CHAPTER VI.

OF PRIVATE WRITINGS.

§ 557. The last class of Written Evidence, which we proposed to consider, is that of Private Writings. And in the discussion of this subject, it is not intended separately to mention every description of writings, comprised in this class; but to state the principles which govern the proof, admissibility, and effect of them all. In general, all private writings, produced in evidence, must be proved to be genuine; but in what is now to be said, particular reference is had to solemn obligations and instruments, under the hand of the party, purporting to be evidence of title; such as deeds, bills, and notes. These must be produced, and the execution of them generally be proved; or their absence must be duly accounted for, and their loss supplied by secondary evidence.

§ 558. And first, in regard to the production of such documents; if the instrument is *lost*, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a *bonâ fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof; after which, his own affidavit is admissible to the fact of its loss.[1] The same rule prevails where the instrument is destroyed. What degree of diligence in the search is necessary, it is not easy to define, as each case

[1] Goodier *v.* Lake, 1 Atk. 446; Ante, § 349, and cases there cited. See also Cowen & Hill's note 861, to 1 Phil. Evid. p. 452. It is sufficient, if the party has done all that could reasonably be expected of him, under the circumstances of the case, in searching for the instrument. Kelsey *v.* Hanmer, 18 Conn. R. 311.

depends much on its peculiar circumstances, and the question, whether the loss of the instrument is sufficiently proved, to admit secondary evidence of its contents, is to be determined by the Court, and not by the Jury.[1] But it seems, that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.[2] It should be recollected, that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument; and that this is a preliminary inquiry, addressed to the discretion of the Judge. If the paper was supposed to be of little value, or is ancient, a less degree of diligence will be demanded, as it will be aided by the presumption of loss, which these circumstances afford. If it belonged to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it, if they are within reach of the process of the Court.[3] And so, if it might or ought to have been deposited in a public office, or other particular place, that place must be searched. If the search was made by a third person, he must be called to testify respecting it.[4] And if the paper belongs to his custody, he must be served with a *subpœna duces tecum*, to produce it.[5] If it be

[1] Page *v.* Page, 15 Pick. 368.

[2] Rex *v.* Morton, 4 M. & S. 48; Rex *v.* Castleton, 6 T. R. 236; 1 Stark. Evid. 336–340; Wills *v.* McDole, 2 South. 501; Thompson *v.* Travis, 8 Scott, 85; Parks *v.* Dunklee, 3 Watts & Serg. 291; Gathercole *v.* Miall, 15 Law Journ. 179. The admission of the nominal plaintiff, that he had burnt the bond, he being interested adversely to the real plaintiff, has been held sufficient to let in secondary evidence of its contents. Shortz *v.* Unagnst, 3 Watts & Serg. 45.

[3] Ralph *v.* Brown, 3 Watts & Serg. 395.

[4] The authorities to these points, which are quite too numerous to be cited here, may be found in Cowen & Hill's note 867, to 1 Phil. Evid. p. 457.

[5] The duty of the witness to produce such document, is thus laid down by Shaw, C. J. "There seems to be no difference in principle, between compelling a witness to produce a document in his possession, under a

an instrument, which is the foundation of the action, and which, if found, the defendant may be compelled again to pay to a *bonâ fide holder*, the plaintiff must give sufficient proof of its destruction, to satisfy the Court and Jury that the defendant cannot be liable to pay it a second time.[1] And if the instrument was executed in duplicate, or triplicate, or more parts, the loss of all the parts must be proved, in order to let in secondary evidence of the contents.[2] Satisfactory proof being thus made of the loss of the instrument, the party will be admitted to give secondary evidence of its contents.[3]

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subpœna duces tecum, in a case where the party calling the witness has a right to the use of such document, and compelling him to give testimony, when the facts lie in his own knowledge. It has been decided, though it was formerly doubted, that a subpœna duces tecum is a writ of compulsory obligation, which the Court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it. Amey *v.* Long, 9 East, 473; Corsen *v.* Dubois, 1 Holt's N. P. R. 239. But of such lawful or reasonable excuse, the Court at nisi prius, and not the witness, is to judge. And when the witness has the paper ready to produce, in obedience to the summons, but claims to retain it on the ground of legal or equitable interests of his own, it is a question to the discretion of the Court, under the circumstances of the case, whether the witness ought to produce, or is entitled to withhold the paper." Bull *v.* Loveland, 10 Pick. 14.

[1] Hansard *v.* Robinson, 7 B. & C. 90; Lubbock *v.* Tribe, 3 M. & W. 607. See also Peabody *v.* Denton, 2 Gall. 351; Anderson *v.* Robson, 2 Bay, 495; Davis *v.* Todd, 4 Taunt. 602; Pierson *v.* Hutchinson, 2 Campb. 211; Rowley *v.* Ball, 3 Cowen, 303; Kirby *v.* Sisson, 2 Wend. 550; Murray *v.* Carrett, 3 Call, 373; Mayor *v.* Johnson, 3 Campb. 324; Swift *v.* Stevens, 8 Conn. 431; Ramuz *v.* Crowe, 11 Jur. 715.

[2] Bull. N. P. 254; Rex *v.* Castleton, 6 T. R. 236; Doe *v.* Pulman, 3 Ad. & El. 622, N. S.

[3] See, as to secondary evidence, Ante, § 84, and note (2). Where secondary evidence is resorted to, for proof of an instrument which is lost or destroyed, it must, in general, be proved to have been executed. Jackson *v.* Frier, 16 Johns. 196; Kimball *v.* Morrell, 4 Greenl. 368; Kelsey *v.* Hanmer, 11 Conn. R. 311. But if the secondary evidence is a copy of the instrument, which appears to have been attested by a witness, it is not necessary to call this witness. Poole *v.* Warren, 3 Nev. & P. 693. In case of the loss or destruction of the instrument, the admissions of the party may be proved, to establish both its existence and contents. Mauri *v.* Heffernan, 13 Johns. 58, 74; Thomas *v.* Harding, 8 Greenl. 417; Corbin *v.* Jackson, 14 Wend. 619. A copy of a document, taken by a machine, worked by the witness who produces it, is admissible as secondary evidence. Simpson *v.* Thoreton, 2 M. & Rob. 433.

§ 559. The *production of private writings*, in which another person has an interest, may be had either by a bill of discovery, in proper cases, or, in trials at law, by a writ of *subpœna duces tecum*,[1] directed to the person who has them in his possession. The Courts of Common Law may also make an *order for the inspection for writings* in the possession of one party to a suit, in favor of the other. The extent of this power, and the nature of the order, whether it should be peremptory, or in the shape of a rule to enlarge the time to plead, unless the writing is produced, does not seem to be very clearly agreed;[2] and in the United States the Courts have been unwilling to exercise the power, except where it is given by statute. It seems, however, to be agreed, that where the action is *ex contractu*, and there is but one instrument between the parties, which is in the possession or power of the defendant, to which the plaintiff is either an actual party, or a party in interest, and of which he has been refused an inspection, upon request, and the production of which is necessary to enable him to declare against the defendant, the Court, or a Judge at chambers, may grant him a rule on the defendant to produce the document, or give him a copy, for that purpose.[3] Such order may also be obtained by the defendant, on a special case, such as, if there is reason to suspect that the

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[1] See the course in a parallel case, where a witness is out of the jurisdiction, Ante, § 320. It is no sufficient answer for a witness not obeying this subpœna, that the instrument required was not material. Doe *v.* Kelly, 4 Dowl. 273. But see Rex *v.* Ld. John Russell, 7 Dowl. 693.

[2] Ante, § 320.

[3] 3 Chitty's Gen. Pr. 433, 434; 1 Tidd's Pr. 590, 591, 592; 1 Paine & Duer's Pr. 486–488; Graham's Practice, p. 524; Lawrence *v.* Ocean Ins. Co. 11 Johns. 245, n. (a); Jackson *v.* Jones, 3 Cowen, 17; Wallis *v.* Murray, 4 Cowen, 399; Denslow *v.* Fowler, 2 Cowen, 592; Davenport *v.* M'Kinnie, 5 Cowen, 27; Utica Bank *v.* Hillard, 6 Cowen, 62.

document is forged, and the defendant wishes that it may be seen by himself and his witnesses.[1] But in all such cases, the application should be supported by the *affidavit* of the party, particularly stating the circumstances.[2]

§ 560. When the instrument or writing is in the *hands or power of the adverse party*, there are, in general, except in the cases above mentioned, no means at law of compelling him to produce it; but the practice in such cases is, to give him or his attorney a regular *notice to produce* the original. Not that, on proof of such notice, he is compellable to give evidence against himself; but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original.[3]

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[1] Brush *v.* Gibbon, 3 Cowen, 18, n. (a).

[2] 3 Chitty's Gen. Pr. 434. See also 2 Phil. Evid. 191–201. This course being so seldom resorted to, in the American Common Law Courts, a more particular statement of the practice is deemed unnecessary in this place.

[3] 2 Tidd's Pr. 802; 1 Paine & Duer's Pr. 483; Graham's Practice, p. 528. Notice to produce the instrument is not alone sufficient to admit the party to give secondary evidence of its contents. He must prove the existence of the original. Sharp *v.* Lambe, 3 P. & D. 454. He must also show that the instrument is in the possession, or under the control of the party required to produce it. Smith *v.* Sleap, 1 Car. & Kirw. 48. But of this fact, very slight evidence will raise a sufficient presumption, where the instrument exclusively belongs to him, and has recently been. or regularly ought to be, in his possession, according to the course of business. Henry *v.* Leigh, 3 Campb. 499, 502; Harvey *v.* Mitchell, 2 M. & Rob. 366; Robb *v.* Starkey, 2 C. & K. 143. And if the instrument is in the possession of another, in privity with the party, such as his banker, or agent, or servant, or the like, notice to the party himself is sufficient. Baldney *v.* Ritchie, 1 Stark. R. 338; Sinclair *v.* Stevenson, 1 C. & P. 582; Burton *v.* Payne, 2 C. & P. 520; Partridge *v.* Coates, Ry. & M. 153, 156; Taplin *v.* Atty, 3 Bing. 164. If a deed is in the hands of an attorney having a lien upon it, as security for money due from his client, on which ground he refuses to produce it in obedience to a *subpœna duces tecum*, as he justly may; Kemp *v.* King, 2 M. & Rob. 437; the party calling for it may give secondary evidence of its contents. Doe *v.* Ross, 7 M. & W. 102. The notice to produce may be given verbally. Smith *v.* Young, 1 Campb. 440. After notice and refusal to produce a paper, and secondary evidence given of its contents, the adverse party cannot afterwards produce the document as his own evidence. Doe *v.* Hodgson, 4 P. & D. 142; 12 Ad. & El. 135, S. C.

§ 561. There are *three cases* in which such *notice to produce is not necessary*. First, where the instrument to be produced and that to be proved are *duplicate originals;* for in such case, the original being in the hands of the other party, it is in his power to contradict the duplicate original, by producing the other, if they vary;[1] secondly, where the instrument to be proved, is *itself a notice*, such as a notice to quit, or notice of the dishonor of a bill of exchange; and thirdly, where, from the *nature of the action*, the defendant has notice that the plaintiff intends to charge him with possession of the instrument; as, for example, in trover for a bill of exchange. And the principle of the rule does not require notice to the adverse party, to produce a paper belonging to a third person, of which he has fraudulently obtained possession; as, where after service of a *subpœna duces tecum*, the adverse party had received the paper from the witness, in fraud of the *subpœna*.[2]

§ 562. The *notice may be directed* to the party, or to his attorney, and may be *served* on either; and it must describe the writing demanded, so as to leave no doubt, that the party was aware of the particular instrument intended to be called for.[3] But as to the time and place of the service, no precise rule can be laid down, except that it must be such as to enable the party, under the known circumstances of the case, to comply with the call. Generally, if the party dwells in another

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[1] Jory *v.* Orchard, 2 B. & P. 39, 41; Doe *v.* Somerton, 9 Jur. 775; Swain *v.* Lewis, 2 C. M. & R. 261.

[2] 2 Tidd's Pr. 803. Proof that the adverse party, or his attorney, has the instrument in Court, does not, it seems, render notice to produce it unnecessary; for the object of the notice is not only to procure the paper, but to give the party an opportunity to provide the proper testimony to support or impeach it. Doe *v.* Grey, 1 Stark. R. 283; Exall *v.* Patridge, Ib. cit.; Knight *v.* Marquis of Waterford, 4 Y. & Col. 284.

[3] Rogers *v.* Custance, 2 M. & Rob. 179.

town, than that in which the trial is had, a service on him at the place where the trial is had, or after he has left home to attend the Court, is not sufficient.[1] But if the party has gone abroad, leaving the cause in the hands of his attorney, it will be presumed that he left with the attorney all the papers material to the cause, and the notice should therefore be served on the latter. The notice, also, should generally be served previous to the commencement of the trial.[2]

§ 563. The *regular time for calling for the production* of papers, is not until the party who requires them has entered upon his case; until which time, the other party may refuse to produce them, and no cross-examination, as to their contents, is usually permitted.[3] The production of papers, upon notice, does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case, the English rule is, that they are admitted as evidence for both parties.[4] The reason is, that it would give an unconscionable advantage, to enable a party to pry into the affairs of his adversary, for the purpose of compelling him to furnish evidence against himself, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties. But in the American Courts, the rule on this subject is not uniform.[1]

[1] George *v.* Thompson, 4 Dowl. 656; Foster *v.* Pointer, 9 C. & P. 718. See also, as to the time of service, Holt *v.* Miers, 9 C. & P. 191.

[2] 2 Tidd's Pr. 803; Hughes *v.* Budd, 8 Dowl. 315; Firkin *v.* Edwards, 9 C. & P. 478; Gibbons *v.* Powell, Ib. 634; Bate *v.* Kinsey, 1 C. M. & R. 38; Emerson *v.* Fisk, 6 Greenl. 200; 1 Paine & Duer's Pr. 485, 486. The notice must point out, with some degree of precision, the papers required. Notice to produce "all letters, papers, and documents, touching, or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered," has been held too general. France *v.* Lucy, Ry. & M. 341. So, "to produce letters, and copies of letters, and all books, relating to this cause." Jones *v.* Edwards, 1 McCl. & Y. 139. But notice to produce all letters written by the party to, and received by the other, between the years 1837 and 1841, inclusive, was held sufficient to entitle the party to call for a particular letter. Morris *v.* Hauser, 2 M. & Rob. 392.

[3] Ante, § 447, 463, 464.

[4] 2 Tidd's Pr. 804; Calvert *v.* Flower, 7 C. & P. 386.

§ 564. If, on production of the instrument, it appears to have been *altered*, it is *incumbent on the party offering it* in evidence *to explain* this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it, is ordinarily held bound to remove.[2] If the alteration is noted in the attestation clause, as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion. And if it appears in the same handwriting and ink with the body of the instrument, it may suffice. So, if the alteration is against the interest of the party deriving title under the instrument, as, if it be a bond or note, altered to a less sum, the law does not so far presume that it was improperly made, as to throw on him the burden of accounting for it.[3] And generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument.[4] But if any ground of suspicion is apparent upon

[1] 1 Paine & Duer's Pr. 484; Withers *v.* Gillespy, 7 S. & R. 14. The English rule was adopted in Jordan *v.* Wilkins, 2 Wash. C. C. R. 482, 484, n.; Randel *v.* Chesapeake & Del. Can. Co. 1 Harringt. R. 233, 284; Penobscot Boom Corp. *v.* Lamson, 4 Shepl. 224.

[2] Perk. Conv. 55; Henman *v.* Dickinson, 5 Bing. 183, 184; Knight *v.* Clements, 8 Ad. & El. 215; Newcomb *v.* Presbrey, 8 Metc. 406. But where a farm was demised from year to year by parol, and afterwards an agreement was signed, containing stipulations as to the mode of tillage, for breach of which an action was brought, and on producing the agreement it appeared that the term of years had been written seven, but altered to fourteen; it was held that this alteration, *being immaterial* to the parol contract, need not be explained by the plaintiff. Earl of Falmouth *v.* Roberts, 9 M. & W. 469. See further, Cariss *v.* Tattershall, 2 Man. & Gr. 890; Clifford *v.* Parker, Ib. 909.

[3] Bailey *v.* Taylor, 11 Conn. R. 531; Coulson *v.* Walton, 9 Pet. 789.

[4] Trowel *v.* Castle, 1 Keb. 22; Fitzgerald *v.* Fauconberg, Fitzg. 207, 213; Bailey *v.* Taylor, 11 Conn. R. 531, 534; Gooch *v.* Bryant, 1 Shepl. 386, 390; Pullen *v.* Hutchinson, 12 Shepl. 249, 254. In Morris *v.* Vande-

the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the Jury, upon proofs to be adduced by the party offering the instrument in evidence.[1]

§ 565. Though the effect of the alteration of a legal instrument is generally discussed with reference to deeds, yet the principle is *applicable to all other instruments*. The early decisions were chiefly upon deeds, because almost all written engagements were anciently in that form; but they establish the general proposition, that written instruments, which are *altered*, in the legal sense of that term, as hereafter

ren, 1 Dall. 67, and Prevost *v.* Gratz, 1 Pet. C. C. R. 364, 369, it was held, that an alteration should be presumed to have been made *after* the execution of the instrument; but this has been overruled in the United States, as contrary to the principle of the law, which never presumes wrong. The reporters' marginal notes in Burgoyne *v.* Showler, 1 Rob. Eccl. R. 5, and Cooper *v.* Bockett, 4 Moore, P. C. C. 419, state the broad proposition, that alterations in a *will*, not accounted for, are *primâ facie* presumed to have been made after its execution. But on examination of these cases they will be found to turn entirely on the provisions of the statute of Wills, 1 Vict. c. 26, § 21, which directs that all alterations, made before the execution of the will, be noted in a memorandum upon the will, and attested by the testator and witnesses. If this direction is not complied with, it may well be presumed that the alterations were subsequently made.

[1] Knight *v.* Clements, 8 Ad. & El. 215; Cariss *v.* Tattershall, 2 M. & Gr. 890; Clifford *v.* Parker, Ib. 909; Vanhorne *v.* Dorrance, 2 Dall. 304; Gooch *v.* Bryant, 1 Shepl. 386; Wickes *v.* Caulk, 5 H. & J. 41; Horry Dist. *v.* Hanison, 1 N. & McC. 554; Whitfield *v.* Collingwood, 1 Car. & Kir. 325; Gillett *v.* Sweat, 1 Gilman, R. 475; Cumberland Bank *v.* Hall, 1 Halst. 215; Haffelfinger *v.* Shutz, 16 S. & R. 44; Bishop *v.* Chambre, 1 M. & Malk. 116; Jackson *v.* Osborn, 2 Wend. 555; Johnson *v.* D. of Marlborough, 2 Stark. R. 278; Emerson *v.* Murray, 4 N. Hamp. 171; Bailey *v.* Taylor, 11 Conn. 531; Taylor *v.* Mosely, 6 C. & P. 273; Whitfield *v.* Collingwood, 1 Car. & Kir. 325. All these questions are of course determined, in the first instance, by the Court, when they are raised upon a preliminary objection to the admissibility of the instrument; but they are again open to the Jury. Ross *v.* Gould, 5 Greenl. 204.

explained, are *thereby made void*.[1] The grounds of this doctrine are twofold. The first is that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected.[2] The other is to insure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned.[3] The instrument derives its legal virtue from its being the sole repository of the agreement of the parties, solemnly adopted as such, and attested by the signature of the party engaging to perform it. Any alteration, therefore, which causes it to speak a language different in legal effect from that which it originally spake, is a material alteration.

§ 566. A distinction, however, is to be observed, between the *alteration* and the *spoliation* of an instrument, as to the legal consequences. An *alteration*, is an act done upon the instrument, by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. The term is, at this day, usually applied to the act of the party, entitled under the deed or instrument, and imports some fraud or improper design on his part to change its effect. But the act of a stranger, without the participation of the party interested, is a mere *spoliation*, or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, and, if it be a deed, any trace remains of the seal. If, by the unlawful act of a stranger, the instrument is mutilated or

[1] Masters *v.* Miller, 4 T. R. 329, 330; Newell *v.* Mayberry, 3 Leigh, R. 250.

[2] Masters *v.* Miller, 4 T. R. 329, per Ld. Kenyon.

[3] Sanderson *v.* Symonds, 1 B. & B. 430, per Dallas, C. J. It is on this ground that the alteration of a deed in an immaterial part is sometimes fatal, where its identity is put in issue by the pleadings, every part of the writing being then material to the identity. See Ante, § 58, 69; Hunt *v.* Adams, 6 Mass. 521.

defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as an accidental destruction of primary evidence, compelling a resort to that which is secondary. Thus, if it be a deed, and the party would plead it, it cannot be pleaded with a profert, but the want of profert must be excused by an allegation that the deed, meaning its legal identity as a deed, has been accidentally, and without the fault of the party, destroyed.[1] And whether it be a deed or other instrument, its original tenor must be substantially shown, and the alteration or mutilation accounted for, in the same manner as if it were lost.

§ 567. In considering the effect of alterations *made by the party himself*, who holds the instrument, a *further distinction* is to be observed, between the insertion of those *words which the law would supply*, and those of a different character. If

[1] Powers *v.* Ware, 2 Pick. 451; Read *v.* Brookman, 3 T. R. 152; Morrill *v.* Otis, 12 N. Hamp. R. 466. The necessity of some fraudulent intent, carried home to the party claiming under the instrument, in order to render the alteration fatal, was strongly insisted on by Buller, J., in Masters *v.* Miller, 4 T. R. 334, 335. And, on this ground, at least tacitly assumed, the old cases, to the effect that an alteration of a deed by a stranger, in a material part, avoids the deed, have been overruled. In the following cases, the alteration of a writing, without fraudulent intent, has been treated as a merely accidental spoliation. Henfree *v.* Bromley, 6 East, 309; Cutts, in error *v.* United States, 1 Gall. 69; United States *v.* Spaulding, 2 Mason, 478; Rees *v.* Overbaugh, 6 Cowen, 746; Lewis *v.* Payn, 8 Cowen, 71; Jackson *v.* Malin, 15 Johns. 297, per Platt, J.; Nichols *v.* Johnson, 10 Conn. 192; Marshall *v.* Gougler, 10 S. & R. 164; Palm. 403; Wilkinson *v.* Johnson, 3 B. & C. 428; Raper *v.* Birkbeck, 15 East, 17. The old doctrine, that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed, was strongly condemned by Story, J., in United States *v.* Spaulding, supra, as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven; and which ought to have the support of unbroken authority before a Court of Law was bound to surrender its judgment, to what deserved no better name than a technical quibble.

the law would have supplied the words which were omitted, and were afterwards inserted by the party, it has been repeatedly held, that even his own insertion of them will not vitiate the instrument; for the assent of the obligor will in such cases be presumed. It is not an *alteration*, in the sense of the law, avoiding the instrument; although, if it be a deed, and to be set forth *in hæc verba*, it should be recited as it was originally written.[1]

§ 568. It has been strongly doubted, whether an *immaterial* alteration, in any matter, though made *by the obligee himself*, will avoid the instrument, provided it be done innocently, and to no injurious purpose.[2] But, if the alteration be *fraudulently made*, by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for in either case he has brought himself under the operation of the rule, established for the prevention of fraud; and having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.[3] But here also, a further distinction is to be observed, between deeds of conveyance and covenants; and also between covenants or agreements executed, and those which are still executory. For if the grantee of land alter or destroy his title deed, yet his title to the land is not gone. It passed to him by the deed; the deed has performed its office, as an instrument of conveyance; and its continued existence is not necessary to the continuance of title in the grantee; but the estate remains in him, until it has passed to another by some mode of conveyance,

[1] Hunt *v.* Adams, 6 Mass. 519, 522; Waugh *v.* Bussell, 5 Taunt. 707; Paget *v.* Paget, 3 Chan. Rep. 410; Zouch *v.* Clay, 1 Ventr. 185; Smith *v.* Crooker, 5 Mass. 538; Hale *v.* Russ, 1 Greenl. 334; Knapp *v.* Maltby, 13 Wend. 587; Brown *v.* Pinkham, 18 Pick. 172.

[2] Hatch *v.* Hatch, 9 Mass. 311, per Sewall, J.; Smith *v.* Dunbar, 8 Pick. 246.

[3] If an obligee procure a person, who was not present at the execution of the bond, to sign his name as an attesting witness, this is *primâ facie* evidence of fraud, and avoids the bond. Adams *v.* Frye, 3 Metc. 103.

recognised by the law.[1] The same principle applies to contracts executed, in regard to the acts done under them. If the estate lies in grant, and cannot exist without deed, it is said that any alteration, by the party claiming the estate, will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.[2] But whether it be a deed conveying real estate or not, it seems well settled that any alteration in the instrument, made by the grantee or obligee, if it be made with a fraudulent design, and do not consist in the insertion of words which the law would supply, is fatal to the instrument, as the foundation of any remedy at law, upon the covenants or undertakings contained in it.[3] And in such case, it seems, that the party will not be permitted to prove the covenant or promise, by other evidence.[4] But where there are several parties to an indenture, some of whom have executed it, and in the progress of the transaction it is altered as to those who have not signed it, without the knowledge of those who have, but yet in a part

[1] Hatch *v.* Hatch, 9 Mass. 307; Dr. Leyfield's case, 10 Co. 88; Bolton *v.* Carlisle, 2 H. Bl. 259; Davis *v.* Spooner, 3 Pick. 284; Barrett *v.* Thorndike, 1 Greenl. 73; Lewis *v.* Payn, 8 Cowen, 71; Jackson *v.* Gould, 7 Wend. 364; Beckrow's case, Hetl. 138. Whether the deed may still be read by the party, as evidence of title, is not agreed. That it may be read, see Doe *v.* Hirst, 3 Stark. R. 60; Lewis *v.* Payn, 8 Cowen, 71; Jackson *v.* Gould, 7 Wend. 364. That it may not, see Babb *v.* Clemson, 10 S. & R. 419; Withers *v.* Atkinson, 1 Watts, 236; Chesley *v.* Frost, 1 N. Hamp. 145; Newell *v.* Mayberry, 3 Leigh, R. 250.

[2] More *v.* Salter, 3 Bulstr. 79, per Coke, C. J.; Lewis *v.* Payn, 8 Cowen, 71.

[3] Ibid. Davidson *v.* Cooper, 11 M. & W. 778; Jackson *v.* Gould, 7 Wend. 364; Hatch *v.* Hatch, 9 Mass. 307; Barrett *v.* Thorndike, 1 Greenl. 73; Withers *v.* Atkinson, 1 Watts, 236; Arrison *v.* Harmstead, 2 Barr, 191; Whitmer *v.* Frye, 10 Missouri R. 348.

[4] Martindale *v.* Follet, 1 N. Hamp. 95; Newell *v.* Mayberry, 3 Leigh, R. 250; Blade *v.* Nolan, 12 Wend. 173; Arrison *v.* Harmstead, 2 Barr, 191. The strictness of the English rule, that every alteration of a bill of exchange, or promissory note, even by consent of the parties, renders it utterly void, has particular reference to the stamp act of 1 Ann. St. 2, c. 22. Chitty on Bills, p. 207–214.

not at all affecting the latter, and then is executed by the residue, it is good as to all.[1]

§ 568 *a*. In all these cases of alterations, it is further to be remarked, that they are supposed to have been made without the consent of the other party. For, if the alteration is *made by consent of parties*, such as by the filling up of blanks, or the like, it is valid.[2] But here, also, a distinction has been taken between the insertion of matter, essential to the existence and operation of the instrument as a deed, and that which is not essential to its operation. Accordingly, it has been held, that an instrument, which, when formally executed, was deficient in some material part, so as to be incapable of any operation at all, and was no deed, could not afterwards become a deed, by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by an instrument under seal.[3] Yet this rule, again, has its exceptions, in divers cases, such as powers of attorney to transfer stock,[4] navy bills,[5] custom-house bonds,[6] appeal bonds,[7] bail bonds,[8] and the like, which have been held good, though executed in blank, and afterwards filled up by parol authority only.[9]

[1] Doe *v.* Bingham, 4 B. & Ald. 672, 675, per Bayley, J.; Hibblewhite *v.* McMorine, 6 M. & W. 208, 209.

[2] Markham *v.* Gonaston, Cro. El. 626; Moor, 547; Zouch *v.* Clay, 1 Ventr. 185; 2 Lev. 35. So, where a power of attorney was sent to B., with his christian name in blank, which he filled by inserting it, this was held valid. Eagleton *v.* Gutteridge, 11 M. & W. 468. This consent may be implied. Hale *v.* Russ, 1 Greenl. 34; Smith *v.* Crooker, 5 Mass. 538; 19 Johns. 396, per Kent. C.

[3] Hibblewhite *v.* McMorine, 6 M. & W. 200, 216.

[4] Commercial Bank of Buffalo *v.* Kortwright, 22 Wend. 348.

[5] Per Wilson, J. in Masters *v.* Miller, 1 Anstr. 229.

[6] 22 Wend. 366.

[7] Ex parte Decker, 6 Cowen, 59; Ex parte Kerwin, 8 Cowen, 118.

[8] Hale *v.* Russ, 1 Greenl. 334; Gordon *v.* Jeffreys, 2 Leigh, R. 410; Vanhook *v.* Barrett, 4 Dev. Law R. 272. But see Harrison *v.* Tiernans, 1 Randolph, R. 177; Gilbert *v.* Anthony, 1 Yerger, 69.

[9] In Texira *v.* Evans, cited 1 Anstr. 228, where one executed a bond in