lord Herschell in *Lowe v Fox*[94] whether "a document is invalidated even if the alteration be made against the will and in fraud of the person who has charge of it and who

89. G L Williams, *Joint Obligations* (Butterworths, London, 1949) at 143. See also H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 61; and S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 113.
90. *Birrell v Stafford* [1988] VR 281 at 285.
91. [1995] 1 NZLR 263 especially at 270.
92. *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 649.
93. *Halsbury's Laws of Australia* (Butterworths) at para 140-260. See also *Chilcott v Goss* [1995] 1 NZLR 263 at 269-270.
94. (1887) 12 App Cas 206 at 216-217.

has to rely upon it".

2.47 There is a remote possibility of action against the stranger, where the stranger's identity can be established. *Markham v Gonaston*[95] is an early authority for the proposition that the promisee "may afterwards have an action on the case against the person who made the alteration, and recover damages".

2.48 In some other jurisdictions the rule no longer applies to alterations made by strangers, whether in the custody of the promisee or not.

2.49 In Canada the law has been said to be that "alteration by a stranger not authorised by a party will not excuse the parties from performance of their obligations".[96] This is supported by the Supreme Court of British Columbia's adoption of the relevant parts of the statement in *Halsbury's Laws of England*.[97]

2.50 In the United States, the making of alterations by strangers without the knowledge or consent of the promisee is referred to as "spoliation" and has no effect on the instrument.[98] The alteration of an instrument by strangers is clearly excluded from the Restatement which, amongst other things, requires that an alteration must be by one to whom a duty is owed under a contract and that the alteration must be both fraudulent and material.[99] This approach was supported by Chief Justice Bray of South Australia in *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd*.[100]

2.51 In New Zealand it seems that the courts may be moving towards treating alterations by strangers more leniently than alterations by agents where

95. (1598) Cro Eliz 626; 78 ER 866.
96. G H L Fridman, *The Law of Contract in Canada* (3rd edition, Carswell, Toronto, 1994) at 474.
97. *Sim v Large* (1980) 22 BCLR 278 at 282.
98. S Williston, *A Treatise on the Law of Contracts* (3rd edition, Lawyers Co-operative Publishing Co, Rochester, NY, 1972) Vol 15 at para 1885. See also H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 60; and S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 114.
99. American Law Institute, *Second Restatement of the Law of Contracts* (St Paul, 1981) at § 286. See para 4.9.
100. (1978) 17 SASR 259 at 275.

liability can be imputed to the promisor.[101]

2.52 Some commentators have suggested that it would be better to deal with alterations by strangers as an issue of express or implied authorisation.[102] This approach would sufficiently deal with the question of fraudulent motives of the parties to an agreement without penalising them for the unilateral (and possibly fraudulent) act of a complete stranger.[103]

Alterations with the consent of both parties

2.53 The general position is that an alteration made with the consent of the parties to the transaction will not fall within the rule.[104] Such an arrangement is essentially a new agreement if there is consideration for it.[105] However, it is not always the case that the consent is express – sometimes it can be implied.

Implied authority

2.54 It appears to be the case that authority will be implied to make alterations in situations where the executed document does not adequately or correctly reflect the agreement between the parties.[106] In *Warburton v National Westminster Finance Australia Ltd* it was also held that if the person making the alteration was in error, rectification will be available to

101. *Chilcot v Goss* [1995] 1 NZLR 263 at 269-272.
102. As has also been suggested with agents or employees: H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 60.
103. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 284; H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 62. See also *Chilcott v Goss* [1995] 1 NZLR 263 at 269.
104. *Halsbury's Laws of Australia* (Butterworths) at para 140-255. See also *Davidson v Cooper* (1844) 13 M&W 343 at 345; 153 ER 142 at 143; *Brunker v Perpetual Trustee Company Ltd* (1937) 57 CLR 555 at 593 (Latham CJ) and at 606 (Dixon J); *Hall v Wilson* (New Zealand, Court of Appeal, CA164/98, 18 December 1998, unreported); and L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 279.
105. See W R Anson, *Anson's Law of Contract* (27th edition, Oxford UP, 1998) at 554.
106. See, for example, *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 267 (Bright J) and at 277 (Bray CJ).

correct the mistake.[107]

2.55 The most common situations where authority to alter a document is implied are those where one party executes a document with blanks and hands it over to the other party.[108] By extension, it seems that where the parties execute a document that they intend to register under the Torrens title system, there is an implied authority to vary the document in a way that does not depart from the original agreement in order to achieve registration.[109]

2.56 Implied authority is not always found in cases where blanks are left in documents. In *Keysen v Gregg* the majority of a full court of the Supreme Court refused to allow that there was a general rule that an implied authority to alter an executed document existed merely because blanks were left in it.[110] However, courts now seem more ready to find implied consent in such circumstances. The New South Wales Court of Appeal has recently suggested that the effect of cases relating to the filling of blanks has been that:

> where alterations were made for the purpose of carrying out the express or implied intention of the parties, but not to alter the document in a material way, the alterations did not vitiate the document.[111]

2.57 However, such statements run the risk of confusing the question of materiality with the question of consent of the parties. The correct position must be that if implied consent to an alteration is found, the question of its materiality is irrelevant. It is only when an alteration turns out to be

107. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 248-249.
108. See *Birrell v Stafford* [1988] VR 281 at 287.
109. See *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 278; *Brunker v Perpetual Trustee Company Ltd* (1937) 57 CLR 555 at 591-592 (Latham CJ); and the dissent of Halse Rogers J in *Keysen v Gregg* (1932) 32 SR (NSW) 288 at 294-295.
110. *Keysen v Gregg* (1932) 32 SR (NSW) 288 at 291-292. See also "The Conveyancer" (1932) 6 *Australian Law Journal* 95.
111. *Ryde Joinery Pty Ltd v Zisti* (1997) 7 BPR 15,233 at 15,234 (Cohen AJA). See also *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 245-248; *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at para 91; and *Endormer Pty Ltd v Australian Guarantee Corporation Ltd* [2000] FCA 1669 at para 56-57.

unauthorised that materiality becomes relevant.[112] This position is desirable for reasons of practicality, if nothing else, especially in relation to instruments requiring registration:

112. See *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 279 (Bray CJ); and A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 293. This is also clearly the case under the American Restatement: American Law Institute, *Second Restatement of the Law of Contracts* (St Paul, 1981) at § 286-287.

> For it to be otherwise would be impractical and extremely expensive, as documents would then have to be redrafted, re-executed and then relodged.[113]

2.58 Most mortgages apparently contain clauses allowing parties to alter the instrument to give effect to intentions already agreed between the parties. This gives express authority without the need to find it implied.[114]

2.59 However, others would argue against allowing findings of implied consent except in certain prescribed circumstances, preferring that express consent be obtained where ever possible. For example, it has been suggested that relief should not be granted unless it can be shown that the party tried to obtain consent but could not do so due to circumstances beyond his or her control.[115] Presumably where parties expressly consent, it will not be necessary to re-draft or re-execute any instruments.[116] The obtaining of express consent, while possibly "embarrassing" or "inconvenient" in some situations, should, nevertheless be encouraged.[117]

2.60 There is a limit to the extent to which authorisation to alter a document can be implied. In South Australia the Supreme Court considered that a promisor did not have authority to "interfere with the document for an indefinite period in the future" and concluded that an implied authority to fill up blanks could be "exhausted by its exercise".[118] The power to alter in such circumstances may be extended by express, rather than implied, authorisation.[119]

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113. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 294.
114. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 295.
115. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267.
116. Although initialling of alterations may be desirable: S MacCallum, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274 at 282.
117. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267.
118. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 279.
119. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 296.

Fraud by both parties

2.61 Courts will not recognise an alteration, even where both parties agree, where the alteration is fraudulent. This approach, however, is based on the doctrine of illegal purposes and not the rule in *Pigot's Case*. An example would be where two parties agree to backdate a document to defeat creditors.[120]

EFFECT OF ALTERATION

2.62 In considering the effect of an alteration that comes within the rule there are a number of inter-related considerations. These include whether the alteration merely affects the written instrument or the underlying agreement also; whether voidness in fact results and then whether the contract is void or voidable at the election of the innocent party; and whether there is a difference between the treatment of deeds and other written instruments.

Contract or underlying agreement?

2.63 The question whether a material alteration vitiates a document or the document and the agreement underlying it has been said to be a "vexed" one.[121] This issue is considered here in light of the question whether the rule has the same result for other instruments as it does for deeds.

Deeds

2.64 It is generally agreed that the rule, if successfully invoked, has the effect of making at least deeds void. The avoidance of a deed under the rule has no retrospective effect – and therefore cannot affect any estate that has already passed by a deed.[122] For example, the rule cannot affect a deed (or

120. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 281.

121. S MacCallum, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274 at 282.

122. *Ward v Lumley* (1680) 5 H&N 87; 157 ER 1112. See also C E Odgers, *Odgers' Construction of Deeds and Statutes* (5th edition, Sweet & Maxwell, London, 1967) at 19; *Brunker v Perpetual Trustee Company Ltd* (1937) 57 CLR 555 at 593; *Chilcott v Goss* [1995] 1 NZLR 263 at 274-275; S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105; A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 293.

part of a deed) that only conveys property – since the conveyance takes effect immediately on execution.[123] In such circumstances the deed is even admissible in evidence to prove that the conveyance actually took place.[124]

2.65 However, if a deed contains covenants or contracts to be carried out after the conveyance, these will be affected by the rule, because the avoidance is prospective (*in futuro*) not retrospective (*ab initio*). For example, Lord Campbell said:

> There is no ground for saying that if a deed be altered in a material part it is rendered void from the beginning. It ceases to have any new operation; and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact.[125]

2.66 The same can be said for dealings under the Torrens system so far as the actual passing of title goes. Certainly it seems to be the case that registration under the Torrens system, in the absence of fraud, cures what would otherwise be a void instrument,[126] especially in light of the High Court's adoption of immediate indefeasibility.[127] However, it seems that not all terms in a registered instrument will be preserved. For example, in the case of leases, only covenants affecting the term of the lease and its extent are indefeasible.[128] Other clauses, such as covenants to repair, would not be so protected.[129] This is not to say that any registration or recording of an

123. R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 35.
124. R F Norton, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928) at 37.
125. *Agricultural Cattle Insurance Co v Fitzgerald* (1851) 16 QB 432 at 440-441; 117 ER 944 at 947.
126. See A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 300-301; S MacCallum, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274 at 283-284; *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at para 48-60; *Morton v Black* (1986) 4 BPR 9,164 at 9,167; and *Baron v Upton* [2000] TASSC 20 at para 9-10.
127. *Breskvar v Wall* (1971) 126 CLR 376. See also *Frazer v Walker* [1967] 1 AC 569.
128. Including covenants to pay rent: *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at para 59-60.
129. *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1. See also

instrument will necessarily be of help. Indeed, registration under the Torrens system, because of its special nature, is probably an exception to the general proposition that the recording of an instrument, if it has been altered after execution, cannot preserve it.[130]

Other instruments

2.67 Is there a difference between deeds and other instruments when it comes to the effect of an alteration? If deeds that have been altered are void – are other instruments? Or are the contracts just enforceable according to their terms prior to alteration?

2.68 Clearly the extension of the rule to instruments other than deeds is problematic. It is perhaps easier, given their history and development, to accept that if deeds are void the obligations arising from them are at an end. However, the situation is different when we are dealing with instruments that are only one form of evidence of an obligation which may not need to be in writing. If the only consequence of the alteration is that the document is not admissible in evidence against the one claiming under it, it may still be possible to prove the underlying contract by other means.[131] For example, it may be possible that a contract can be proved by recourse to an unaltered duplicate.[132]

2.69 In any case, an agreement evidenced by an instrument other than a deed may be unenforceable simply because, once the instrument is prevented from being used in evidence, there is usually insufficient evidence on which to ground a claim.[133] This would be particularly so in cases where the parol evidence rule applies.

2.70 Written contracts may also be subject to the parol evidence rule which, put simply, is a rule which operates, when an agreement has been reduced to writing, to exclude extrinsic (particularly oral) evidence which would have

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S MacCallum, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274 at 284.

130. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 110. See also para 2.74.
131. See S Williston, *A Treatise on the Law of Contracts* (3rd edition, Lawyers Co-operative Publishing Co, Rochester, NY, 1972) at para 1910.
132. See A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 292b.
133. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 286.

the effect of altering the terms of the agreement as recorded. However, it appears only to operate when the document has been "integrated", that is, the parties intended the writing to be the complete record of the whole bargain between them or a particular aspect of it.[134] The parol evidence rule is important to an understanding of the effect of the rule on some contractual documents.

2.71 On this basis, oral agreements only partly evidenced in writing appear more likely to be enforced by recourse to other evidence.[135]

2.72 In Victoria it has been held that an unaltered duplicate original may be relied on in evidence when an instrument has been altered after execution. In *Vacuum Oil* Justice Sholl stated in relation to the operation of the rule:

> Where the true terms of the contract can be proved by another original, of equal authority with that altered, why should the law impose so great a penalty?[136]

Justice Sholl's decision was, however, also premised upon an absence of fraud in the case before him.[137]

2.73 Although authority is slender on this point, it has been suggested that courts will be willing to follow the position of Justice Sholl if only because the existence of multiple copies would make detection of an alteration extremely likely, to the extent that few would attempt a fraudulent alteration for fear of detection.[138]

2.74 It can be argued more strongly that if an instrument is altered after a copy has been registered or recorded by some formal process, then the

134. See N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Australian edition, Butterworths, Sydney 1997) at para 10.3-10.4; and J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at para 705 and 708.
135. See A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 292b.
136. *Vacuum Oil Co Pty Ltd v Longmuir* [1957] VR 456 at 464.
137. See also H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 75.
138. See L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 288. But see *Spector v Ageda* [1973] Ch 30 at 49 where the transaction was found to be void notwithstanding the existence of duplicates.

recorded copy can be produced as evidence of the agreement.[139] This view has been put by Justice Young who claims that the proposition is "self evident":

> because the rationale for the rule is to prevent a person, in whose custody a document is, from committing a fraud by proffering an altered deed in court. Once a genuine copy of the instrument is registered there is no purpose to be served by applying the rule.[140]

139. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 110.
140. *Morton v Black* (1986) 4 BPR 9,164 at 9,166.

2.75 The American Restatement confines itself to alterations in situations where the writing is an "integrated agreement" or "satisfies the Statute of Frauds with respect to that contract".[141] Such a position is a little difficult to relate to New South Wales since the relevant provisions of the *Statute of Frauds 1677* (Imp) have been repealed[142] and there are other statutory enactments requiring some contracts to be evidenced in writing.[143]

2.76 Justice Young in *Zisti v Ryde Joinery Pty Ltd* follows what appears to be the American approach, at least with respect to deeds:[144]

> However, it is a mistake to think that the rule about a deed being automatically completely void if it was altered applied to non-deeds. As Professor Williston says in his article "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 114 the rule operates differently with respect to non-deeds. The rule so far as non-deeds are concerned appears to be that one merely disregards any alteration and that secondary evidence is allowed to prove the original terms of the obligation and if valid in that form it would be enforced (see at 116). The only authority quoted for that proposition is *Gunter v Addy* (1900) 36 SE 553 (South Carolina), which is an example of its operation rather than a case which actually states any principles.
>
> ... With a non-deed the worst that can happen to one is that one disregards the alterations and looks at the document in accordance with its original tenor.

2.77 There does not appear to be any direct support for the above proposition in Australia.[145] The Court of Appeal did not deal with this aspect

141. American Law Institute, *Second Restatement of the Law of Contracts* (St Paul, 1981) § 286. See para 4.9.
142. In fact s 4 and 17 of the *Statute of Frauds 1677* (Imp) no longer applies in any Australian jurisdiction. In New South Wales s 4 was repealed by *Imperial Acts Application Act 1969* (NSW) s 8(1) and s 17 was repealed by *Sale of Goods Act 1923* (NSW) s 3(1) which substituted s 9 of the *Sale of Goods Act 1923* (NSW) which was in turn repealed by *Sale of Goods (Amendment) Act 1988* (NSW) s 3.
143. For example, *Conveyancing Act 1919* (NSW) s 54A(1). See generally J W Carter and D J Harland, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996) at ch 5.
144. *Zisti v Ryde Joinery Pty Ltd* (1996) 7 BPR 15,217 at 15,225.
145. See especially *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 639 where the Court of Appeal refers specifically to "a deed or other written contract".

of Justice Young's judgment.[146]

2.78 The New Zealand Law Commission, in its review of the *Property Law Act 1952* (NZ) considered the law in relation to the alteration of instruments other than deeds to be "that the alteration is ineffective unless it has been agreed upon by the parties to the contract or gives rise to an estoppel".[147] Accordingly they recommended, with respect to deeds:

> The rule that a deed becomes invalid if there has been a material alteration to it after its execution is abolished, but the abolition of that rule does not validate any such alteration if it is invalid on any ground other than that rule.[148]

2.79 In absence of any clear judicial statement, the effect of the rule with respect to documents other than deeds is uncertain in New South Wales. The assumption that the rule has the same effect that it does for deeds has led some to suggest that the document alone and not the obligation should be vitiated and that other evidence should be allowed, where appropriate, to prove the content of the original contract.[149]

Consequences of the alteration: void or voidable?

2.80 Some authorities have stated that a contract, where the instrument has been materially altered, will be void[150] while others state that it is merely voidable.[151] The expressions are used confusedly. In this context voidable simply means that the innocent party can choose to invoke it and that otherwise the contract remains on foot. For example, *Halsbury's Law of Australia*, relying on an 1875 decision,[152] states that an innocent party can

146. *Ryde Joinery Pty Ltd v Zisti* (1997) 7 BPR 15,233.
147. New Zealand, Law Commission, *The Property Law Act 1952: A Discussion Paper* (PP 16, 1991) at para 58.
148. New Zealand, Law Commission, *A New Property Law Act* (Report 29, 1994) at 51.
149. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 76.
150. For example, *Pigot's Case* (1614) 1 CoRep 26b; 77 ER 1177 at 1178. See also G H L Fridman, *The Law of Contract in Canada* (3rd edition, Carswell, Ontario, 1994) at 473.
151. J W Salmond and J Williams, *Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945) at para 199.
152. *Pattinson v Luckley* (1875) LR 10 Exch 330 at 334-335.

choose to sue on a document that has been altered provided the instrument can be proved in its original form.[153] However, this statement in *Halsbury's* appears to apply only to "instruments under hand" and not to deeds and in any case related to a claim for *quantum meruit* for work already done in a building case, that is, that some obligations had already been performed.[154] It has also been suggested that there is a distinction between deeds and simple contracts:

> it can at least be put forward that a bilateral contract in English law is not rendered void by a material alteration, but is, at 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. [155]

By contrast, on this view, a deed that has been altered becomes void.

2.81 So, while it is clear that the party who has made the alteration cannot be in a position to enforce the contract against the innocent party,[156] it is less clear whether the innocent party can choose to keep the contract on foot.[157]

2.82 Whatever the true position is, it has been suggested that voidability should be considered preferable on the ground that "automatic nullification of a contract ... may therefore penalise the innocent contracting party"[158] for example, in situations where it is in the innocent party's economic interest to keep the contract on foot.

153. *Halsbury's Laws of Australia* (Butterworths) at para 140-470.
154. Bramwell B stated: "where a person claiming to be paid for work did the work under an instrument of contract, that instrument, though altered in a material part, is still the governing document to determine the rights of the plaintiff": *Pattinson v Luckley* (1875) LR 10 Exch 330 at 335. See also J W Salmond and J Williams, *Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945) at para 199.
155. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 63.
156. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 284; J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) Volume 1 at para 26-019.
157. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 285.
158. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 286.

Subsequent revival

2.83 Some of the problems arising from the operation of the rule rendering instruments void rather than voidable relate to situations where the possible revival of the instruments becomes an issue – for example where the innocent party attempts to ratify the alteration or where an alteration has been erased or where a material alteration subsequently becomes immaterial.

2.84 When an innocent party subsequently ratifies an alteration it may in fact not be possible to revive the instrument[159] at least if the agreement is already operative when the alteration is made.[160] However, it has also been suggested that in principle there is no reason why a subsequent ratification should not be possible in relation to a previously unauthorised alteration.[161]

2.85 The traditional position in the United States seems to be that a subsequent ratification can have full effect,[162] with the possible exception of cases of forgery.[163] The Restatement of Contracts has confirmed this position:

> **§287. Assent to or Forgiveness of Alteration**
>
> (1) If a party, knowing of an alteration that discharges his duty, manifests assent to the altered terms, his manifestation is equivalent to an acceptance of an offer to substitute those terms.
>
> (2) If a party, knowing of an alteration that discharges his duty, asserts a right under the original contract or otherwise manifests a willingness to remain subject to the original contract or to forgive the alteration, the original contract is revived.

These provisions appear to allow ratification by an innocent party even in cases of fraud.[164]

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159. S MacCallum, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274 at 275, footnote 11.
160. Subsequent ratification of an alteration would seem to be effective if it is made before the agreement becomes operative: *Amalgamated Television Services Pty Ltd v Television Corporation Ltd* [1970] 3 NSWR 85 at 90. See also *Koenigsblatt v Sweet* [1923] 2 Ch 314; and *Morton v Black* (1986) 4 BPR 9,164 at 9,165-9,166.
161. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 52.
162. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 117.
163. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 117, footnote 3.
164. American Law Institute, *Second Restatement of the Law of Contracts* (St Paul,

2.86 Similar problems may exist in relation to the restoration of instruments that were previously altered and had become void by operation of the rule. So, for example, where an interlineation has been erased or where erased text is written back in, it would seem to be the case that the obligations under the instrument cannot be restored, at least without the agreement of the promisor.[165]

2.87 A related situation is where a material alteration subsequently becomes immaterial. The British Columbia Supreme Court has held that the question of materiality is to be determined at the time the alteration is made and the fact that it may later become immaterial is irrelevant.[166] The only justification for such a position would appear to be to punish fraud regardless of whether the attempt succeeds or not.[167]

Is voidness appropriate in any case?

2.88 Treating a document as void, whether a deed or other written instrument, has been criticised on the grounds that in many cases this will amount to an over-reaction and is unnecessary in light of other options available.

2.89 For example, one submission has suggested that:

> in modern times it is very difficult to argue against the proposition that the only sanction there should be in relation to an alteration made to a contract without the consent of the other party, is that the alteration should be ignored. ... I can see no justification, however, for a conclusion that in the event there is an alteration made to a contract without the consent of the other party then the effect is the entire contract is void. Such a result may well work a far greater injustice than the vice it seeks to respond to.[168]

2.90 Justice Hope has suggested that:

1981) Vol 2 at 399 and 400.

165. See H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 54.
166. *Petro Canada Exploration Inc v Tormac Transport Ltd* [1983] 4 WWR 205 at 210-211.
167. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 275-276.
168. R Newlinds, *Submission* at 2.

> If alterations have been made, there is ample scope within the principles of law and equity to do justice to the parties without destroying the document.[169]

2.91 Similarly, Chief Justice Bray, in *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd*, has held:

> Unless I am constrained to do otherwise by authority binding on me I prefer to follow those cases which have interpreted the rule as liberally and reasonably as possible. There is, in my view, little reason for preserving, in a rational system of law, a rule which instead of adjusting the equities of the case to the circumstances and nature of the alteration visits the document with total nullity.[170]

Availability of restitution

2.92 Even when a contract is declared void, it may be possible for a promisee, when an instrument has been altered, to claim restitution from the promisor. In the New Zealand case of *Goss v Chilcott* the Privy Council considered a situation where restitution was claimed by a promisee because alterations to the mortgage document had discharged the liability of the promisors.[171] The Privy Council held that the alteration had the effect of discharging obligations under the contract but that the promisors "had nevertheless been enriched by the receipt of the money, and prima facie were liable in restitution to restore it".[172] This approach appears to answer the British Columbia Court of Appeal's call for "some recognition of the principles of unjust enrichment" in relation to the effect of the rule in *Pigot's Case*.[173]

2.93 However, restitution is not a panacea in all circumstances in which the rule applies. Restitution is available only in narrowly defined circumstances where there has been performance of the contract by one party only and the

169. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 247.
170. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 276.
171. *Goss v Chilcott* [1996] AC 788 at 797.
172. *Goss v Chilcott* [1996] AC 788 at 799. See also P Butt, "Conveyancing: Restitution and the Rule in Pigot's Case" (1996) 70 *Australian Law Journal* 872.
173. *Canadian Imperial Bank of Commerce v Skender* [1986] 1 WWR 284 at 288.

other party stands to be unjustly enriched. There may also be other problems, for example, if the claim for restitution is defeated because an order for restitution would be unjust[174] or if tracing and proprietary remedies turn out not to be available.[175]

174. For example, if the promisee has changed his or her position. See A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 297-299.

175. See A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 299-300.

3. Criticisms of the rule

- The document is the obligation
- Evidential value
- Punishment of fraud

3.1 There have been many suggestions that the rule is no longer justified. For example, Beehag has suggested that "the grounds to justify the rule are outdated and the problems associated with material alterations can be remedied appropriately by alternative remedies".[1] One submission has stated that "the rule is out of step with the current approach of the legislature and the Court to questions of contract".[2] In recent times the judicial response to such views has been to state that the rule should be interpreted "as liberally and reasonably as possible".[3]

3.2 Particular criticisms of the reasons said to support the rule are provided in more detail in the following paragraphs.

THE DOCUMENT IS THE OBLIGATION

3.3 Salmond and Williams suggest that the reason for the rule lay in its original application to deeds only:

> and as thus applied was a consequence of the primitive notion whereby the contract created by the deed was inseparably identified with the parchment, ink and wax expressing it. On this view the continued existence of the contractual obligation was necessarily dependent on the continued existence of the deed in the form in which it declared the obligation. If the deed should cease to exist in that form, therefore, the obligor ceased to be bound.[4]

1. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 302.
2. R Newlinds, *Submission* at 2.
3. *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at para 47; *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 276 (Bray CJ); *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 640 (Gleeson CJ); and *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 244 (Hope JA).
4. J W Salmond and J Williams, *The Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945) at 573.

Glanville Williams also considers that the rule is due to a confusion between the obligation and its physical evidence.[5]

3.4 This criticism was developed by Oliver Wendell Holmes who compared modern written contracts with bonds:

> The existence of a written contract depends on the fact that the offeror and offeree have interchanged their written expressions, not on the continued existence of those expressions. But in the case of a bond the primitive notion was different. The contract was inseparable from the parchment. If a stranger destroyed it, or tore off the seal, or altered it, the obligee could not recover, however free from fault, because the defendant's contract, that is, the actual tangible bond which he had sealed, could not be produced in the form in which it bound him.[6]

EVIDENTIAL VALUE

3.5 Another reason offered for the rule is the need to preserve the evidential value or authenticity of the document. Salmond and Williams have observed:

> The presumed purpose of the party or parties in reducing the contract to writing is to provide an authentic record of it beyond the reach of future controversy, bad faith or treacherous memory, and plainly this purpose would tend to be defeated if the instrument were not to be preserved in an unaltered state.[7]

Throughout the 19th century the courts became progressively stringent in their view of the need to preserve the evidential value of instruments.

3.6 Justice Ashhurst in *Master v Miller* said that it was the business of the person in possession of the document to preserve it without any alteration because "all written contracts whether by deed or not, are intended to be

5. G L Williams, *Joint Obligations* (Butterworths, London, 1949) at para 67.
6. O W Holmes, "The Path of the Law" (1897) 10 *Harvard Law Review* 457 at 473. See also J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 282; and *Elliot v Holder* (1567) 3 Dyer 261b; 73 ER 580 now more fully reported in J H Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer* (Selden Society, London, 1994) at 129-131.
7. J W Salmond and J Williams, *The Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945) at 574.

standing evidence against the parties entering into them".[8] In the same case Lord Kenyon said with respect to deeds:

> It is of greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened.[9]

3.7 Baron Martin in *Crookewit v Fletcher*[10] makes the policy grounds clear:

> it must be borne in mind 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, but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration. But upon this point, the case of *Davidson v Cooper* is conclusive. No case can possibly be entitled to more weight than this.

3.8 A particular aspect of the point that the evidential value of the instrument must be preserved is that the party with custody of the document is bound to preserve it. Lord Denman in *Davidson v Cooper* 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 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.[11]

Criticisms

3.9 However, in some cases the preservation of the authenticity of the document against alterations is not so important. Since *Pigot's Case*

8. (1791) 4 TR 320 at 331; 100 ER 1042 at 1048.
9. *Master v Miller* (1791) 4 TR 320 at 330; 100 ER 1042 at 1047.
10. (1857) 26 LJ Exch 153 at 159.
11. *Davidson v Cooper* (1844) 13 M&W 343 at 352; 153 ER 142 at 146. See also *Winchcombe v Pigot* (1614) 2 Buls 246; 80 ER 1096: "He at his peril ought to keep the same safely, without any rasure, or interlining".

immaterial alterations by strangers have not triggered the operation of the rule and immaterial alterations by all parties have been excepted since *Aldous v Cornwell* in 1869.[12]

3.10 And even in the case of material alterations it can't be said that a party would have difficulty proving that a document has been altered because to take advantage of the rule one must be able to prove that there was an alteration in any case.[13]

3.11 Maintaining the integrity of a document from forms of harm other than alteration has also, apparently, not been considered so important. The rule was never applied in the case of destruction by agents such as weather and mice.[14] The rule also does not operate in cases of accident[15] or mistake.[16] In *Davidson v Cooper* counsel argued, albeit unsuccessfully, that:

> It would be unreasonable to hold, that if a stranger tears off the seals from a deed without the privity or consent of the person to whom it belongs, the owner should lose all remedy upon it; whereas, if the stranger proceeded further and utterly destroyed it, his remedies would not be in any degree prejudiced, as he might give secondary evidence of its contents, and recover upon it.[17]

In such cases extrinsic evidence is available to determine the true words of the agreement.[18] And even materially altered deeds can be admitted in evidence if only to show that an estate has passed.[19]

3.12 The protection of an original document is not so important today

12. See *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 275.
13. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 243.
14. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 275.
15. See *Hong Kong and Shanghai Banking Corporation v Lo Lee Shi* [1928] AC 181.
16. See *Henfree v Bromley* (1805) 6 East 309; 102 ER 1305; *Wilkinson v Johnson* (1824) 3 B&C 428; 107 ER 792.
17. *Davidson v Cooper* (1844) 13 M&W 343 at 345-346; 153 ER 142 at 143-144.
18. J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) at para 26-019.
19. S Williston, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105 at 108.

because of the ready availability of copying and data storage technology, which was obviously not available in the seventeenth century when only one copy of a deed would be likely to be held by the promisee.[20] It is also now much easier to get documents that are not originals into evidence than it was in the seventeenth century.[21] While there are conceivably increased opportunities for fraud provided by modern technology, the availability of more copies of documents should, in practice, make it easier to detect fraud. Not only has the availability of copies increased, but it has also become more common for parties to execute multiple copies of contracts.[22] Indeed, in Victoria it may be the case that when an instrument is altered after execution an unaltered duplicate original may be relied on in evidence.[23]

3.13 However, some commentators consider that the preservation of evidence is still an important function of the rule in *Pigot's Case* and that some recent developments have gone too far in generating uncertainty about the authenticity of contractual documents:

> Courts must not lose sight of the need to maintain the integrity of written contracts, a principle which continues to and will always be a critical aspect of contract law.[24]

3.14 It has been said that the rule is justified on the grounds that alteration of documents in the custody of the promisee gives rise to doubt about the document's identity.[25] It has been suggested that this is illogical since any such doubt would exist irrespective of who had the document.[26]

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20. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 275.
21. See *Evidence Act 1995* (NSW) s 48 and 51.
22. See L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 286.
23. *Vacuum Oil Co Pty Ltd v Longmuir* [1957] VR 456 at 464. Justice Sholl's decision was, however, also premised upon an absence of fraud in the case before him: see H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 75.
24. L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 289.
25. *Sanderson v Symonds* (1819) 1 B&B 426 at 430; 129 ER 786 at 788.
26. J Chitty, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999) at para 26-019.

A part of the law of evidence?

3.15 By itself, this reason would only justify the rule acting as an exception to general admissibility of original documents. However, the view that the rule should operate merely to void the instrument rather than the underlying agreement is far from widely accepted.

3.16 Even if the rule is treated merely as an exception to general admissibility the consequences of the instrument not being admissible in evidence has been said to go against the "general tendency of the law". Oliver Wendell Holmes has noted in this regard:

> We do not tell a jury that if a man ever has lied in one particular he is to be presumed to lie in all. Even if a man has tried to defraud, it seems no sufficient reason for preventing him from proving the truth. Objections of like nature in general go to the weight not to the admissibility of evidence.[27]

PUNISHMENT OF FRAUD

3.17 It has also been suggested that the rule was put in place to punish the party who alters a document. This point of view was put by Lord Kenyon in 1791:

> Because 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. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same.[28]

However, Salmond and Williams suggest that this view is not historically sound and does not accord with the "modern policy of the law, for remedies

27. O W Holmes, "The Path of the Law" (1897) 10 *Harvard Law Review* 470 at 472-473.
28. *Master v Miller* (1791) 4 TR 320 at 329; 100 ER 1042 at 1047.

in contract are not punitive but compensatory or reparative".[29]

3.18 In *Warburton v National Westminster Finance Australia Ltd*, Justice Hope suggested that punishment is possibly still a valid reason for the rule, at least in cases involving fraud.[30] He also noted that:

> If, as I believe, this Court should adopt as the correct principle the inapplicability of the law in *Pigot's Case* to non-fraudulent alterations, this would not only achieve a just result but would also accord with the views of Kenyon CJ and Denman CJ that the foundation of the harsh rule lies in crime and fraud.[31]

This appears to be the position in the United States. The American Law Institute's *Restatement* requires that there must be a specific finding of fraud in relation to a material alteration. This position also has some support in Canada.[32]

3.19 Fraud certainly appears to be a relevant concern. First, and most obviously, some commentators connect fraud with the question of materiality.[33] Fraud is also a relevant concern in other closely related areas. For example, under the Torrens system fraud is an exception to indefeasibility[34] which would otherwise cure a document rendered void because of alteration.[35] Fraud may also be a defence to a claim for restitution which may otherwise be made to overcome the effects of the rule.[36]

3.20 However, it can also be argued that punishment of fraud is a flimsy

29. J W Salmond and J Williams, *The Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945) at 574.
30. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 243.
31. *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 244. It was, however, not necessary for Justice Hope to go so far in the case before him. See also *Zisti v Ryde Joinery Pty Ltd* (1996) 7 BPR 15,217 at 15,224.
32. S M Waddams, *The Law of Contracts* (4th edition, Canada Law Book, Toronto, 1999) at para 351 considers that the rule should be reserved for cases of actual fraudulent intent. See also L Friedlander, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267 at 274.
33. See para 2.23.
34. See P Butt, *Land Law* (3rd edition, LBC Information Services, Sydney, 1996) at para 2057-2061.
35. See para 2.66.
36. See para 2.92-2.93.

ground for retention of the rule. First, it does not justify the rule as it relates to material alterations by strangers and secondly, and more importantly, fraud may be more appropriately dealt with through criminal sanctions. In any case it can only be effective as a punishment if the underlying agreement is avoided. If only the instrument itself is rendered inadmissible (which may well be the case, at least with respect to documents which are not deeds) then it is not so much a punishment as merely a hurdle to be overcome.

3.21 Justice Kiefel of the Queensland Supreme Court has suggested that the rule was not necessary even in relation to fraudulent alterations because of the "Courts' powers in cases of fraud".[37] Certainly the courts have a wide jurisdiction so that equity can intervene in cases of fraud if the fraud results in unfavourable consequences for the innocent party.[38]

Comparison with the law of wills

3.22 The law has taken a different course with respect to the alteration of testamentary documents, even though testamentary documents are considered very susceptible to fraud. It seems that, at common law, an alteration to a will after execution and without the knowledge of the testator simply had no effect.[39] This position has been confirmed by legislation. For example s 18 of the *Wills Probate and Administration Act 1898* (NSW) now provides:

> No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent...

The will as originally executed therefore must continue to have effect even for those beneficiaries who may have fraudulently altered it with a view to personal gain. Presumably it is thought to be enough that s 135 of the *Crimes Act 1900* (NSW) is available to punish those making such fraudulent alterations. Why should the fraudulent alterations of deeds be any different?

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37. *Kaffe Pty Ltd v Vasta* (Queensland, Supreme Court, No 949/1992, Kiefel J, 4 August 1994, unreported) at 22.
38. See, for example, I C F Spry, *The Principles of Equitable Remedies* (5th edition, LBC Information Services, Sydney, 1997) at 165-170.
39. In *Goods of Rolfe* (1846) 4 Notes of Cases 406 the Prerogative Court considered it most improper to alter codicils after execution, even if only to correct errors and allowed probate to pass as the codicils were originally written without the alterations.

Availability of criminal sanctions

3.23 In *Master v Miller* Lord Kenyon suggested that the avoidance of deeds was perhaps introduced to make up for the inadequacy of the common law with respect to forgery. Forgery was originally a misdemeanour at common law, but was made a felony (that is, punishable by death) by statute in 1728.[40] So by 1791 the punishment for forgery had been increased, but this change in circumstances did not sway Lord Kenyon:

> the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanour, and the avoidance of the deed. And though the punishment has since been increased, the principle still remains the same.[41]

3.24 Part 5 of *Crimes Act 1900* (NSW) now deals with forgery and the making of false instruments. A false instrument includes one that has been altered in certain prescribed ways:

> (e) to have been altered in any respect by a person who did not in fact alter it in that respect; or
>
> (f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
>
> (g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered.[42]

Serious penalties apply. Section 300(1), for example, provides:

> A person who makes a false instrument, with the intention that he or she, or another person, will use it to induce another person:
>
> (a) to accept the instrument as genuine; and

40. See 2 Geo 2 c 25 (1728) s 1.
41. *Master v Miller* (1791) 4 TR 320 at 329; 100 ER 1042 at 1047.
42. *Crimes Act 1900* (NSW) s 299(2).

> (b) because of that acceptance, to do or not do some act to that other person's, or to another person's, prejudice,
>
> is liable to imprisonment for 10 years.

An act or omission is prejudicial if it is one that results

> (i) in the person's temporary or permanent loss of property; or
>
> (ii) in the person's being deprived of an opportunity to earn remuneration or greater remuneration; or
>
> (iii) in the person's being deprived of an opportunity to obtain a financial advantage otherwise than by way of remuneration.[43]

3.25 There appears to be some support for the use of criminal sanctions instead of civil proceedings to deal with fraudulent alteration of instruments.[44] One submission to the Commission suggested:

> If the alteration were made with an intent to defraud then no doubt Criminal Law might have a role to play.[45]

In fact, criminal sanctions for the alteration of documents appear in the background of at least one case involving the rule where one person, at the time of the civil proceedings, was serving a gaol term for fraud relating to alterations made to the mortgage in issue.[46]

43. *Crimes Act 1900* (NSW) s 305.
44. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 74.
45. R Newlinds, *Submission* at 2.
46. See *Chilcott v Goss* [1995] 1 NZLR 263, where a solicitor to the lending company acted fraudulently and was found guilty of criminal misconduct.

4. Reforms

- Negotiable instruments laws
- General proposals and changes in other jurisdictions
- Possible courses of action
- The Commission's conclusion

4.1 There have been some legislative reforms, both proposed and actually implemented, in the area of material alterations to instruments after execution. The most interesting relate only to negotiable instruments law – but these could be usefully extended into other related areas.

NEGOTIABLE INSTRUMENTS LAWS

4.2 The rule in *Pigot's Case* once applied to negotiable instruments as much as to any other instrument.[1] However, the law relating to the effect of alterations on negotiable instruments has long been codified. There are essentially two broad categories into which the codifications fall. First, those in common law jurisdictions based on s 64 of the *Bills of Exchange Act 1882* (UK) of which s 69 of the *Bills of Exchange Act 1909* (Cth) is an example and secondly, those originally based on certain conventions of the League of Nations relating to bills of exchange and promissory notes.[2] The chief difference appears to be that, as a general rule, the provisions in common law jurisdictions based on the British Act render void an instrument that has been materially altered while the ones based on the international conventions, in general, render an instrument that has been materially altered enforceable according to its original terms. Examples of each are set out below.

Common law jurisdictions

Australia

4.3 The *Bills of Exchange Act 1909* (Cth) provides as follows:

> **69. Alteration of bill**
>
> (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers:
>
> Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had

1. J B Byles, *Byles on Bills of Exchange* (26th edition, Sweet & Maxwell, London, 1988) at 267.
2. League of Nations, Treaty Series, Volume 143 (1933-1934) No 3313 and 3314. See now United Nations *Convention on International Bills of Exchange and International Promissory Notes* (1988) Art 35.

> not been altered, and may enforce payment of it according to its original tenor.
>
> (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

However, it should be noted that s 69(2) has been problematic in that it may render some otherwise immaterial alterations, such as the changing of a date which has no significant consequence, material, thereby avoiding the instrument in question.[3]

United States

4.4 The United States provides a slightly different approach to the other common law jurisdictions in that the material alteration must also have been made fraudulently for the instrument to be avoided. Article 3 of the Uniform Commercial Code, which has been adopted in its current form by most States,[4] makes the following provision:

> **§ 3-407. ALTERATION.**
>
> (a) "**Alteration"** means
>
> (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or

3. See *Heller Factors Pty Ltd v Toy Corporation Pty Ltd* [1984] 1 NSWLR 121 at 143-144.
4. All states except Massachusetts, New York, Rhode Island, South Carolina, and Utah have adopted the 1990 revision of the Uniform Code.

(ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument

(i) according to its original terms, or

(ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

4.5 The following provision, relating to incomplete instruments, is also of interest:

§ 3-115. INCOMPLETE INSTRUMENT.

(a) "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c), if an incomplete instrument is an instrument under Section 3-104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under Section 3-104, but, after completion, the requirements of Section 3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under Section 3-407.

(d) The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority.

The Uniform Commercial Code no longer employs the term "material" when dealing with alterations.[5]

International conventions

4.6 The most recent international convention relating to negotiable instruments is the United Nations *Convention on International Bills of Exchange and International Promissory Notes* (1988) which was adopted and opened for signature by the General Assembly in December 1988:

Article 35

(1) If an instrument is materially altered:

(a) A party who signs it after the material alteration is liable according to the terms of the altered text;

(b) A party who signs it before the material alteration is liable according to the terms of the original text. However, if a party makes, authorizes or assents to a material alteration, he is liable according to the terms of the altered text.

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5. For an example of the older American drafting, see *South Carolina Code of Laws* (1988) s 36-3-407 which provides:

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in
  (a) the number or relations of the parties; or
  (b) an incomplete instrument, by completing it otherwise than as authorized; or
  (c) the writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course
  (a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;
  (b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

(2) A signature is presumed to have been placed on the instrument after the material alteration unless the contrary is proved.

(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

GENERAL PROPOSALS AND CHANGES IN OTHER JURISDICTIONS

New Zealand

4.7 The New Zealand Law Commission has recommended the following provision:

> The rule that a deed becomes invalid if there has been a material alteration to it after its execution is abolished, but the abolition of that rule does not validate any such alteration if it is invalid on any ground other than that rule.[6]

The New Zealand Commission suggests that this abolition of the rule means that an alteration will now have "no more nor less effect than an unauthorised alteration to any other document". The discussion paper suggested that:

> It would be fairer and less arbitrary if the law in this respect were the same as that for an ordinary contract: namely, that the alteration is ineffective unless it has been agreed upon by the parties to the contract or gives rise to an estoppel.[7]

This may be a misreading of the law as it currently stands – especially in light of the uncertain position in relation to the extension of the rule in its strict form to instruments other than deeds.[8]

United States

4.8 It has long been the general position in America that a non-fraudulent

6. New Zealand, Law Commission, *A New Property Law Act* (Report 29, 1994) at 51.
7. New Zealand, Law Commission, *The Property Law Act 1952: A Discussion Paper* (PP No 16, 1991) at para 58.
8. See para 2.67-2.79.

alteration whether material or not has no effect and the document is enforced according to its original terms. This approach is also mirrored in negotiable instruments laws, as discussed above.

American Law Institute

4.9 The American Law Institute's *Restatement*[9] provides:

> **286. Alteration of Writing**
>
> (1) If one to whom a duty is owed under a contract alters a writing that is an integrated agreement or that satisfies the Statute of Frauds with respect to that contract, the duty is discharged if the alteration is fraudulent and material.
>
> (2) An alteration is material if it would, if effective, vary any party's legal relations with the maker of the alteration or adversely affect that party's legal relations with a third person. The unauthorized insertion in a blank space in a writing is an alteration.
>
> **287. Assent to or Forgiveness of Alteration**
>
> (1) If a party, knowing of an alteration that discharges his duty, manifests assent to the altered terms, his manifestation is equivalent to an acceptance of an offer to substitute those terms.
>
> (2) If a party, knowing of an alteration that discharges his duty, asserts a right under the original contract or otherwise manifests a willingness to remain subject to the original contract or to forgive the alteration, the original contract is revived.

These provisions have been looked at favourably by some courts in Australia.[10]

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9. American Law Institute, *Second Restatement of the Law of Contracts* (St Paul, 1981) Vol 2.

10. *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 275; *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 244; *Chilcott v Goss* [1995] 1 NZLR 263 at 271; *Kaffe Pty Ltd v Vasta* (Queensland, Supreme Court, No 949/1992, Kiefel J, 4 August 1994, unreported) at 22. See also *Citibank Savings Ltd v Executors of the Estate of Vago* (NSW, Supreme Court, No 50443/1991, Cole J,
1 May 1992, unreported) at 25; and *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 648.

POSSIBLE COURSES OF ACTION

4.10 A number of possible courses of action were considered by the Commission in reaching its conclusion.

Leave to the common law

4.11 First, we could leave the development of the rule to the common law.[11] This was what occurred in the United States, with somewhat satisfactory results, at least with regard to the requirement of fraud. However, the courts in Australia and elsewhere appear unwilling to overturn so ancient a Rule.[12]

4.12 As part of this option, parties could also be encouraged to adopt practical ways of getting around the problem such as drafting clauses specifying what happens if a contract becomes void or seeking permission from other parties before altering a contract.[13] However, the types of cases that come before the courts may not be ones where such advice would be helpful (or heeded) in any case.

Minor legislative changes

4.13 Tidying up some of the doubtful areas of the law by means of legislation is another option. For example, making clear that an alteration by a stranger to the transaction will have no effect[14] or limiting the operation of the rule to deeds or agreements required to be in writing. The codifications reproduced above[15] could provide some useful guidelines.

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11. Suggested, for example, by H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 52 with regards to the issue of materiality.
12. See especially *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 at 282. See also P Young, "Recent Cases: The Rule in Pigot's Case" (1997) 71 *Australian Law Journal* 117 at 117-118; and *Crossseas Shipping Ltd v Raiffeisen ZentralBank Osterreich AG* (England and Wales, Court of Appeal, 21 December 1999, unreported) at para 29.
13. A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 303-304.
14. See the suggestion in H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 76.
15. By the American Law Institute at para 4.9; and in relation to negotiable

Retain the rule in respect of fraudulent alterations

4.14 This would involve following the American approach of limiting the rule to cases of fraud.[16] Matters such as whether the alterations would need to be material as well as fraudulent would need to determined. This option would also not exclude other alterations relating to the operation of the rule that might be considered necessary .

Abolish the rule

4.15 The abolition of the rule has also received some support.[17] One way of achieving this would be to adopt the New Zealand approach of saying that an altered document takes effect as if alteration had not been made, unless the alteration "has been agreed upon by the parties to the contract or gives rise to an estoppel".[18] This would leave the punishment of fraudulent alterations to the criminal law.

THE COMMISSION'S CONCLUSION

Recommendation

The law deriving from the rule in Pigot's Case should be abolished by legislation.

4.16 The Commission has decided to recommend that the rule be abolished for the reasons outlined in this Report. In making this recommendation we note that there are other remedies available for fraud where the fraud causes

instruments at para 4.3-4.6.

16. See also the suggestion of S M Waddams, *The Law of Contracts* (4th edition, Canada Law Book, Toronto, 1999) at para 351.
17. H Tarlo, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43 at 75-76; P Young, "Recent Cases: The Rule in Pigot's Case" (1997) 71 *Australian Law Journal* 117 at 117-118; and A Beehag, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289 at 303.
18. See New Zealand, Law Commission, *The Property Law Act 1952: A Discussion Paper* (PP 16, 1991) at 20.

harm to an innocent party.
The Commission does not intend to affect any other remedies that may be available in relation to altered documents.

4.17 The abolition of the rule will need to be carried out by legislation. The only model for this is the New Zealand proposals outlined above.[19] However, unlike the New Zealand Law Commission, we would avoid any attempt to state what the law is that we are abolishing since, as the preceding discussion has shown, the law is far from clear. We therefore recommend that the abolition of the rule be achieved by providing:

1. that the law deriving from the decision known as the rule in *Pigot's Case* is abolished;

2. that an alteration to a contractual document made after execution by any person other than with the consent of the parties (or where an estoppel arises) does not make the contract void and the document continues to have effect in its unaltered form; and

3. that the provision does not affect any cause of action against the person who made the alteration, for example, in fraud.

4.18 A draft bill to implement these recommendations, by adding a section to the *Conveyancing Act 1919* (NSW), follows in Appendix A. A copy of this bill, together with a draft of this report, was circulated to a number of interested parties. The responses received were generally in support of the Commission's position.[20] One response also emphasised the need to preserve other available remedies, for example, those in fraud.[21] The Commission considers that the third provision in the previous paragraph will be achieved by including in proposed s 184(2) of the *Conveyancing Act 1919* (NSW) the words "by itself" which must be understood in the context of the abolition of the rule achieved by proposed s 184(1).

19. See para 4.7.
20. J W Carter, *Submission*; Property Law Committee, Law Society of NSW, *Submission*; D Mulcahy, *Submission*; W Windeyer, *Submission*; and A Beehag, *Submission*.
21. J W Carter, *Submission*.

Appendices

- Appendix A
  Conveyancing Amendement
  (Rule in Pigot's Case) Bill 2001
- Appendix B
  Submissions

APPENDIX A:
Draft Bill

(from Parliamentary Counsel, approximately 4 pages)

(span 69-72)

Draft

New South Wales

Draft Conveyancing Amendment (Rule in Pigot's Case) Bill 2000

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The rule of law known as the Rule in *Pigot's Case* (1614) 11 Co Rep 26b; 77 ER 1177) was stated by the New South Wales Court of Appeal in *Farrow Mortgage Services Pty Ltd v Slade* (1996) 38 NSWLR 636 at 639–640 in the following terms:

> where a deed or other written contract is, after execution, materially altered without the consent of the obligor, by the obligee, or by someone else without the consent of the obligee, or by a stranger whilst it is in the obligee's custody, the deed becomes void (or, according to some, voidable at the election of the obligor).

The Rule, which essentially is to the effect that any material alteration to a document after execution will void it, was originally laid down to prevent the physical alteration of deeds. However, the courts have attempted to modify the operation of the Rule so as to avoid its more unjust operation.

The object of this Bill is to abolish the Rule, and to provide, accordingly, that a material alteration to a deed does not, by itself, invalidate the deed or render it voidable, or otherwise affect any obligation under the deed.

This Bill gives effect to the recommendations of the Law Reform Commission in its Report dealing with the Rule in *Pigot's Case*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Clause 3 amends the *Conveyancing Act 1919* for the purposes described in the above overview.

New South Wales

Draft Conveyancing Amendment (Rule in Pigot's Case) Bill 2000

No , 2000

A Bill for

An Act to amend the *Conveyancing Act 1919* to abolish the Rule in *Pigot's Case*, and for related purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Conveyancing Amendment (Rule in Pigot's Case) Act 2000*.

2 Commencement

This Act commences on a day to be appointed by proclamation.

3 Amendment of Conveyancing Act 1919 No 6

The *Conveyancing Act 1919* is amended by inserting after section 183 the following section:

184 Abolition of Rule in Pigot's Case

(1) The rule of law known as the Rule in *Pigot's Case* is abolished.

(2) Accordingly, a material alteration to a deed does not, by itself, invalidate the deed or render it voidable, or otherwise affect any obligation under the deed.

(3) This section applies to and in respect of alterations made before or after the commencement of this section, but does not apply in relation to proceedings instituted before the commencement of this section.

(4) This section extends to dealings under the *Real Property Act 1900*.

(5) In this section, ***deed*** includes a written contract or any document evidencing a contractual intention.

APPENDIX B: Submissions

Preliminary submissions

Mr Robert Newlinds, Barrister (6 April 1999)

The Hon Justice W Windeyer (26 May 1999)

Submissions on the draft report and bill

The Hon Justice W Windeyer (11 August 2000)

Mr Andrew Beehag, Corporate Lawyer, Queensland Treasury Corporation (23 August 2000)

Mr David Mulcahy, Registrar General, Land and Property Information New South Wales (14 September 2000)

Professor John W Carter (18 September 2000)

Property Law Committee, Law Society of New South Wales (30 October 2000)

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BIBLIOGRAPHY

AMERICAN LAW INSTITUTE, *Second Restatement of the Law of Contracts* (St Paul, 1981)

ANSON, W R, *Anson's Law of Contract* (26th edition, Clarendon Press, Oxford, 1984) (27th edition, Oxford UP, 1998)

BEEHAG, A, "Unilateral Alterations to Mortgage Documents" (1997) 8 *Journal of Banking and Finance Law and Practice* 289

BUTT, P, "Conveyancing: Restitution and the Rule in Pigot's Case" (1996) 70 *Australian Law Journal* 872

BUTT, P, *Land Law* (3rd edition, LBC Information Services, Sydney, 1996)

BYLES, J B, *Byles on Bills of Exchange* (26th edition, Sweet & Maxwell, London, 1988)

CARTER, J W and HARLAND, D J, *Contract Law in Australia* (3rd edition, Butterworths, Sydney, 1996)

CHITTY, J, *Chitty on Contracts* (28th edition, Sweet & Maxwell, London, 1999)

"The Conveyancer" (1932) 6 *Australian Law Journal* 95

FRIDMAN, G H L, *The Law of Contract in Canada* (3rd edition, Carswell, Ontario, 1994)

FRIEDLANDER, L, "Unilateral Alteration of Contracts in Canada" (1996) 11 *Banking and Finance Law Review* 267

Halsbury's Laws of Australia (Butterworths)

HOLMES, O W, "The Path of the Law" (1897) 10 *Harvard Law Review* 470

MacCALLUM, S, "A New Approach to the Unilateral Alteration of Instruments" (1981) 7 *Adelaide Law Review* 274

NEW ZEALAND, Law Commission, *A New Property Law Act* (Report 29, 1994)

NEW ZEALAND, Law Commission, *The Property Law Act 1952: A Discussion Paper* (PP 16, 1991)

NORTON, R F, *A Treatise on Deeds* (2nd edition, Sweet & Maxwell, London, 1928)

ODGERS, C E, *Odgers' Construction of Deeds and Statutes* (5th edition, Sweet & Maxwell, London, 1964)

SALMOND, J W and WILLIAMS, J, *The Principles of the Law of Contracts* (2nd edition, Sweet & Maxwell, London, 1945)

SEDDON, N C and ELLINGHAUS, M P, *Cheshire and Fifoot's Law of Contract* (7th Australian edition, Butterworths, Sydney 1997)

SHEAHAN, J C, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280

SIMPSON, A W B, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, Oxford, 1975)

SPRY, I C F, *The Principles of Equitable Remedies* (5th edition, LBC Information Services, Sydney, 1997)

TARLO, H, "The Unilateral Alteration of Instruments" (1959) 2 *Melbourne University Law Review* 43

WADDAMS, S M, *The Law of Contracts* (4th edition, Canada Law Book, Toronto, 1999)

WILLIAMS, G L, *Joint Obligations* (Butterworths, London, 1949)

WILLISTON, S, "Discharge of Contracts by Alteration" (1904) 18 *Harvard Law Review* 105

WILLISTON, S, *A Treatise on the Law of Contracts* (3rd edition, Lawyers Co-operative Publishing Co, Rochester, NY, 1972)

YOUNG, P, "Recent Cases: The Rule in Pigot's Case" (1997) 71 *Australian Law Journal* 117