Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 66

Constitution and Proof of Voluntary Obligations and the Authentication of Writings

JULY 1985

This Consultative Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 31 March 1986. All correspondence should be addressed to:-

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Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

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SCOTTISH LAW COMMISSION

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CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS AND THE AUTHENTICATION OF WRITINGS

PART I - INTRODUCTION

Previous consultation.

1.1. In 1977 the Commission published a consultative memorandum on the Constitution and proof of voluntary obligations: Formalities of constitution and restrictions on proof.[1] This memorandum described and criticised the existing law. The main criticism related to the complexities and uncertainties caused by the four categories of obligations-

(1) those requiring writing for their constitution by the common law (obligationes literis),

(2) those requiring writing under specific statutory provisions,

(3) those requiring proof by writ or oath, though capable of being constituted in any way, and

(4) those capable of being constituted and proved in any way.

The memorandum invited comments on several options for reform. The first of these involved only slight modifications of the present system. Four categories of obligations would have remained but the list of obligationes literis would have been extended and certain minor reforms, such as abolition of proof by reference to oath, introduced. This option attracted hardly any support on consultation.[2] Most commentators preferred a simpler system. The second option involved much more

formality than the present system. The general rule would have been that all obligations required writing for their constitution, but there would have been exceptions, including an exception for agreements under £50 in value and an exception for mercantile transactions. Again this option attracted hardly any support. Some commentators were severely critical of it, taking the view that it would be "far too rigorous" and "basically unworkable". They thought the proposed exception for transactions below a certain value would be difficult to apply and that alterations in the stated figure to keep pace with inflation would be confusing to the public. They also thought the proposed exception for mercantile transactions would be difficult to define and apply and could undermine the whole scheme. The third option also involved more formality than the present law but, under this option, the formality would have taken the form of a restriction on the proof of certain obligations. The general rule would have been that obligations could be constituted informally but required writing for their proof. Again there would have been exceptions, including an exception for obligations relating to matters under £50 in value. Not one of those who commented favoured this option. The fourth option involved less formality than the present law. Under this option, the general rule would be that obligations could be constituted, varied and discharged informally and would be subject to no special limitations on mode of proof. There would, however, be certain obligations where writing would be required by statute. This was the scheme which was favoured by most of those who commented.

1.2. The general tenor of consultation on the earlier memorandum was thus clearly against the first three options mentioned and in favour of a scheme which was simpler and less formalistic than the present law. This is very much our own view. Our provisional conclusion is therefore that the categories of obligations requiring writing for their constitution at common law (obligationes literis) and of obligations requiring proof by writ or oath should be abolished and that in future there should be two categories of obligations-

1. those where writing is required by statute, and
2. others.

We suggest that only a few types of obligation ought to fall into the first category. In general, our view is that, in addition to those cases where writing is required by existing statutes, the category should be confined to (a) agreements to buy or sell heritable property or to lease such property for more than a year (b) cautionary obligations[3] and (c) gratuitous obligations. Writing would be required for constitution, not proof. We discuss later the type of writing required. Our provisional view is that subscribed writing would suffice and that there is no need, in this context, for the writing to be attested, holograph or adopted as holograph. We are talking at this stage, of course, only of obligations and not of conveyances giving effect to obligations. Moreover, nothing in our provisional proposals would affect the right of a party to negotiations to stipulate that he will not be bound until the terms have been reduced to writing. Nor would our proposals affect the freedom of parties to reinforce an informal obligation (such as an

obligation to repay money lent) by a formal written obligation (such as a bond) if they so wish.

Reasons for this memorandum.

1.3. We have two reasons for publishing a second consultative memorandum on this subject. First, we wish to give people an opportunity to comment on our provisional conclusions. Although the scheme which we now propose is similar in its essential features to the scheme which found favour with most of those who commented on the earlier memorandum, and certainly bears no resemblance to the rejected options, it is simpler than anything previously proposed. The list of obligations requiring writing would, for example, be shorter than the suggested list in the earlier memorandum. We would welcome comments on the details of our proposals. Secondly, we have come to the conclusion in the course of our work on this topic that it would be undesirable to deal with the formalities for the constitution of obligations without also dealing with the rules on the types of writing required for various purposes and on the authentication of writings generally. This is partly because the two topics are intertwined in the present law. The essential feature of the obligationes literis of the common law is not merely that they require writing for their constitution but that they require writing complying with certain formal requirements. More importantly, it would be confusing to recommend rules for the constitution of, say, obligations relating to heritage but to say nothing of conveyances and other deeds relating to heritage, and to

recommend rules for the constitution of obligations to repay money lent but to say nothing of bonds.

Scope of this memorandum

1.4. This memorandum covers the matter dealt with in the earlier memorandum - that is, formal requirements relating to the constitution and proof of voluntary obligations - in sufficient detail to provide a self-contained account of the reasons for, and nature of, our provisional conclusions on those matters. In addition it deals with other cases where writing is required by the substantive private law and, in some detail, with the law on the authentication of writings. In this part of the memorandum we have been greatly assisted by a paper on the authentication of writings prepared for us by Mr Kenneth G.C.Reid of the Department of Scots Law at Edinburgh University.

Formal validity and probativity

1.5. In this memorandum we draw a distinction, which we believe to be essential to a clear understanding of the issues, between formal validity and probativity. Formal validity is concerned with the question whether a writing must be denied effect because of some formal defect. Probativity is concerned with the question whether a writing proves itself, in the sense that there is sufficient on the face of it to make extrinsic evidence of its authenticity unnecessary and to cast the burden of proving that it is not genuine on anyone challenging its authenticity. Under the present law, for example, an unsigned holograph "will" is neither formally valid nor probative; a subscribed holograph will is formally valid but not probative; a forged disposition which appears

to comply in every respect with the law on the authentication of attested writings is probative but not formally valid (because it does not in fact comply with those requirements); a genuine disposition which both appears to, and does in fact, comply in every respect with the law on the authentication of attested writings is both formally valid and probative. Another way of putting it is to say that formal validity is a matter for the law on the constitution, transfer and extinction of rights (including property rights), while probativity is a matter for the law of evidence. This distinction may seem obvious but it has not always been clearly drawn in Scottish legal writing.

Writing and other means of communication

1.6. We are concerned in this memorandum only with legal requirements relating to writing. It may seem ironical that proposals are being made to simplify and rationalise these requirements at the very time when writing is being replaced to a considerable extent by other means of communication, recording and information storage. The expansion of telecommunications and computers does not, however, cause any fundamental conceptual difficulty in relation to the subject matter of this memorandum. The distinction made in Scots law has never been between obligations which may be constituted or proved by writing and obligations which may be constituted or proved orally. It has been between obligations which may be constituted or proved by writing and obligations which may be constituted or proved by other means. An expansion in the category of "other means" gives rise to no fundamental difficulty. It does, however, have policy implications. It is less

natural, and indeed less desirable, to insist on writing as the sole means of constituting or proving an obligation at a time when writing is only one of several available techniques than it may have been at a time when writing was the only available alternative to unrecorded communications by spoken words or actings. Indeed some commentators may consider that new methods of communication (e.g. by telex, or by links between computers and word processors) cast doubt on the wisdom of retaining even a very restricted category of obligations requiring subscribed writing for their constitution. Should solicitors, for example, be able to conclude missives for the sale of a house by telex or by some similar process which does not involve a signed writing? Consultees will no doubt have such considerations in mind when responding to the provisional proposals made in this consultative memorandum.

PART II- THE PRESENT LAW

Introduction.

2.1. In this part of the memorandum we set out the present law on the constitution and proof of obligations, and on the formal validity and probativity of writings. For the benefit of those who do not have our earlier memorandum to hand we summarise much of the material contained in it, but without the same extensive reference to authority.

Cases where writing is required by the substantive private law.

2.2. The common law obligationes literis. The following obligations require writing for their constitution at common law.

(a) Obligations relating to heritage, including leases for more than one year.[1]

(b) Contracts of service for more than one year and contracts of apprenticeship.[2]

(c) Submissions to arbitration relating to heritage and, possibly, submissions relating to moveables over a hundred pounds Scots in value.[3]

In addition, there is some doubt as to whether contracts of insurance require writing for their constitution by the common law.[4] There is also doubt about the position of cautionary obligations at common law.[5] We discuss later the types of writing required for different purposes.[6] Here it is only necessary to note that the general rule in relation to the common law obligationes literis is that the writing must be attested, holograph

or adopted as holograph.[7] The right to resile from a contract which has not been completed by the required type of writing may, however, be lost by rei interventus (where one party allows the other to act on the faith of the contract, as if it were complete, and alter his circumstances to his prejudice thereby) or homologation (where one party by his own actings indicates that he is regarding the contract as binding).[8] It was at one time thought that the underlying agreement had to be proved by writ or oath before rei interventus or homologation could operate but in the case of Errol v. Walker[9] it was held that it could also be proved by parole evidence of actings establishing that agreement had been reached.[10]

2.3. Analogous statutory provisions. Several statutory provisions require writing for the constitution of an enforceable obligation or for the protection of the weaker party to a transaction.[11] As our proposals will not affect existing statutory requirements unless otherwise stated, it is not necessary to list these exhaustively or in detail. They include provisions relating to:-

(a) cautionary obligations[12]
(b) certain consumer credit agreements[13]
(c) bills of exchange and promissory notes[14]
(d) certain loans to partnerships where it is intended that the lender is not to be regarded in law as a partner[15]
(e) the memorandum and articles of association of a company[16]
(f) crew agreements for merchant ships registered in the United Kingdom[17]

(g) particulars of contracts of employment[18]

(h) certain agreements contracting out of provisions of the Truck Acts[19]

(i) mobile homes[20]

(j) consent to dealings affecting occupancy rights in a matrimonial home or renunciation of those rights.[21]

2.4. Wills. Wills and testamentary dispositions and settlements must be in writing, but there is an exception for bequests of moveables of a value not exceeding a hundred pounds Scots (£8.33p.).[22]

2.5. Grants and transfers of real rights. Dispositions of heritable property must be in writing[23] as must assignations of registered leases.[24] Writing is also required for the creation of feudal rights,[25] liferents of heritable property[26] and heritable securities.[27] At common law transfers of rights in incorporeal moveables, at least where the rights are constituted in writing, must also, as a general rule, be effected by writing.[28] Assignations and transfers of various types of incorporeal moveable property - such as stocks, shares and debentures,[29] patents,[30] and copyright[31] - must also, by statute, be in writing.

2.6. Other cases. There are various other cases (e.g. in relation to carriage by road, rail or air) where writing is required by the substantive private law (and there are many where writing is required as a matter of procedural or administrative law) but none of these will be affected by our proposals.[32]

Writing required by parties.

2.7. This heading covers two different situations.[33] In both it is assumed that writing is not required by any of the rules already discussed. The first is where a party to a negotiation stipulates that he will not be bound unless the obligation or the terms of the agreement in question are set out in writing. Here writing is required for the constitution of the obligation, not by any special rule of law, but simply by the general rule that contracts require the agreement of the parties. The second situation is where the parties to a completed obligation have agreed that the obligation should be recorded or expressed in, or supplemented by, writing. Here writing is not required for the constitution of the original obligation. The purpose of the writing may be merely to record the terms of the agreement or may be to fortify the position of one party by supplying him with a formal written obligation or liquid document of debt (such as a bond) on which he can rely.

Obligations requiring proof by writ or oath.

2.8. General. Certain obligations, although they may be constituted in any way, may be proved, if not admitted on record, only by the writ of the party alleged to be bound or by his admission on the reference of the matter to his oath.[34] For this purpose the writ of the party need not be attested, holograph or adopted as holograph.[35] Reference to the oath of the party is a special procedure, quite distinct from the normal giving of evidence on oath, whereby the disputed issue of fact is perilled entirely on the oath of the party.

2.9. Loans. Proof of the loan of a sum of money in excess of £100 Scots (£8.33p.) is restricted, in an action to constitute the debt,[36] to the writ or oath of the borrower.[37] The restriction on proof does not apply to a loan of corporeal moveables,[38] nor to the debit items in a long standing current account between principal and agent even though these take the form of advances by the agent to the principal or vice versa.[39]

2.10. Obligations of relief. A contractual obligation of relief (as opposed to one which arises by force of law) may be proved only by the writ or oath of the person alleged to have undertaken it.[40] According to Dickson[41] "parole [i.e. oral testimony] will be admitted to prove the obligation when it forms part of a transaction which may be established by that means", but the scope of this exception is not entirely clear.[42]

2.11. Declarators of trust. The Blank Bonds and Trusts Act 1696 provides that

> "no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of party simpliciter ..."

This Act has given rise to great difficulties of interpretation.[43] It does not, in general, apply unless there is a document of title.[44] Nor does it apply where it is alleged that the "trustee" took the title to the property in his own name without the consent of the true owner. A pursuer may consequently prove by parole evidence that an agent or mandatory in taking title in his own name acted contrary to instructions,[45] or that

the pursuer's consent to his acting as he did was obtained by fraud or misrepresentation.[46] There is also authority for the view that an averment that the alleged trustee is the pursuer's agent, and in taking title in his own name was acting as such, may be proved by oral testimony, at least if the agency averred is not of a merely ad hoc character.[47] This view is not, however, universally held.[48] Similarly, it has been held that parole proof is competent where the defender is alleged to be a partner of a firm and to hold the property in question as trustee for the firm,[49] but again there is authority for the contrary view.[50]

2.12. Innominate and unusual contracts. A contract other than one of the familiar "named"contracts, (such as sale or hire) which is in its terms unusual, anomalous or peculiar must be proved by the writ or oath of the party interested in denying its formation.[51]

2.13. Gratuitous obligations. A gratuitous obligation may be proved only by the writ of the person bound by the obligation or by reference to his oath.[52] The restriction on proof does not apply where the obligation is part of a larger composite transaction of a type which may be proved by parole evidence.[53]

2.14. Performance or discharge. Where an obligation has been constituted in writing or is vouched by a document of debt, proof of its performance or discharge is restricted to the creditor's writ or oath.[54] The restriction in relation to obligations other than the

payment of money[55] is subject to important exceptions[56] and examples of its operation are very rare.

2.15. Payment of money under an antecedent obligation. Payment of money in excess of a hundred pounds Scots (£8.33p.) in fulfilment of an antecedent obligation may be proved only by the writ or oath of the creditor.[57] The restriction on proof applies only where the payment has been made under a pre-existing obligation: payment in a ready money transaction (e.g. in the case of a sale where the price is paid on conclusion of the contract or at the time of delivery of the goods[58]) may be proved by oral testimony.[59] Payment of the price, or an instalment, in the case of a sale on credit terms must, however, be proved by the writ or oath of the creditor,[60] as must the repayment of money lent.[61]

2.16. Gratuitous renunciation of rights. The gratuitous renunciation of rights constituted in writing may be proved only by the writ or oath of the creditor.[62] However, an exception is recognised and parole proof is admissible where it is sought to be established that the creditor's actings, or the circumstances generally, give rise to the inevitable inference that the obligation owed to him has been discharged.[63] There is a conflict of opinion on the renunciation of rights not constituted in writing. Erskine[64] and Gloag[65] take the view that in these circumstances renunciation may be proved by oral testimony, and this is probably the better view.[66] Dickson[67] and Sheriffs A.G. and N.M.L. Walker,[68] however, are of opinion that the gratuitous renunciation of a right, whether or not constituted in writing, is subject

to the same restriction on proof as a gratuitous obligation.[69]

2.17. Variation of written obligation. It is a general rule, subject to many exceptions, that it is incompetent to lead parole evidence to prove the variation of a written agreement or obligation.[70] The rule applies not only to obligations which require to be constituted in a formal writing but also to agreements or obligations which the parties have chosen to record in writing.[71]

2.18. It is not clear what will be regarded as sufficient to establish the agreement to vary. Decisions are to be found in which proof of the agreement by writ or its admission on reference to oath were apparently regarded as all that was required;[72] in other cases it was regarded as necessary that in addition to proof of the agreement to vary by writ or oath there should be proof of actings in the nature of rei interventus or homologation following upon it;[73] and in yet other cases oral agreement followed by actings or even actings alone - the actings amounting to facts and circumstances explicable only on the basis that the original agreement had been altered - have been treated as sufficient and parole proof of such agreement and such actings has been allowed.[74]

2.19. Though the decisions are frequently difficult to reconcile, it is thought that they support the following propositions.

(a) Where the contract which is alleged to have been varied is an obligatio literis[75] the agreement to vary it, if not itself in properly authenticated writing, must be proved by the writ or oath of the party who seeks to deny the variation, and actings amounting to rei interventus or homologation must be shown to have taken place. In other words, an agreement to vary must be established, in the absence of writing complying with the normal formalities for the constitution of an obligatio literis, by the same means as would an original contract.[76]

(b) Where the contract which is alleged to have been varied is in fact constituted or embodied in writing but is not in the category of obligationes literis, the agreement to vary or modify it must be proved by writ or oath, but it is not necessary to aver or prove that actings amounting to rei interventus or homologation have followed upon it.[77]

(c) A written contract, whether an obligatio literis or not, may be held to be effectively varied by parole proof of facts and circumstances which are explicable only on the basis that an agreement to vary it has been entered into by the parties: the contract is thereby "altered rebus et factis for the past and for the future by acts of the parties necessarily and unequivocally importing an agreement to alter".[78] The facts and circumstances which are held sufficient to import such an agreement normally comprise

actings by one party which infringe the terms of the written contract, and which are known to and acquiesced in by the other party.[79] Where the actings in question and the acquiescence in them are alleged to be the consequence of a prior agreement between the parties to vary the written contract, it is competent to prove that prior agreement also by parole evidence.[80] But it always remains necessary that the actings and acquiescence should in themselves manifest a clear intention to vary the original contract and be inconsistent with its continuing in force in its original form.[81] So, for example, where it was alleged that a party who was entitled to a lump sum payment had agreed instead to accept payment in a number of instalments, parole evidence of the tendering and acceptance of such instalments was held to be inadmissible since, even if established, this would not by itself be inconsistent with a subsisting right on the part of the creditor to demand immediate full payment.[82]

Types of writing required for different purposes.

2.20. General. In the case of the common law obligationes literis the writing required must be attested, holograph or adopted as holograph.[83] Where writing is required by statute, the type of writing required depends on the terms of the statute. Usually subscribed writing is all that is required, but sometimes more formality is necessary. The memorandum and articles of a registered company must, for example, be signed by each subscriber in the presence of at least one

witness.[84] A renunciation of occupancy rights in a matrimonial home under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 must be in writing sworn or affirmed before a notary public,[85] while a consent by a non-entitled spouse to a dealing by the other spouse with the home must be in attested writing.[86] In a few cases, where the purpose of the writing is merely to inform, it appears that the writing need not even be subscribed.[87] With one exception, the statutory provisions requiring writing appear to cause no difficulty and we propose no alteration to them. The exception is the requirement in section 6 of the Mercantile Law Amendment (Scotland) Act 1856 that cautionary obligations shall be in writing.[88] Although the section appears to state clearly enough that writing is required before the obligation will have any effect and that subscribed writing is sufficient, there are indications in some cases (and in the history of the section, which was designed to bring Scots law into line with English law as laid down in the Statute of Frauds) that writing is required only for proof.[89] In other cases the question has been left open whether writing is required for constitution of the obligation and, if so, whether it must be attested, holograph or adopted as holograph.[90]

2.21. The type of writing required in cases where neither the common law on <u>obligationes literis</u> nor any statutory requirement of writing applies but where the parties require writing depends on whether the writing is a mere pre-condition of liability or is intended as a self-contained source of obligation. Where a party to a negotiation has stipulated that he will not be bound

until the terms are committed to writing, the type of writing required will, as a matter of basic principle, depend on the terms of his stipulation. He could, if he thought fit, make his agreement conditional on writing attested by ten witnesses, or one.[91] Similarly, where the parties to a contract have agreed that it should be recorded in writing, the type of writing required by the contract, will, on principle, depend on its terms.[92] Where, however, a party wishes to found on a writing as the sole basis of his action (e.g. as a liquid document of debt) it is clear that the writing must be attested, or holograph or adopted as holograph, unless the value of the subject matter is under £8.33p. or the writing falls within the exception, discussed in a later paragraph, for writs in re mercatoria.[93]

2.22. Wills, unless the exception for bequests of moveables not exceeding £8.33p. in value applies, must be in writing which is attested, or holograph or adopted as holograph.[94]

2.23. Deeds granting or transferring real rights in heritable property are invariably attested (for obvious practical reasons and because the forms given in the conveyancing statutes provide for attestation[95]) but might, it has been suggested, be formally valid in some cases if holograph or adopted as holograph.[96] By statute, a standard security, and any assignation, restriction, variation, or discharge of a standard security, must be in attested writing.[97] The optional form of assignation for certain types of incorporeal moveable property provided for by the Transmission of Moveable Property (Scotland) Act 1862 must be attested.[98]

Registered securities coming under the Stock Transfer Act 1963 (which covers most stocks, shares and debentures) may be transferred by a written transfer form, signed by the transferor, which need not be attested.[99] Assignations of copyright, also, need only be "in writing signed by or on behalf of the assignor."[100] Assignations of patents, however, must be in writing "probative or holograph of the parties to the transaction".[101]

2.24. Writs in re mercatoria. The writ in re mercatoria is one of the mysteries of Scots law. Lawyers know that writs in re mercatoria enjoy special privileges but no-one is quite sure what writs in re mercatoria are or what privileges they enjoy. The general idea is that the normal rules on the authentication of writings would be too restrictive in the commercial field and that, therefore, writings in mercantile matters need not be attested, holograph or adopted as holograph even where authentication in one of these ways would normally be required. It is settled, however, that this privilege does not apply to contracts or conveyances relating to heritage[102] nor to contracts of service for more than a year.[103] As the exception for writs in re mercatoria could not prevail over or qualify the express words of a modern statute, it follows that the only relevance of writs in re mercatoria is in relation to (a) submissions to arbitration relating to moveables in mercantile matters (b) cautionary obligations (so far as governed by the common law)[104] (c) contracts of insurance (if they are obligationes literis, which is doubtful)[105] and (d) obligations which do not require to be in writing but which the parties

choose to express in writing with a view to providing a clear written obligation which could be founded on as the sole basis of an action.[106] From one point of view, therefore, it could be said that "whatever may have been the original importance of writings *in re mercatoria* their practical importance is now very limited".[107] From a wider point of view it could be argued that the exception has swallowed up the rule and, in so doing, has ceased to exist as an easily recognisable exception. The argument would be on these lines. The original rule was that all non-holograph legal writings of importance had to comply with the authentication statutes.[108] An exception came to be recognised for cases (described as transactions *in re mercatoria*) where this was obviously impracticable. The enormous increase since the 16th century in the complexity of life and in the use of writing has resulted, with the help of the courts[109] and the legislature[110] on an *ad hoc* basis, in a situation where the rule, for practical purposes, now is that writings are informal unless there is some special reason for complying with the authentication statutes. At one time attested writings were the rule and informal writings the exception. Now informal writings are the rule and attested writings the exception. It is difficult to fit writs *in re mercatoria* into the new framework. One of the questions for consideration in this memorandum is whether the rules on the authentication of writings could now be set out in a way which would reflect this reality and make any exception for writs *in re mercatoria* unnecessary. The vagueness of the exception makes this course seem doubly attractive. The accepted definition of matters *in re mercatoria* includes "all the varieties of engagements or

mandates or acknowledgements which the infinite occasions of trade may require".[111] This is not the kind of definition which would be acceptable in a modern statute.

Attested writings

2.25. Introduction. We now consider, in more detail, the law on attested writings. We are here concerned not only with cases where attested writing, or its equivalent, is required by law but also with any other case where attested writing is used.

2.26. History. Until 1540 writings were executed by seal.[112] The law was altered by the Subscription of Deeds Act 1540, which continued to require sealing but in addition required the subscription of the granter and witnesses. The number of witnesses was not specified, but two has always been regarded as sufficient, in conformity with the general rule requiring corroboration of evidence.[113] The 1540 Act is typical of the Acts that followed in at least one respect, that no sooner had it been passed than uncertainty was expressed as to its precise effect. With the 1540 Act the particular difficulty was whether the witnesses were required to subscribe. From the wording of the Act it rather appeared that they were, but the courts on the whole took the opposite view.[114] The next Act to be passed, the Subscription of Deeds Act 1579, dealt mainly with notarial execution. At one time the view was taken that this Act also added to the existing solemnities by requiring that witnesses be designed, but this view was ultimately rejected.[115] Sealing, a continuing requirement under the 1540 Act, was made unnecessary for all writings containing a clause of consent to registra-

tion in books of court by the Act of 1584 c.11, and in practice rapidly disappeared in all cases.[116] Finally, the Act of 1593 c.25[117] provided that the writer - the person, that is, in whose hand the deed is actually written - had to be named and designed in the deed; but, following the usual pattern, this provision was not rigorously enforced.[118] By the middle of the seventeenth century, then, a writing was validly attested if it was subscribed by the granter in the presence of two witnesses. It was also common, although not essential, for the witnesses to subscribe, and for writer and witnesses to be designed.

2.27. The Subscription of Deeds Act 1681, the most important of the authentication statutes, made into essential solemnities much of what had previously rested on conveyancing practice. In terms of the Act witnesses had to subscribe and be designed. The writer had also to be named and designed. The principal change in modern times has been the removal in 1874[119] of the requirement that the writer be named and designed; and by implication, the removal of the requirement, if requirement it was, that deeds be in handwriting and not typed or printed.[120] Otherwise the law has remained substantially unchanged since 1681.[121]

2.28. Subscription. Attested writings must, under the 1540 Act, bear the subscription of the granter. And "subscription", according to Lord President Clyde, "must be something written underneath the concluding part of the deed, not something above it or beside it or behind it".[122] By subscribing, the granter indicates that the writing is at an end. Anything beneath the signature is

consequently disregarded. One difficulty which has occasionally arisen is the status of a signature added on the other side of the paper from the writing itself. The rule appears to be that such a signature is permissible where there is something to connect it with the body of the deed - for example, a testing clause, or the expression "p.t.o.".[123]

2.29. Writings often extend beyond a single sheet of paper. Until 1696 additional sheets were added by pasting on to the lower end of the existing sheet to form a roll. At the point where two sheets met the granter signed in the margin, partly on one sheet and partly on the other. This was known as side-scribing. Roll-form deeds remain competent, but in practice they have long been obsolete. In their place the Deeds Act 1696 introduced "book-wise" deeds, that is, deeds where the sheets are joined at the back, like a book. Book-wise deeds were subject to the condition that "every page be...signed as the margines were before".[124] The margins in roll-form deeds were only signed once for every sheet and so the 1696 Act requirement for book-wise deeds (where each sheet consists of two pages - one side and the other) was likewise just to sign on each sheet.[125] It was, however, universal practice for the granter to sign every page. Nothing in the 1696 Act affects witnesses, and so they need only subscribe once, at the end of the writing. The 1696 Act requirement of the granter's signature on each sheet remained unaltered until 1970. Since 1970, however, the requirement has been confined to testamentary writings. For other writings it is sufficient if the granter subscribes on the last page.[126]

2.30. The question of what constitutes a valid signature is dealt with later where we discuss in particular two areas of difficulty - namely notarial execution for a person who is blind or unable to write, and execution by or on behalf of a company.[127]

2.31. Witnesses. The Subscription of Deeds Act 1681 provides

> "that only subscribing Witnesses in writes to be subscribed by any partie hereafter shall be probative and not the witnesses insert not Subscribing And that all such writes to be subscribed heirafter wherein the.....witnesses are not designed shall be null And are not supplyable by condescending vpon..the designation of..Witnesses And it is farder Statute and Declared that no witnes shall subscribe as witnes to any parties subscription Unles he then know that party and saw him subscribe...Or that the party did at the time of the witnesses subscribing acknowledge his subscription Otherways the saids witnesses shall be repute and punished as accessorie to forgerie..."

The text of this Act is examined in detail in the paragraphs that follow.

2.32. Witnesses, according to the 1681 Act, must subscribe. A person who sees the granter sign but does not sign himself is not a valid instrumentary witness and his oral testimony is inadmissible. At least two witnesses are required, but the same person may witness any number of signatures provided that they are made prior to his own.[128] "Idiots, madmen, and pupils are rejected as witnesses",[129] who must therefore be capax and, in the case of both sexes,[130] aged fourteen years or more. A granter cannot act as witness to the signatures of fellow-granters.[131] The same rule was once thought to apply to the grantee of a deed.[132] However, in

Simsons v. Simsons[133] a court of seven judges allowed a will in which one of the witnesses was also a beneficiary.

2.33. Witnesses must be designed, either in the deed itself, in the testing clause, or underneath the signature.[134] In practice, witnesses are almost never designed in the deed itself. They are, however, very often designed in the testing clause, and in such cases it is normal practice, although not a statutory requirement,[135] to include the witness's full name. This practice is not without its risks, for a material error in the name will detach the accompanying designation from the witness who signed the deed and leave him undesigned.[136] Witnesses are also commonly designed after their signature. A normal designation consists of the witness's address and, sometimes, his occupation, but difficult questions can sometimes arise as to the sufficiency of a particular designation. The considerations to be applied to such cases are set out clearly by Hume as follows.[137]

> "The Statute..has not given any precise or special direction concerning the sort of designation, and it is therefore held sufficient that it be such a one, although not very particular (not the best possible), as substantially serves the purpose, and affords the means of discovering the individual, in case there be occasion to make enquiries into the fact. Indweller in such a place might, for instance, be sufficient, - if it is a small place - a village of a few houses - or a farm steading with a few cottages adjoining. If it is a larger place - a town or city - certainly something fuller and more particular must be said: the profession of the person, the street where he dwells or the like must be set down."

2.34. The 1681 Act requires of the witnesses that they either see the granter subscribe or hear him acknowledge the subscription as his own. The acknowledgement is usually verbal but it need not be: "the statute covers any act or any word which leaves no doubt in the mind of the witness as to the fact of the acknowledgement having been given".[138] It is not necessary that the two witnesses ever meet. Thus, one may see the act of subscription while the other receives a subsequent acknowledgement, or indeed both may receive acknowledgements on separate occasions.[139] The 1681 Act additionally requires that the witnesses know the granter. The witnesses are therefore conceived of as a safeguard against forgery. They are attesting not merely to the fact of subscription but to the identity of the subscriber. In practice, however, this requirement has been lightly enforced, and the safeguard correspondingly devalued. In Brock v. Brock, the leading case, a witness was said to require merely "credible information that the person whose signature he attested was the granter of the deed".[140] "A simple introduction by name is all that is necessary if the witness does not know the granter personally."[141]

2.35. Testing clause. Attested writings usually end with a testing clause setting out the place and date of execution and the designations of the witnesses. Strictly, however, a testing clause is not necessary in most cases. The place and date of execution are not required solemnities,[142] while witnesses may be designed elsewhere.[143] But where a writing contains vitiations a testing clause is required if the vitiations are to be authenticated as part of the writing.[144] By the very

nature of the information contained in a testing clause, it cannot be added until after execution. As the testing clause is not itself authenticated, it does not form part of the writing. It is merely an informal postscript, providing details of attestation. It cannot competently touch on the substance of the writing.[145] Conveyancing practice, however, seems deliberately designed to disguise the anomalous status of the testing clause. It is usual to ask the granter and witnesses to leave a substantial gap between their signatures and what appears to be the end of the writing. The testing clause is then interpolated above the signatures. The overall effect is to make the testing clause appear to have been written prior to execution. This awkward, and perhaps rather undesirable, practice has been used by conveyancers more or less continuously since the seventeenth century. It may be explained historically as a pragmatic attempt to pay lip-service to the requirement of the 1681 Act that witnesses be designed "in the bodie of the writ".[146] That justification disappeared, however, in 1874.[147]

2.36. Permitted timescale. Four distinct stages may be identified in the execution of an attested writing.

(1) The granter subscribes.

(2) The two witnesses subscribe, having first either seen the granter subscribe or heard him acknowledge his signature.

(3) The testing clause is added.

(4) The witnesses are designed (where this has not already been done at (3)).

There is considerable uncertainty as to how far these four stages require to be continuous. Must all four

stages be completed immediately, one following the other? Or, if intervals of time are permitted, how long may they be?

2.37. The rule of both stages (3)[148] and (4)[149] is the same. They need not be completed contemporaneously with the subscription of the granter and witnesses, but may be added at any time before the writing is registered for preservation[150] or founded on in court.[151] The position is not affected by the supervening death of the granter.[152]

2.38. The rule for the completion of stage (2) is both more complex and less certain. The governing provision is the following passage from the Subscription of Deeds Act 1681:

> "...no witnes shall subscribe as witnes to any parties subscription Unles he then know that party and saw him subscribe...Or that the party did at the time of the witnesses subscribing acknowledge his subscription..."

The rule appears from this passage to depend on whether the witness has actually seen the granter sign or whether he has merely heard him acknowledge his signature. Where the second alternative has been followed - where, in other words, the witness signs after hearing the granter acknowledge his signature - matters are reasonably clear. In terms of the Act the granter must acknowledge his signature "at the time of the witnesses subscribing". Absolute compliance with this rule has not been, and probably could not be, insisted on. It was said, in Thomson v. Clarkson's Trs., that the Act must be given "a fair and reasonable construction",[153] and so in that case a delay of forty five minutes was

allowed. No precise time limits have ever been laid down, the courts having taken refuge in statements such as that there must be one continuous transaction. The first alternative - subscription after having seen the granter subscribe - presents greater difficulties because the Act is silent on this point and there has been some difference of judicial opinion as to the current rule. On one view the same rule applies as when the witness hears the granter acknowledge his subscription.[154] On another view the witness is free to subscribe at any time before the writing is registered for preservation or founded on in court, although any real interval may require an explanation.[155] The former view appears to have found favour with the House of Lords in Walker v. Whitwell although it was not necessary to decide the point in that case.[156] What that case did decide was that the witness's signature cannot be added after the granter has died or after he has withdrawn the witness's authority to act as such. The case concerned a will which was subscribed by one of the witnesses four weeks after the testator's subscription. The real difficulty, however, was not the lapse of time but the fact that the testator had died before the witness signed. This was said by the House of Lords to separate the case from previous cases. The witness's signature was part of the statutory solemnities and thus a requirement for formal validity, not mere probativity. At the testator's death there was no formally valid will. None could be provided later. This would have been sufficient for the decision of the case but Lord Dunedin and Lord Shaw of Dunfermline also based the decision on the cancellation of the witness's authority to sign. Starting from the well-established principle that a witness may only sign

at the request, express or implied, of the granter, the court evolved the doctrine that the request may be withdrawn at any time. According to Lord Dunedin, the witness's right to sign depends on "a continuing request which must be held as repeated every moment till subscription is effected".[157] This precarious right may be withdrawn by the granter at any time; and on the granter's death it falls automatically. Accordingly, the witness's signature in Walker was invalid and the will void. The rule established by the decision in Walker v. Whitwell gives rise to the surprising conclusion that the granter of a delivered inter vivos writing may prevent its completion by withdrawing permission for the witnesses to sign.

2.39. It is explained above that the four stages identified as comprising execution of an attested writing need not be completed contemporaneously. Delays, although uncommon in practice, are in some cases tolerated as a matter of law. The possibility of delay raises two difficult questions about the status of uncompleted writings. First, at which of the four stages does a delivered writing become operative? And second, can a party whose cooperation is required in order to complete execution - for example, a witness who has yet to sign - be compelled to cooperate? The answer to neither question is certain. A delivered writing probably does not become operative until stages (1), (2) and (4) have all been completed.[158] Stage (3), the testing clause, is not in itself a statutory requirement.[159] It is, however, possible to read section 38 of the Conveyancing (Scotland) Act 1874 as conferring immediate validity on a writing at the end of

stage (2), provided only that stage (4), the designing of witnesses, is completed before the writing is registered for preservation or founded on in court. The answer to the second question is probably in the negative: it does not seem possible under the present law to force an unwilling party to cooperate.[160]

2.40. Vitiations. Any alteration made to a writing after it has been written or typed is referred to as a "vitiation". The main examples of vitiations are discussed further in the following paragraph. Vitiations are subject to the presumption "that they have been made after the granter and witnesses had signed the deed, since no person is presumed to sign a blotted or vitiated writing".[161] Unless, therefore, the presumption is rebutted, vitiations are not part of the writing and are disregarded.[162] The policy behind this rule is the prevention of forgery, the "nervous apprehension that the party who had possession of the deed has fraudulently vitiated it in his own favour".[163] The presumption of subsequent addition may be rebutted. At one time this could be done by the writ or oath of the granter, or even possibly by parole evidence.[164] This is no longer so. The present law was established by Reid v. Kedder,[165] in which all evidence extrinsic to the writing itself was rejected. A vitiation is only accepted as part of a writing where it has been authenticated within the writing in the manner explained below.[166] This rule is usually justified as a necessary corollary of the probative status enjoyed by attested writings.[167] In practice, as will be explained

later,[168] its inflexibility is ameliorated by the operation of section 39 of the Conveyancing (Scotland) Act 1874.

2.41. Two kinds of vitiations may be identified.

(1) The deletion of words at one time included in the writing is a vitiation. Deletion is usually achieved either by erasure or by scoring out.

(2) The insertion of words into a writing - whether by interlineation or by marginal addition - is a vitiation. The position is less clear where words are inserted into a blank space apparently left deliberately for this purpose. This issue arises every time a pro forma printed deed, for example, a standard security, is used and is therefore of considerable practical importance. Two different views of the law can be found among the institutional writers. According to Stair,[169] words added to blanks are vitiations and come within the presumption of subsequent addition. Unless they are authenticated within the writing they must be disregarded as pro non scripto. The difficulty for pro forma writings created by this view may be partly solved by section 149 of the Titles to Land Consolidation (Scotland) Act 1868, which authorises attested documents to be partly written and partly printed.[170] Stair's view is not accepted by either Erskine or Hume.[171] Their view is that words added in this way are not vitiations but fall to be treated in exactly the same way as the rest of the document. No separate authentication is required. The case law on

this area is scant and equivocal[172] and the conflict of views remains unresolved.

In the great majority of cases the presence of a vitiation is obvious from a physical inspection of the writing. A duly attested writing in which no vitiation is apparent is, of course, probative, and the onus of establishing the existence of a disputed vitiation rests on the challenger.[173]

2.42. The presumption that a vitiation has been added after subscription may only be rebutted by its separate and express authentication within the writing.[174] In the absence of such authentication, the vitiation is not treated as part of the writing and, subject to the minor exceptions explained below,[175] falls to be disregarded. The writing is read as if the alteration had never taken place: words added are ignored, and words deleted are reinstated. This simple principle becomes difficult to apply where words in a writing have been deleted in such a way that they can no longer be read. Stair's solution to this problem was to introduce a second presumption. Words made illegible by deletion are presumed to have been essential "unless the contrary appear by what precedes and follows". Accordingly, the writing is presumed to be void.[176] This is a "malignant principle of construction"[177] which does not appear to have found favour in later authorities. Certainly it was not followed in Gollan v. Gollan, a leading case in this area.[178] In Gollan, as so often in practice, certain words had been erased and then replaced by different words superimposed on the erasure. The new words fell to be disregarded as unauthenticated

vitiations, but the House of Lords declined to apply the Stair presumption to the deleted words. "As to what particular words were previously in the deed", said Lord Chelmsford, "no presumption is admissible".[179]

2.43. An unauthenticated vitiation is not part of the writing in which it appears, but it does not always follow that the vitiation is completely disregarded. There are three special rules.

(1) In terms of the Blank Bonds and Trusts Act 1696 it is permissible to add the name of the grantee to a writing in the interval between execution and delivery where this is done in the presence of the original witnesses. This provision appears to be the last survival of an older principle which in certain circumstances authorised the completion of blanks after execution.[180]

(2) In the case of wills, an unauthenticated vitiation, while not actually part of the will, may be taken as revocation by the testator of the provision in question.[181] This is a rule of the law of succession rather than of the law of authentication.

(3) By the Erasures in Deeds (Scotland) Act 1836 notices of title,[182] and also notarial instruments[183] and instruments of sasine, may not be challenged "on the ground that any part of the said instrument is written on erasure, unless it shall be averred and proved that such erasure had been made for the purposes of fraud, or the record thereof is not conformable to the

instrument as presented for registration". The favour conferred by the 1836 Act is presumably due to the fact that the deeds in question may only be executed by notaries public and, in the case of notices of title, by solicitors.[184]

2.44. Additions which are holograph of the granter are sometimes said to be valid as independent holograph writings.[185] But, subject to this possible exception, post-execution alterations are not part of the authenticated writing and are disregarded. The position for pre-execution alterations is different. They are presumed to have been made after execution, but that presumption may be rebutted by separate and express authentication within the writing itself.[186] The approved method of authentication is for the vitiation to be clearly identified and then declared to have been made prior to execution. Where the vitiation takes the form of a marginal addition it may also be necessary for the granter to sign the addition, pre-names on one side and surnames on the other.[187] The declaration of addition before execution may be made either in the body of the writing or in the testing clause. In practice it is always made in the testing clause. This practice exposes a major defect in the present law. The testing clause is not written until after execution;[188] and it is usually completed not by the granter, a safeguard of sorts, but by the grantee. There is therefore the disturbing possibility that a fraudulent grantee could doctor an executed writing and then purport to authenticate the alterations in the testing clause. Such a writing would be ex facie valid[189] and probative,

leaving the onus upon the defrauded granter to show that forgery has taken place. This defect has often been commented on,[190] but although the courts at one time suggested that a post-execution testing clause could not authenticate a vitiation,[191] this is no longer insisted on[192] and the defect remains.

2.45. Defective execution. The consequences for a writing of defective execution depend upon two variants: upon the seriousness of the defect (considered further in the immediately following paragraph), and upon whether the defect is latent or patent. Where the defect is patent and serious - where, for example, a witness has failed to sign - then the consequence is invalidity. (We are not here concerned with holograph writings or writs in re mercatoria.) But where the defect is latent - the witness, perhaps, has signed but after too great an interval or without knowing the granter - then matters are rather different. The writing, although equally failing as an attested deed, gives the appearance of valid execution. It is therefore probative. Although actually invalid[193] it is presumed to be valid. The onus of establishing the invalidity rests on the person challenging the writing, and may never be discharged.

2.46. Until 1874 any defect in the solemnities of execution was fatal to the writing. If the solemnities were not properly complied with the writing was invalid. This rule was altered by section 39 of the Conveyancing (Scotland) Act 1874. By section 39 certain minor defects, known as "informalities of execution", do not invalidate a writing or render it ineffective, although

they do prevent it from being probative. Section 39 reads:

> "No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument or writing bears to be attested, shall lie upon the party using or upholding the same..."

The ultimate effect of section 39 is to create a new type of valid, although improbative, formal writing. In practice, of course, no-one sets out with the deliberate intention of executing such writings. They are invariably attempts at properly attested writings which have gone wrong.

2.47. What are the requirements for a validly executed writing under section 39? The section itself gives surprisingly little help: in Lord Neaves' words it is "not very happily framed".[194] Before the section can be prayed in aid at all, the writing must appear[195] to have been subscribed by the granter and two witnesses. On this, at least, the section is clear. The other requirements,however, are not articulated. The section relates to writings marred by some "informality of execution". The normal solemnities of execution are divided into two classes: those which are essential for validity even under section 39, and those the omission of which is a mere "informality of execution" and which are

not therefore essential for validity. "Informality of execution", although a new term, is not defined. What, then, is an "informality of execution"? The manner in which section 39 is drafted has forced the courts to address this question indirectly. The starting-point has been the fact that a writing coming under section 39 is improbative. If authenticity is disputed, the section requires the person founding on such a writing to prove that it was subscribed by the granter and witnesses by whom it bears to have been subscribed. In requiring certain matters to be proved in certain circumstances the section appears to be prescribing a number of solemnities as essential. And from here it is a short step to argue that the omission of any other solemnity must be permissible as a mere "informality of execution".[196] In order to define "informality of execution", therefore, it is necessary first to look closely at what it is that has to be proved when the writing is challenged. What has to be proved, in the words of the Act, is that "such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument or writing bears to be attested". It was settled as early as 1876 that "subscribed" means signed once, at the end of the writing.[197] There is no need to sign on every sheet. There was less agreement on a more fundamental question. Is it necessary only to prove the bare fact of subscription? Or does section 39 require that the subscription be in conformity with the rules for attested writings so that the witnesses must have seen the granter sign or heard him acknowledge his signature and then signed themselves within the permitted timescale?

Decisions can be found to support both points of view,[198] and it was not until Walker v. Whitwell that the authoritative conclusion was reached that any subscription must conform to the rules for attested writings.[199] With the decision in Walker it became possible for the first time to state the requirements for validity under section 39 with some degree of certainty. To come within section 39 a writing must be subscribed by the granter and two witnesses. The granter need only subscribe once, at the end, but in every other respect the subscriptions must obey the rules governing attested writings. Nothing further is required. Any other defect is an "informality of execution" and does not invalidate the writing. The main examples of such informalities are failure to design witnesses,[200] to spell their names correctly in the testing clause,[201] to authenticate vitiations,[202] and, in the case of wills, to sign on every sheet.[203]

2.48. The consequences of defective execution may extend beyond possible nullity of the writing to touch the person responsible for the defect. A person who intentionally or negligently causes defective execution may be liable in damages to a party who suffers loss.[204] If he is a member of a professional body, for example the Law Society of Scotland, he may also attract disciplinary action from a professional tribunal. And finally, and most seriously, there is the possibility of criminal liability. The perpetration of a probative writing vitiated by some latent defect with the intention that some other party should take the writing as properly attested is the common law crime of fraud. Examples of such latent defects are an underage witness, or a witness

signing after an unlawful interval, or actual forgery, whether of a signature or of the contents of a writing. In the case of forgery the crime may also amount to uttering of forged documents.[205] There is also one special statutory provision. By the Subscription of Deeds Act 1681 a witness who signs without having first either seen the granter sign or heard him acknowledge his signature is "repute and punished as accessorie to forgerie".[206]

Holograph Writings

2.49. Meaning of holograph. A holograph writing is a writing subscribed by the granter and written by his own hand. There is no need for witnesses. Such a writing is formally valid, although improbative. A holograph deed is almost always handwritten. In McBeath's Trs. v. McBeath,[207] however, the court was called upon to decide the validity of a will which had been typed by the testator and then signed. By a bare majority, the court of seven judges held the will valid as a holograph writing. Typing was said to be the testator's usual method of writing. McBeath's Trs. may be contrasted with a subsequent Outer House case, Chisholm v. Chisholm,[208] in which another typewritten will was denied effect. In McBeath's Trs. the will had contained a typewritten declaration that the will was typed by the testator, and this was said, not entirely convincingly, to separate the later case from the earlier. Holograph writings are not, as might be expected, confined to individuals. A deed written by one of the partners is treated as holograph of a partnership.[209] And it is possible that an analogous rule exists for companies. It is not necessary for the entire writing to be

holograph of the granter. "Writs are accounted holograph", according to Stair,[210] "where large sentences are written with the party's hand, although not the whole writ". In the case of wills the courts have adopted a fairly lenient approach - a matter of considerable practical importance in relation to will forms, that is to say, printed forms with spaces left for the testator to complete. It not infrequently happens that will forms are signed by the testator but not attested. The validity of the will then depends on whether it can be regarded as holograph.[211] The approach adopted by the courts is to read the entire will, including the printed words. If the essentials of the will are to be found in the holograph section, and if the printed section is merely formal and superfluous, then the entire will is treated as holograph. If, however, the will fails this rigorous test, as it usually does, then it is invalid.[212]

2.50. Subscription. Holograph writings must be subscribed: "if they be not subscribed, they are understood to be incomplete acts, from which the party hath resiled".[213] A passing tendency to permit unsubscribed writings was firmly and conclusively checked by a court of seven judges in Taylor's Exrx. v. Thom.[214] Subscription means signature at the end of the writing.[215] Anything written underneath the signature is regarded as a later and unauthenticated addition,[216] unless it is itself subscribed or, possibly, initialled.[217]

2.51. Alterations. Holograph writings are often "home-made", without access to professional advice; and,

perhaps for this reason, it is not uncommon for the text of the writing to contain alterations made by the granter. What is the status of such alterations? The answer depends on when they were made.

(1) A holograph alteration by the granter made before subscription forms part of the authenticated writing. As it is in the granter's handwriting, no separate authentication, whether by express declaration or by initialling, is required.[218] The strict rules which govern attested writings[219] have no counterpart. But of course alterations, like the rest of the deed, are improbative, and it is for the person founding on the deed to show that they were made by the granter before subscription.

(2) In the case of a testamentary writing an alteration made after subscription, although not part of the writing originally subscribed, may nonetheless have legal force on its own account. Such alterations take one of two forms. They may be deletions or erasures of part of the existing text and thus potentially in revocation of that text. The governing rules on the revocation of testamentary writings belong to the law of succession rather than the law of authentication.[220] Alternatively, the alterations may be insertions of additional text - codicils, in effect. Opinion is divided as to the effectiveness of such codicils. The rule which requires all holograph deeds to be

subscribed[221] suggests strongly that a codicil which has been neither subscribed or initialled must fail.[222] It is, however, possible to argue that in inserting additional holograph text within the body of the writing (whether by interlineation, marginal addition or possibly even postscript in certain cases) the testator's intention was that the new text should be covered by his existing signature.[223] In the case of inter vivos holograph writings it is thought that unauthenticated alterations after subscription have at best no legal force and, at worst, vitiate the writing, or the severable part of it in which they appear.[224] The law on this point is, however, undeveloped.

Writings "Adopted as Holograph" by docquet

2.52. A writing which is not in fact in the handwriting of the granter (for example, one which is typed or printed or written by someone else) will nonetheless be treated as a holograph writing if the granter adds below it in his own handwriting the words "adopted as holograph".[225] These words usually precede the signature but may also be written below it.[226] Other words to the same effect, such as "accepted as holograph", produce the same result.[227] In practice, the use of the docquet "adopted as holograph" is extremely common. It enables simple typewritten documents (such as missives) to comply with the rules on the authentication of writings, and hence to be formally valid, without the considerable inconvenience of attestation. The development of the law on writing "adopted as holograph" can be seen as a pragmatic

response to the strictness of the rules on the authentication of writings. The development has not, however, been without challenge. Lord McLaren complained that "in sanctioning this practice the Court came dangerously near to legislation".[228] And there is something fundamentally unsatisfactory about requiring an unattested writing to be in the granter's hand, or very substantially so, if it is to be regarded as properly authenticated and then allowing this requirement to be avoided by the use of a simple three word formula. The justification for conferring a special privilege on holograph writings is that each person's handwriting has a distinctive individuality. This justification practically disappears in the case of typed writings "adopted as holograph". As Lord Anderson said in McBeath's Trs: v. McBeath:[229]

> "In practical application...the point as to individuality is reducible to this - that, if a testator can write three words, 'adopted (or accepted) as holograph', he can make a holograph will; if not, he cannot. The three words, however illegibly written, appended to a document printed or typed by any third party, make proof competent, although, for purposes of comparatio literarum, the words may be practically useless; while in the absence of the three words the most conclusive evidence that every letter of every word was typed by the granter must be excluded. Such a result, to my mind, is grotesque..."

The reforms which we suggest later would eliminate the need for writings to be adopted as holograph.

Other Adopted Writings

2.53. Introduction. A writing not in itself attested or holograph or adopted as holograph may be adopted by another writing which is holograph or attested. The effect of adoption is not to make the adopted writing

formal on its own account, but rather to make it formal as part of the writing which adopts it. The informal writing is thus incorporated as part of the formal writing. It is possible to distinguish two different methods of adoption. In the first place, a formal writing may adopt a particular informal writing. This method, which may be termed special adoption, is only available where the informal writing is already in existence. And in the second place, a formal writing may adopt all informal writings falling within a particular specified class. This second method, which may be termed general adoption, is of particular use for informal writings which are anticipated but which are not yet in existence.

2.54. Special adoption. An informal writing may be specially adopted as part of a formal writing. Lord President Clyde explains the principle as follows (in the context of wills).[230]

> "Subscription is unnecessary if, in another writing which unmistakably identifies that document, the testator designates and adopts it as containing his will. In that case, the adoptive writing is really the will, and the document containing the directions plays the part of a schedule annexed to and incorporated with it."

The informal writing which is the object of adoption need not itself comply with any particular formalities. Certainly subscription, as Lord Clyde explains, is unnecessary.[231] The special adoption may be express or implied.

2.55. An informal writing may be expressly incorporated into an attested or holograph writing. It is by virtue

of this principle that schedules and plans are annexed to conveyancing deeds, and that earlier deeds are referred to by later deeds for the purpose of incorporating descriptions and real burdens.[232] Other examples may also be found from outside normal conveyancing practice. One such example led to the litigation in Inglis v. Harper.[233] This case concerned a direction contained in an attested will that the executor should give effect to the bequests contained "in a letter signed by me of this date". It was held by the House of Lords that the letter had been properly incorporated as part of the attested will.

2.56. Implied adoption gives rise to more difficulty. In Callander v. Callander's Trs.[234] a bond of provision, in informal writing, was referred to in, and to some extent re-stated by, various subsequent formal writings. None of the subsequent writings contained an express clause adoptive of the informal writing. It was held by a majority of the whole court that the informal writing was nonetheless validly authenticated. The court was not, however, at one as to the reasons for this decision. For some judges the later writings were seen as in homologation of the earlier informal writing.[235] Another judge thought the principle might be that the granter of a formal deed has power to dispense with the rules of authentication in respect of other deeds.[236] But it is as an example - indeed, the first clear example - of implied adoption that Callander has been received into the case law.[237] In referring to the earlier writing, the argument goes, the later writing by implication adopted and incorporated it. Since

Callander a number of cases have arisen in which an earlier and informal will has been held impliedly adopted by a later and formal will, and the doctrine is now well established. The theory underlying implied adoption should not, perhaps, be pressed too hard. It is settled, for example, that it is not necessary that the granter realise the invalidity of the informal writing.[238] It is sufficient that he intended both writings to have effect, an intention which can usually be demonstrated by showing the second writing to be "meaningless and ineffectual"[239] without the first. It would appear to follow from this rule that the second, adoptive, writing must always have been intended by the granter as an operative deed, but this conclusion was disputed in the most recent case, McGinn v. Shearer.[240] In that case an informal acceptance of an offer to buy heritage was accompanied by a subscribed holograph covering letter. A majority of the First Division was prepared to treat the informal acceptance as valid on the basis that it had been impliedly adopted by the formal covering letter. The court was clearly influenced by what it saw as undue strictness in the law relating to sale of heritage. But the result is not entirely satisfactory: an informal writing is given effect because it is treated as incorporated into a second writing which, although itself formal, was never intended as more than a covering letter.

2.57. General adoption. Instead of adopting a particular, named writing, a formal writing may adopt all writings of a particular class. Such general adoption is especially useful for adopting future writings, and in practice it is used mainly for this purpose. A clause

in a formal writing which adopts a specified class of future writings is called an enfranchising clause. General adoption works in the same way as special adoption. A writing which is adopted by an enfranchising clause is not formally valid on its own merits but only as a part of the earlier, formal writing. It amplifies, and sometimes amends, the original deed. Criticisms to the effect that enfranchising clauses in some way suspend the usual rules of authentication are, accordingly misconceived.[241] Enfranchising clauses are in practice never found outside wills. Their function is to authenticate subsequent informal codicils.[242]

2.58. In principle, general adoption follows special adoption[243] in not requiring any particular formalities of the writing being adopted. Thus, according to Lord Curriehill:[244]

> "When the estate is taken out of the hereditas jacens of the defunct, and vested in trustees by a probative deed, it is competent for the testator to prescribe the kind of evidence upon which the trustees shall be guided in disposing of the estate.".

But there is a difficulty here. With special adoption there can never be any doubt that the granter wished the informal writing thus specially referred to to take effect. With general adoption matters are different. By definition, no particular writing is specified; and there may be a number of writings which potentially come within the terms of the enfranchising clause. How is it to be determined which of these writings represents the concluded intention of the granter? The usual indicator of concluded intention is the presence of a signature. And for this reason Lord President Cooper was of the view that any informal writing must at the very least be

subscribed.[245] Unsubscribed codicils have, however, been enforced on more than one occasion.[246] And moreover, there seems no reason why a signature should be the only permissible evidence of the granter's intentions. Other factors may also be of help.

> "The cases to which I have referred appear to me to establish that the validity of the unsigned codicil in the present case must depend on whether the facts connected with the document, together with any reference in the formal settlement to the recognition of informal documents, lead to the inference that the testator must have intended the informal document to be read along with and as part of the formal will...It appears to me that, in putting the codicil in a sealed envelope with a signed direction to his agents that the sealed envelope should be placed along with his will, the testator intended that on his death the codicil should be treated as part of his will."[247]

It should also be noted that Lord Cooper's view makes the enfranchising clause more or less redundant. This is because the typical informal codicil is written in the granter's own hand. If such a codicil is subscribed, as Lord Cooper requires, then it is already formally valid as a holograph writing. The enfranchising clause is unnecessary. If, however, it is not subscribed, then, on Lord Cooper's view, it is null and cannot be rescued by an enfranchising clause.

2.59. It appears, therefore, that the informal writing need not be subscribed as a condition of adoption. But the writing must, of course, satisfy whatever conditions are laid down in the enfranchising clause in question.[248] In the clause most often found in wills, executors are instructed to give effect to any writing however informal which is "under my hand". Prolonged disagreement as to the meaning of "under my hand"[249] was finally resolved by

a court of seven judges in Waterson's Trs. v. St. Giles Boys' Club[250] which held the expression to mean "subscribed by me".

2.60. Effect of adoption. An adopted writing, it has been explained, is not formally valid on its own account. Rather, it is formally valid only as part of the writing by which it is adopted. It follows that the operative date of the informal writing depends on whether it was executed before or after the formal writing, on which its validity depends. Where the informal writing was executed first, it does not become operative until the execution of the formal writing, on which its validity depends. Where, however, the informal writing is executed second, then it is immediately operative. The informal writing is not, by definition, itself probative: the onus of proving that it is in fact the writing referred to in the adoptive writing rests on the party founding on it.[251] In many cases, of course, this onus is easily discharged.

Probative writings.

2.61. Requirements for probativity. To be probative, in the sense that it proves itself without the need to produce evidence of its authenticity, a writing must appear, on its face, to have been executed in accordance with the statutory requirements for attested deeds.

> "...If a deed is authenticated by the necessary solemnities, it is not only valid, but is probative - by which I mean, that when a deed appears with the prescribed statutory solemnities on its face, these solemnities are such credentials of its authenticity as to create a legal presumption of its genuineness, without any other evidence, and the public are to take it as carrying with it sufficient evidence that

it is the deed of the party by whom it professes to be granted."[252]

2.62. Effects of probativity. A probative writing, until reduced, proves its own authenticity and formal validity.[253] Its testing clause, including the date (if mentioned) is presumed to state the truth.[254] It is, however, possible to reduce a probative writing by proving that, despite appearances, it was not in fact signed by the supposed granter or executed in the required way.[255] The onus on anyone seeking to reduce a probative writing is heavy, particularly if it is admittedly signed by the granter and the challenge is based on non-compliance with the other requirements of the authentication statutes.[256] Moreover a granter may be personally barred from challenging the validity of his own writing on the ground of a latent defect in attestation.[257]

PART III - REFORM: GENERAL CONSIDERATIONS

Introduction

3.1. In this part of the memorandum we attempt to draw together the criticisms of the present law, many of which are implicit in the account of it already given, and to set out what we see as the objectives of any proposed reform. The results of the consultation on our earlier memorandum on the constitution and proof of voluntary obligations[1] convince us that some reform is required in that area of the law. Our survey of the present law on the authentication of writings suggests that reform is no less necessary in that related area. Much of the case law in both areas has been concerned with attempts by the courts to alleviate the effects of a system which had become too strict for modern conditions. Techniques used have included the following:-

(a) the use of the doctrine of personal bar (and particularly rei interventus and homologation)[2]

(b) the recognition of sweeping exceptions[3]

(c) the interpretation of old statutes in such a way as to reduce strict requirements[4]

(d) the relaxation of the authentication requirements in the case of writings required only for proof (and not constitution) of an obligation[5]

(e) a benevolent approach to holograph and testamentary writings[6]

(f) the sanctioning of the "adopted as holograph" technique[7]

(g) a lenient approach to the adoption of informal writings by separate formal writings.[8]

Statute law too has intervened to alleviate the strictness of the rules on the formal validity of writings. Perhaps the most notable example, although by no means the only one,[9] is section 39 of the Conveyancing (Scotland) Act 1874 which, in effect, considerably reduced the requirements for formal validity. The main question for consideration in this memorandum is whether it might not be possible to achieve the right balance between formality and informality in a more simple and direct way, which would avoid many of the complications and inconsistencies of the present law.

The case for reform

3.2. Excessive formality. Formal requirements are useful, up to a point.[10] They may help to ensure that evidence is available later. They may provide an indication of concluded intention. They may help to differentiate what is legally binding from what is not. They may help to protect the weak or unwary by, for example, providing an opportunity for second thoughts.[11] On the other hand requirements of form may add to the expense and inconvenience of undertaking even fairly simple transactions and may invalidate transactions or writings on purely technical grounds. In certain cases they may enable the unscrupulous to escape from their obligations by founding on formal defects.

3.3. In many legal systems the trend appears to be away from formality. Professors Zweigert and Kötz, after undertaking á survey of the role of formalities in the formation of voluntary obligations in a number of legal systems and in particular in Anglo-American, French and German law, reached the following conclusions.[12]

"This survey suggests that while no legal system can entirely dispense with formal requirements, the trend is towards informality, at any rate in the area of classical private law. One indication of this is the unanimity in favour of informality when the law of international sales contracts was being unified... The same tendency can also be seen in the repeal of the Statute of Frauds in England in 1954, which left contracts of guarantee and contracts for the sale of land as the only transactions requiring writing. France has gone particularly far in dispensing with formal requirements: commercial transactions never require any particular form, and in other areas the doctrine of commencement de preuve has been so extended by the courts that a plausible claim hardly ever fails merely because there is no written evidence ...Only in the systems of the German legal family is there no comparable development, those being the systems where the formal requirements are primarily designed to protect inexperienced persons from surprise rather that just restrict the methods of proof."

3.4. If requirements of proof by writ or oath are left on one side,[13] the present law of Scotland is perhaps not open to serious criticism on the ground of excessive formality. As we have seen, there are only a few cases where formal legal writing is required for an effective legal act. Moreover, the requirements for the formal validity of writings, although initially strict, have been considerably relaxed by statute[14] and by the use of the "adopted as holograph" formula. The present law is nonetheless open to the criticism that it errs on the side of excessive formality. One well-known area where this causes real difficulty is testamentary writings. Many home-made wills, although genuine and duly subscribed, fail to receive effect because they have not been properly authenticated. It is our provisional view that the list of obligations requiring writing for their constitution, and the formalities required for formal

validity and probativity of writings, could with advantage be reduced and rationalised.

3.5. Unnecessary restrictions on evidence. The rules of the present law restricting proof of certain obligations (or the variation, performance or discharge of certain obligations) to writ or oath have been subjected to criticism. The effect of these rules is to prevent a party relying on an obligation or exercising a right or setting up a defence, which he might well be able to establish by parole evidence if that were admissible, merely because he cannot prove it by writ. Reference to the other party's oath is a somewhat archaic procedure and cannot be regarded as an adequate alternative. There have been particularly hard cases relating to proof of payment under an antecedent obligation. In Hope Brothers v. Morrison[15] a builder was sued by a firm of plasterers for payment of sums allegedly still due under a contract to do plasterwork. The builder produced parole evidence that the sums had been paid. As he did not, however, produce any writ of the pursuer the decision went against him. In the course of his opinion Lord Sorn said:

> "...this decision is not one at which it gives me any satisfaction to arrive, since, if it had been open to me to proceed upon the parole evidence in the case, my decision would probably have been the other way .... These reflections are, no doubt, immaterial so long as the rule that payment under an antecedent obligation, albeit only a verbal one, can only be proved by writ or oath remains part of our law, but they prompt me to doubt the desirability of the rule and to think that the question of discarding it from our law is a question which is due - or perhaps overdue - for examination.".[16]

3.6. Unnecessary complexity. The present law, with its four categories of obligations - those requiring writing for their constitution at common law, those requiring writing by statute, those requiring proof by writ or oath, and those capable of being constituted and proved in any way - seems unnecessarily complex. The rules on the authentication of writings also seem unnecessarily complex. Instead of beginning with apparently strict rules of general application and proceeding to produce a workable system by recognising exceptions and qualifications it would be simpler to begin with a general rule of informality and then state those cases where writing is required and the type of writing required for different purposes.

3.7. Uncertainties and obscurities. "The law which requires writing for the constitution or proof of certain obligations is so uncertain and unsatisfactory that it is almost impossible to state a principle which is of general application."[17] Examples supporting this proposition are not hard to find. It is not clear whether cautionary obligations require writing for constitution or only for proof, nor what kind of writing is required.[18] There is doubt about whether insurance contracts are obligationes literis at common law.[19] The law on writs in re mercatoria is highly obscure.[20] The rules requiring proof by writ or oath are often subject to exceptions of uncertain scope.[21] There are many unresolved questions in the law on the authentication of writings. To what extent, for example, is continuity required of the various stages in the execution of an attested writing?[22] What is the effect of an unauthenticated holograph addition to a holograph

document?[23] In what circumstances may a typed document be regarded as holograph?[24] One result of the piecemeal development of the law in this area is the confusion over the meaning of "probative" itself. Another is that the law is difficult to find. To discover the rules on the authentication of writings - a matter of everyday importance - it is necessary to rely on secondary sources or to trace the law from the terse language of 16th and 17th century statutes through many, often conflicting, cases to the present day.

3.8. Inefficiency. To some extent this criticism is merely a corollary of the criticisms already mentioned. A system which is excessively formal, which places unnecessary restrictions on evidence, which is unnecessarily complex and which contains unnecessary uncertainties and obscurities will, by virtue of these defects, lead to an unnecessary expenditure of time at various stages including the instruction of students, the writing and using of textbooks, the concluding of transactions, the preparation of deeds and the resolution of disputes. Everything is just more difficult and time consuming than it needs to be. There is, however, another aspect of inefficiency - the law on the authentication of writings may not achieve the basic objective of eliminating forgery as well as it could. It is arguable that the rules on adding testing clauses after subscription and on the authentication of vitiations[25] are so loose as to provide an inefficient protection against forgery.[26] It is also arguable that the change in the law in 1970, by which non-testamentary writings do not need to be subscribed by the granter on every page in order to be probative, made it too easy to

substitute a new page after subscription.[27]

3.9. Archaism. The main statutes governing the authentication of writings date from 1540, 1579 and 1681. Statutes which serve for centuries reflect great credit on their authors. Nonetheless it is questionable whether it reflects great credit on a legal system if an important area of the law, of everyday importance, is governed by statutes of such antiquity and the many cases to which they have given rise. "There is", said Lord Moncrieff, "scarcely any branch of the law in which there has been greater uncertainty and fluctuation of judicial opinion than the application and scope of the Scots statutes which regulate the authentication of writings."[28] The law on the constitution and proof of obligations and the authentication of writings is not, to put it at its lowest, likely to impress the international business world as being designed for the needs of the present day.

Objectives of reform

3.10. The objectives of reform in this area are the converse of the criticisms mentioned above. They are easy to state, but less easy to achieve. They are, in our view:-

a less formal system,
a less restrictive system,
a simpler system,
a clearer system,
a more efficient system, and
a less archaic system.

In the following parts of this memorandum we invite views on provisional proposals which we hope will go at least some way towards the achievement of these objectives.

PART IV - SUBSTANTIVE REQUIREMENTS FOR WRITING

Introduction.

4.1. In this part of the memorandum we explain, and invite views on, the provisional conclusions we have reached on some of the matters covered in our earlier consultative memorandum on the constitution and proof of voluntary obligations.[1] We also deal with certain related matters not covered in the earlier memorandum (such as wills and conveyances). We are concerned here with the cases where writing ought to be required for the constitution, variation, transfer or extinction of rights and obligations and for the transfer of property during life or on death. We are not concerned here with the type of writing required or with proof by writ or oath. We deal with these questions in subsequent parts of the memorandum.[2]

Replacement of common law obligationes literis.

4.2. General. Our provisional conclusion is that the common law rules requiring certain obligations to be constituted, varied or discharged in writing ought to be replaced by a clear statutory statement setting out those cases where writing is required. This would reduce the uncertainty in the present law (e.g. as to the position of contracts of insurance and contracts which relate only incidentally to heritage)[3] and would help to reduce the complexity. It would give effect to the view, favoured by most of those who commented on our earlier memorandum, that the general rule should be that obligations may be constituted varied or discharged informally. In line with that view, we consider that exceptions to the

general rule should be admitted only where there is a real need for them.

4.3. Contracts relating to heritage. One reason given long ago for requiring contracts relating to heritage to be in writing was that these contracts were "generally of great moment".[4] While it is still true that for most people their house is their most valuable asset, it could not now be argued that contracts relating to heritage are necessarily more important than other contracts. The importance of the transaction could not, by itself, justify requiring formal writing for an agreement to sell a strip of land for a few hundred pounds while not requiring formal writing for a transaction concerning shares worth millions of pounds. As Lord President Cooper put it:

> "It is useless to disguise that, the further we recede from the far distant days when land was the substance of the private wealth of the community, the more clearly does this rule stand revealed as a fossil relic of feudalism, explicable, if confined within the field of strict conveyancing, but completely out of touch with realities when it intrudes into the field of mutual contract. It is emphatically not a rule for benignant interpretation or extended application.".[5]

We seriously considered the option of not requiring writing at all for contracts relating to heritage[6] and remain of the view that this should be the general rule. We certainly would not wish to see enacted a rule that all contracts relating to heritable property should be constituted in writing. That might have the effect of including a wide range of contracts (such as contracts for the provision of building, decorating, gardening or other services) which need not be in writing under the

present law. We think, however, that there may be a need to preserve a requirement of writing in relation to contracts for the sale of heritage. Most transactions for the sale of heritage will be concerned with dwellinghouses. In relation to dwellinghouses there clearly is a case for a rule which gives parties time for consideration or reconsideration and which discourages them from concluding informal doorstep contracts without the benefit of legal advice. It would be possible to devise a special rule for this purpose (perhaps involving a cooling-off period or the use of some special form) and to confine it to dwellinghouses on the ground that it is in this field that the need for consumer protection is greatest. Our provisional view is, however, that there are advantages in using the familiar requirement of writing rather than devising new and untried techniques. We suggest that the requirement of writing should also apply to agreements to lease, or take on lease, heritable property for a period of more than one year. Although long leases for more than 20 years can no longer be used for private dwellinghouses,[7] leases for a period of years are probably sufficiently similar to sale to justify the imposition of the same requirements. We also suggest that the requirement of writing should apply to the variation or cancellation of agreements for the sale, or lease for more than one year, of heritable property. Our provisional view is therefore that writing should be required for the constitution, variation or cancellation of agreements to buy or sell heritable property or lease or take on lease such property for more than a year, but should not be required for the constitution, variation or cancellation of any other agreement or obligation relating to heritage. The justification for this view

is consumer protection, coupled with the desire to keep formalities to a minimum. Drawing a line is, however, a slightly arbitrary process and we recognise that a case could be made out for including other contracts relating to heritage in the category of those requiring writing, for example, those relating to excambion, licences and express grants of servitude.

4.4. Contracts of service for more than a year. We can see no good reason for preserving the common law requirement of writing in relation to contracts of service for more than a year. Employees are adequately protected by the employment protection legislation which provides, among other things, for written particulars of the terms of employment to be made available.[8] In a large proportion of cases terms of employment, including terms as to periods of notice, are governed by collective agreements. The present common law requirement is of uncertain scope[9] and its application where there has been rei interventus, in the form of actual service, is far from clear.[10] Our provisional conclusion is that writing should no longer be required by the general law for the constitution, variation or cancellation of a contract of service for more than a year. This would not affect any statutory provisions, or any agreements between the parties, whereby writing might be required.

4.5. Certain submissions to arbitration. The essence of a submission to arbitration is simply an agreement to submit a dispute to the judgment of a specified arbiter and to abide by his decision. There seems, at first sight, to be no good reason for requiring such an agreement to be constituted in writing, although no doubt

in matters of importance writing will be regarded as highly expedient. On our earlier consultation some commentators suggested the deletion of submissions to arbitration (or at least those relating to moveables) from the list of obligationes literis. We agree, and indeed can see no good reason in this context for distinguishing between arbitrations relating to moveables and those relating to heritage. The essential nature of the transaction is the same in both cases. Our provisional conclusion is, therefore, that submissions to arbitration should no longer require to be in writing. Again this would be without prejudice to any statutory provisions,[11] or agreements, relating to arbitrations.

4.6. Cautionary obligations. Under the present law, as we have seen, cautionary obligations are required, by section 6 of the Mercantile Law Amendment (Scotland) Act 1856, to be in writing. We think that there is an argument for continuing to require writing in this case. An agreement to guarantee payment of someone else's debt is, of its nature, one where there should be an opportunity for reconsideration and some brake on hasty undertakings. The existing statutory provision has, however, given rise to doubts and conflicting interpretations. There is even doubt as to whether writing is required for constitution or merely for proof.[12] We suggest that the part of section 6 dealing with "guarantees, securities or cautionary obligations"[13] be replaced by a provision making it clear that writing is required for constitution.

4.7. Contracts of insurance. There is some doubt as to whether contracts of insurance are obligationes

litteris at common law.[14] The prevailing view appears to be that they are not and, on our earlier consultation, we received strong representations from the insurance industry both to the effect that this was the existing law and to the effect that it should certainly continue to be the law. It was pointed out that in practice insurance companies frequently provided insurance cover following an oral agreement, with the policy following some time later. Our conclusion is that insurance contracts should not be included in the list of contracts requiring writing for their constitution. Again this would be without prejudice to any specific statutory provision regulating specific types of insurance contract.[15]

4.8. Gratuitous obligations. Under the present law writing is required for the proof but not the constitution of a gratuitous obligation. There is, we think, a good case for requiring writing in some manner in relation to gratuitous obligations. As one group of commentators on our earlier memorandum pointed out, there might otherwise be a danger of rash or frivolous promises being made the subject of litigation. And, as Lord President Dundedin pointed out in Smith v. Oliver,[16] it would be odd if wills had to be in writing but promises to make wills could be constituted and proved without writing. If writing is required, we think that there would be advantages in requiring it as a condition of constitution. There is something unsatisfactory in the notion of an obligation which is admitted to exist, but which cannot be proved because of a technicality of the law of evidence. The person who has rashly promised

orally to pay for repairs to a church roof and has then, on reconsideration, concluded that it would be safer to limit his or her contribution to a fixed amount, could be placed in a moral dilemma if told that the original obligation is legally binding but could not be proved in a court of law. It is a more clear cut, and, in our view, a more satisfactory solution to say that no obligation comes into existence without the requisite writing. We do not think that any exception for obligations under £8.33p. (or any other sum which might be substituted) is worth preserving.

4.9. Personal bar. The reduction in the list of obligationes literis and the decrease in required formalities which we recommend later,[17] will reduce the need to rely on rei interventus, homologation and other types of personal bar in order to prevent a party withdrawing from an agreement, imperfect in form, which has been acted upon. Nonetheless there will continue to be cases where the application of personal bar could be essential to avoid injustice. Nothing in our proposals on the constitution, variation or cancellation of obligations is intended to affect the law on personal bar.[18]

4.10. No retrospectivity. Any change in the law on the constitution of obligations should not, as a matter of principle, be restrospecitve. There is, however, a slightly more difficult question in relation to the variation or cancellation of existing obligations. It would be possible to say that the old law would continue to govern, say, the variation or cancellation of a contract of service for more than a year entered into

before the new law came into force. It would be equally possible to say that any variation or cancellation after the new law came into force should be governed by the new law, even if it was a variation or cancellation of an existing obligation. We prefer the second approach on grounds of both principle and practice. As a matter of principle a variation or cancellation is a legally effective act in its own right and ought to be governed by the law in force at the time. As a matter of practice it would, we think, be confusing and dangerous, especially after practitioners have become used to the new law, to make the method of variation or cancellation depend on the date of the original obligation.

4.11. Existing or future statutory provisions. Our recommendations are not intended to affect any existing statutory provisions (apart from section 6 of the Mercantile Law Amendment(Scotland) Act 1856) whereby writing is required for the constitution, variation or cancellation of any agreement or obligation.[19] Any legislation to implement them would not, of course, prevent future legislation from adding to or subtracting from the list of agreements or obligations requiring writing.

4.12. Stipulation or election of parties. Nothing in our provisional recommendations is intended to prevent -

(a) a party to a negotiation from stipulating that his agreement to be bound is conditional on the agreement being reduced to writing (in whatever form may be stipulated);

(b) parties to an agreement from agreeing to embody their agreement in writing (in whatever form may be agreed) so as to preserve a record of it; or

(c) parties to an agreement (e.g. for loan) supplementing their agreement with a document (e.g. a formal bond) so as to have available a written obligation which could be founded on without proof of the underlying agreement.

Legislation is not required to achieve these results. We deal later with the requirements which a document in category (c) above must fulfil in order to be formally valid and with the requirements which any writing must fulfil in order to be probative.[20]

4.13. Summary of provisional conclusions. Our provisional conclusions on the replacement of the common law obligationes literis are as follows.

1. Any rule of the common law that restricts to writing in any form the manner in which any agreement or obligation may be constituted, varied or cancelled should cease to have effect.
2. Section 6 of the Mercantile Law Amendment (Scotland) Act 1856 (on cautionary obligations) should be repealed in so far as it deals with "guarantees, securities or cautionary obligations", and replaced as noted in 3(b) below.

3. It should be provided by statute that, in addition to any other case where writing is required by statute, writing is required for the constitution, variation or cancellation of
   (a) an agreement to buy or sell heritable property or to lease, or take on lease, such property for a period of more than one year
   (b) a cautionary obligation and
   (c) a gratuitous obligation.
   Views are invited as to whether writing should be required for any other contracts relating to heritage - such as those relating to excambion, licences or grants of servitudes.
4. Nothing in the above proposals should affect the law of personal bar.
5. Nothing in the above proposals should affect
   (a) the constitution of any agreement or obligation
   (b) the variation of any agreement or obligation or
   (c) the cancellation of any agreement or obligation
   before any implementing legislation comes into force.

Wills

4.14. We did not deal with wills and other testamentary writings in our earlier memorandum. It is necessary, however, to deal with this subject here in order to give a complete account of cases where writing is, or ought to be, required by the substantive private law. There can be little doubt that writing ought to be required, at least as a general rule, for an effective testamentary

disposition of property. There is, however, room for doubt about whether there is any need for an exception for small bequests. Under the present law a bequest of moveables of a value not exceeding £8.33p. may be validly made without writing and may be proved by parole evidence.[21] This seems an indefensible rule as it stands, given the present value of money, and the question is whether the exception ought to be abolished altogether or preserved with an increased limit on the permitted value of oral bequests. We suspect that the need for a written will is widely accepted and understood by the public and we doubt whether the abolition of the presently unimportant exception for small oral (or "nuncupative") bequests would give rise to surprise or hardship. On the other hand, to allow bequests of moveables of up to (say) £500 to be made orally and proved by parole evidence might merely give rise to disputes and litigation. Our provisional conclusion, on which we invite views, is in favour of abolition of the rule rather than its retention with an increased limit, which would undoubtedly have to be updated regularly if it were to keep pace with the changing value of money. For the removal of doubt as to whether soldiers may make oral wills[22] we suggest that it should be made clear that there is no exception to the rule requiring testamentary dispositions to be in writing. We therefore invite views on the following propositions.

6. (a) Writing should continue to be required for testamentary dispositions.

(b) The exception for nuncupative bequests of moveables of a value not exceeding £8.33p. should be abolished.

(c) There should be no other exceptions.

We deal later with the type of writing required.

Conveyances and transfers.

4.15. There are sound reasons for requiring the grant, variation, transfer or extinction of real rights in heritable property to be in writing. In these matters an accurate record is essential and in most, if not all, cases writing will in any event be an essential pre-requisite for registration in the register of sasines or land register. In the case of certain types of incorporeal moveable property, writing is already required by statute for any transfer or assignation.[23] We do not in this memorandum propose any alteration in the cases where writing is required for the grant, variation, transfer or extinction of real rights in heritable or moveable property. We would, however, be grateful for any comments as to whether any clarification or alteration of the law on this point is thought to be required.

PART V - PROOF BY WRIT OR OATH

Introduction

5.1. We have already noted cases where the rule restricting, to writ or oath, proof of payment under an antecedent obligation has apparently given rise to injustice.[1] Any restriction on the evidence available to a court is liable to have this effect and requires to be examined with particular care. This is particularly so of a restriction to writing when, at the present time, many transactions are vouched and recorded not by the writ of a party but by unsigned non-holograph documents, machine-produced receipts, telex messages and so on. It is no doubt impossible to eliminate all risk of injustice in litigation but it is better, in our estimation, that the risk should arise after, rather than before, all available and relevant evidence has been considered by the court. We begin, therefore, with the assumption that any existing rule restricting proof to writ or oath must, if it is to be preserved, have some fairly strong justification. We examine each of the rules in turn later in this part of the memorandum. First, however, we deal with reference to a party's oath.

Reference to party's oath

5.2. Reference to oath is a procedure quite distinct from giving evidence on oath, and is competent only in civil causes. It is a historical anachronism, which originated at a time when the parties to an action were not competent witnesses. It enables a party to appeal, "against the apparent effect of the evidence of competent witnesses, to the conscience of his opponent".[2] The party to whose oath reference is made must depone on pain

of being held as confessed, and the other party undertakes to be bound by the answers. It is not competent to challenge or contradict the answers, which are thus not evidence in the ordinary sense. Even today, if a party to an action has called his opponent as a witness and has led evidence from him, he cannot subsequently refer to his oath any matter on which he has given evidence. It is thus apparent that the procedure is a somewhat imperfect method of ascertaining the truth in a civil action. It has in general fallen into disuse and is now in practice resorted to only in the context of constitution and proof of obligations, and is resorted to infrequently. We proposed in the memorandum that, whatever future there might be for restricting proof to writ, reference to oath should cease to be competent. This proposal was unanimously supported on consultation. Our provisional conclusion is therefore that:-

7. The procedure of reference to the oath of a party should be abolished.

Restriction of proof to writ

5.3. Loans. The rule restricting proof of loan to writ or oath has been the subject of judicial criticism for many years. As long ago as 1897 Lord Kincairney expressed the view that the rule was to be regretted

> "as unsuitable to the present state of the law of evidence, and tending more to defeat justice than to promote it."[3]

There are, nevertheless, arguments both ways on the question whether the rule restricting proof of the loan of money exceeding £8.33p. to the writ of the borrower should be abolished.[4] The main argument for abolishing the restriction is that it could clearly cause lenders to

labour under a sense of injustice. They might have the clearest possible proof of loan but might not be allowed to lead it because it consists of parole evidence. Another strong argument for abolishing the restriction is that, in a doubtful case, it can prevent the court from reaching a conclusion on the basis of all the available evidence. This presents a clear danger of injustice. Suppose, for example, that after a man's death the question arises whether £750 paid by him to his brother was a loan to help the brother make a large purchase (as claimed by the deceased man's executor) or was partly repayment of an unspecified debt and partly payment for unspecified services (as claimed by the brother). There is evidence, in the form of an endorsed cheque, that the money was paid but no written evidence of loan. In these circumstances, the sensible course would surely be to hear all the relevant evidence on both sides before coming to a conclusion. The present law operates so as to prevent this.[5] The argument for retaining the restriction is that if it did not exist a person might be subjected to unfounded claims.[6] These might be of two types. First, a person who had actually paid over money for some other purpose (for example, for goods received or work done) might falsely claim that the money was a loan. This danger already exists under the present law in any case where the pursuer has an unqualified written acknowledgement of receipt of the money (but not a mere endorsed cheque).[7] Such a receipt not only satisfies the rule on proof by writ or oath but also raises a presumption that the money was received on loan.[8] The only difference, if the restriction on proof were removed, would be that the danger would also arise even if the pursuer had no written receipt. In this case,

however, the pursuer would have the onus of proving not only that the money was paid but also that it was paid in loan.[9] Secondly, a person who had not paid over money at all might falsely allege that he had made a loan. Again, the onus would be on him to prove not only the payment of money but also that it was paid in loan. We are not convinced that the danger of unfounded claims would be significantly greater if parole evidence were allowed. In relation to the first type of case an unrestricted proof would allow the defender to lead evidence of the work done, or goods supplied or other relevant circumstances explaining the payment. The pursuer could not know in advance the strength of the defender's evidence and would, therefore, be taking a considerable risk in putting forward an unfounded claim. In relation to the second type of case (where no money has been paid at all) it may be supposed that a court would scrutinise with care evidence that a large sum of money was handed over in cash, as an unsecured loan, without so much as a receipt or an I.O.U. being obtained in return. It may also be supposed that a crook seeking to extract a sum of money from a victim would be unlikely to favour such a risky and exposed technique as a false court action for repayment of a non-existent loan. Anything more likely to lead to resistance and detection would be hard to imagine. In short, we consider that the danger of unfounded claims can easily be exaggerated. It is significant that English law appears to manage without any rule requiring written proof of loan. In our view the best safeguard against injustice in this area is not to restrict proof to writ or oath, which is liable to cause more injustice than it prevents, but to allow all relevant evidence to be admitted. Our

provisional conclusion is, therefore, that the rule restricting proof of loan to writ or oath should be abolished.

5.4 Obligations of relief. We have already made the provisional proposal that gratuitous obligations should require to be constituted in writing.[10] We can see no good reason why non-gratuitous obligations of relief should be subject to any restriction on proof.

5.5. Declarators of trust. The provisions in the Blank Bonds and Trusts Act 1696 on proof of trust have given rise to a voluminous and difficult body of case law, a good deal of it concerned with recognising exceptions to the rule contained in the statute.[11] The present law is undoubtedly arbitrary in its effects. As Lord Sands pointed out in Newton v. Newton:[12]

> "If A hands B a bearer bond, A may prove prout de jure that B holds the bond or its proceeds in trust for A. But, if the bond happens not to be a bearer one, and a transfer or some other form of assignation be necessary to put B in possession, then proof that B holds the bond or its proceeds in trust for A must be limited to writ or oath.".

The Act has been held to apply to shares[13] but not to War Loan;[14] to missives[15] but not to deposit receipts.[16] The result is that a dispute between two parties as to the true ownership of various assets may have to be determined in relation to some assets on the basis of proof by writ or oath and in relation to others on the basis of all relevant and available evidence, the choice of mode of proof depending on highly technical considerations, such as whether there was a "deed of trust", and not on any justifiable policy considerations. We have no doubt that the present law is open to serious

criticism and that some reform is desirable. We gave careful consideration to various possibilities for clarifying the law while retaining a requirement of writing, either for constitution or proof. All of these possibilities were riddled with difficulties and disadvantages. The major difficulty is that trusts may be constituted in a wide variety of circumstances. In some cases it will be perfectly plain that property is held in trust even although there is no writ of the alleged trustee acknowledging this fact. In some cases this may not be plain, but it could give rise to injustice, particularly in the case of simple transfers of moveables in trust, to restrict proof of trust to the writ of the alleged trustee. In the end we were driven to the conclusion that the simplest and best solution, and the one least likely to give rise to difficulties and anomalies, was to repeal the provision in the 1696 Act and not replace it. The result would be to remove any restriction on proof of trust. In theory there is a danger that people may be exposed to unfounded allegations that property which they own is really held in trust for someone else. In practice, we believe, this is unlikely to be a serious danger. It does not appear to emerge under the present law in relation to the various types of property not held under a "deed of trust". We would expect the practical results of the proposed change in the case of normal trusts to be minimal. In practically all cases involving trusts with genuine trust purposes there will, as a matter of practical necessity or high expediency, continue to be properly drawn trust deeds. In cases where property is transferred to a bare trustee to hold it on behalf of the

transferor, the transferor would certainly be well-advised in his own interests to obtain a written back-letter or acknowledgement of the trust and we have no doubt that that would continue to be the normal practice.

5.6. Innominate and unusual contracts. The rule restricting, to writ or oath, proof of innominate and unusual contracts is, of its nature, so vague as to be unworthy of reproduction in a modern statute. We can see no good reason for the rule, which is simply liable to give rise to dispute, difficulty and expense without any countervailing advantage, and suggest that it should cease to have effect.

5.7. Gratuitous obligations. Our earlier proposal to include gratuitous obligations in the list of obligations requiring to be constituted in writing means that there would no longer need to be any rule restricting proof of such obligations to writ or oath.

5.8. Performance or discharge. The rule restricting, to writ or oath, proof of the performance or discharge of an obligation constituted in writing or vouched by a document of debt is particularly liable to cause injustice and is, in our view, overdue for repeal.

5.9. Payment of money under an antecedent obligation. Again, we consider that the rule restricting proof to writ or oath is more liable to produce injustice[17] than to serve any useful function. A good example of the results to which it can lead is provided by the case of Thiem's Trustees v. Collie.[18] An I.O.U. for £225 signed by Mr Collie was found in Mr Thiem's repositories after

his sudden death in a railway accident. The I.O.U. was more than ten years old. Mr Collie explained that it represented a loan but that the loan had been repaid in five instalments and that on payment of the last instalment Mr Thiem had promised to destroy the I.O.U. Both men were prosperous tradesmen in the same town. They were close friends. They had had regular business dealings over the years since the I.O.U. was granted, all accounts being paid regularly. There was no indication of any demand having been made by Mr Thiem in connection with the I.O.U. since the date of alleged final repayment. The sheriff substitute, after a proof, appeared to have little doubt that the loan had been repaid but, because of the rule restricting proof to writ or oath, felt bound to hold that repayment had not been proved. On appeal the Second Division adhered to this decision, holding that proof of repayment was limited to writ or oath. Lord-Justice Clerk Macdonald (at p.768) said that the result, in the light of the evidence led before the sheriff-substitute, was "to be regretted" but was unavoidable because that evidence could not competently be looked at. Lord Young, in his dissenting opinion, pointed out (at p.772) that the legal question would have been the same if there had been "any number of credible witnesses that they witnessed both the loan and the repayment of it." Lord Trayner expressed the view (at p.778) that

> "the restriction long ago imposed by our common law upon the mode of proving either a loan, or payment of a loan, should now be altered as quite inconsistent with modern ideas on the subject of probation. It does seem anomalous that a loan of £20, or the payment of such a loan, should be provable only by writ or oath, while a contract under which liability for thousands of pounds may arise can be proved by

> witnesses. A loan, or payment of a loan, is after all only a fact, and should be provable like any other fact by the persons who know about it.".

This judicial call for reform was made in 1899. In our view it should now be heeded. Our provisional conclusion is that the rule discussed in this paragraph should cease to have effect.

5.10. Gratuitous renunciation of rights. It might be thought that gratuitous renunciations of rights ought to be treated in the same way as gratuitous obligations. Given the proposal we have made earlier on gratuitous obligations, this would mean that a gratuitous renunciation of rights would require to be in writing before it would be legally effective. This would not, in our view, be a desirable solution. The gratuitous renunciation or waiver of rights is, we would suppose, a much more common occurrence than the deliberate incurring of a gratuitous obligation and could occur in a variety of ways. In many cases it may be implied from conduct. Our provisional conclusion is that any rule of law whereby the gratuitous renunciation of a right may be proved only by writ or oath should cease to have effect.

5.11. Variation of written obligation. We have provisionally proposed that agreements or obligations which require to be constituted in writing should also require writing for their variation. In relation to all other agreements or obligations our provisional conclusion, on which we invite views, is that there should be no restriction on the way in which a variation may be proved. It is important that we should make clear what this provisional conclusion is not intended to

affect. First, it is not intended to affect the law on rectification of documents. Where rectification is sought the pursuer is claiming that the document does not accurately express the common intention of the parties at the time it was executed.[19] We are not concerned here with that situation. We are concerned with the situation where the agreement or obligation was accurately expressed at the time but where the parties have subsequently agreed to vary it. Second, our provisional conclusion is not intended to abolish the rule that extrinsic evidence cannot be led to contradict, modify or explain writings.[20] That rule relates to extrinsic evidence of any kind and it is concerned primarily with evidence designed to show that while the contract says X it really means Y. Our concern here is only with rules restricting proof of subsequent variation of a contract or obligation to writ or oath. Third, our provisional conclusion is not intended to affect cases where the parties to a written contract provide expressly for variation to be in writing. The change we are suggesting is, therefore, more limited than might at first sight be supposed. It would nonetheless, we believe, be a useful change. It would remove a technical obstruction to giving effect to the agreement of the parties and would thus remove a potential source of injustice. It would help to simplify a notoriously complex and difficult area of the law. And it would help to make the law more principled and coherent: if writing is not required for the proof of a contract it is hard to see any good reason of principle why it should be required for proof of an agreement to vary that contract.

5.12. Rei interventus and homologation. It was for many years the generally accepted view that where rei interventus or homologation was relied on to bar a person from resiling from an agreement which required to be, but was not, constituted in writing, the underlying agreement had to be proved by writ or oath.[21] In Errol v. Walker,[22] however, it was held that the acceptance of a written offer to purchase heritage could be proved by evidence of actings. Although no doubt equitable, this decision has created the anomalous situation whereby an agreement may be proved by evidence of actings but not, so far as the present law appears to stand, by direct parole evidence of the agreement. In our earlier memorandum, we invited views on the option (among others) of permitting proof by any means of the underlying informal agreement. This was supported by the legal bodies which commented on it. We can see no good reason for restricting proof of the underlying agreement to writ. Such a restriction could readily deprive a person of the benefit of an agreement clearly made and clearly acted on. Our provisional conclusion is, therefore, that any rule of law whereby proof by writ is required of an underlying agreement, before rei interventus or homologation can be relied on in relation to that agreement, should cease to have effect.

5.13. Summary of provisional conclusions. We have dealt one by one with the cases where proof of the constitution, variation or performance of an obligation or agreement is restricted to writ or oath. In each case we have reached the provisional conclusion that the restriction is unjustified and should be removed. Our

general provisional conclusion can, therefore, be stated very shortly. It is that:-

8. Any enactment or rule of law that restricts proof of the constitution, variation or performance of any agreement or obligation to writ or oath should cease to have effect. This is without prejudice to the proposal (no. 3 above) that writing should be required as a matter of substantive law for the constitution, variation or cancellation of certain obligations.

PART VI - FORMAL VALIDITY OF WRITINGS

Introduction.

6.1. In this part of the memorandum we are dealing not only with cases where writing is required by the law for the constitution, variation or cancellation of an obligation, or for a will, or for the creation, variation, transfer or extinction of real rights, but also with cases where the parties choose to embody an obligation in a writing which is intended to operate as a source of obligation in itself, the main example being a simple bond for the payment of money. We are concerned solely with the question of formal validity - and not with probativity. If a writing of the type under discussion is admittedly genuine, in what circumstances should it nonetheless be denied effect because of failure to comply with formal requirements? Our general approach to this question is to favour the reduction of formal requirements to a safe and acceptable minimum. It is, we think, an affront to people's sense of justice if genuine writings are denied effect because of unnecessary technical requirements. Indeed almost the whole history of this branch of the law has been one of attempts to alleviate, at the cost of some complexity and incoherence, its original formal strictness.[1]

Functions of formal requirements

6.2. As we have seen,[2] formal requirements may serve four functions.

1. They may help to ensure that reliable evidence of a transaction or legally effective act is available later (the "evidential" function).[3]

2. They may provide an indication of concluded intention (the "concluded intention" function).
3. They may distinguish legally binding transactions or writings from others (the "marking out" function).
4. They may protect the weak or unwary (the "protective" function).

To arrive at a balanced conclusion on what should be required for formal validity it is necessary to consider these functions in more detail. We shall anticipate one of our conclusions by indicating that in our view the functions listed justify a requirement of subscribed writing for such writings as contracts for the sale of heritable property, leases, gratuitous obligations, cautionary obligations, wills, bonds and dispositions. A much more difficult question is whether they justify any additional formal requirement in all or any of these cases.

6.3. The "evidential" function justifies laying down a requirement for formal validity (and the corresponding risk of formal invalidity) only where the interests of people other than the party to the transaction, or beneficiary of a will or gratuitous obligation, are affected. So far as the party to a transaction is concerned he may well take the view that if he wants a document which is, say, attested he will stipulate for it and, if he does not, he would rather have an obligation which is slightly difficult to prove than no obligation at all. Similarly, a beneficiary under a will or gratuitous obligation would, it may be supposed, rather have a claim which was slightly difficult to establish than no claim at all. The interests of third parties

such as heirs or creditors may, of course, be affected by contracts relating to heritage, gratuitous or cautionary obligations, wills or bonds but, in general, the evidential function would seem to be adequately fulfilled in these cases by a requirement of subscribed writing. We would not consider it justifiable to insist on attestation (the formality which is most clearly relevant in this context) as a requirement of formal validity in the case of missives, gratuitous obligations, cautionary obligations, wills or bonds. Indeed in many of these cases a requirement of attestation would be grossly inconvenient. There is clearly more of an argument for a requirement of attestation, for evidential purposes, in the case of dispositions and other writings creating or transferring real rights in land. There is a public interest in having an extremely reliable record of transfers of real rights in land. However, this public interest is well served by the registration systems (the Register of Sasines and the Land Register). Indeed under the new land registration system even a private interest in having an attested disposition (as opposed to a simple subscribed disposition or simple form of transfer) is hard to discern. Under this sytem the real right to the registered interest in land depends on registration and the owner does not need to produce the disposition in his favour when he comes to sell.[4] The certificate of title supersedes the relevant deeds. Under the old system of registration of deeds in the Register of Sasines (which will gradually be phased out as registration of title comes into effect in more parts of Scotland) there is a strong and obvious private interest in obtaining an attested, and hence probative disposition. The purchaser will be required when he

sells, perhaps many years later, to supply not only a valid title but also a marketable title. It is not clear, however, that this private interest justifies a legal requirement of attestation as a condition of formal validity. If, as has been suggested,[5] a disposition which is holograph or adopted as holograph is valid at present then attestation is not required under the present law as a condition of formal validity, although a purchaser would be entitled to refuse to accept a disposition which was not attested.[6] It may be that there is no need to introduce a requirement of attestation as a legal condition of formal validity at this stage. In short, it would seem that, even in relation to conveyancing writs, the evidential function can be fulfilled adequately by a requirement of subscribed writing coupled with the public protection afforded by the systems of registration and the legitimate self interest of purchasers of non-registered land in requiring an attested deed.

6.4. The "concluded intention" function is particularly important in relation to gratuitous obligations and wills,[7] but may also be important in other cases. It appears to be adequately served by a requirement of subscription. We do not think it justifies any formal requirement over and above subscription.

6.5. The "marking out" function may be a matter of practical importance in the case of a bulky file of correspondence on a transaction relating to the sale or lease of heritable property. It may be highly convenient for lawyers dealing with such a case if the contractual documents are clearly marked out from those

which are non-contractual. This is not simply a matter of concluded intention. A person who thought that the concluded intention function was adequately met by subscription might nevertheless argue, perfectly consistently, that the "marking out" function in this context requires something more than mere subscription (which would not mark out one letter from another). Under the present law it is, by chance, performed by the "adopted as holograph" formula which is required for other reasons. The function would not be well performed by actually holograph letters which, clearly, would not stand out from other handwritten letters on a file. It could be performed equally well, or perhaps even better, by a legal requirement that some other formula or indeed a red seal or any other clear and distinctive mark be appended as a condition of formal validity. This function is not so important as the other functions under consideration. It is essentially a matter of the convenience of lawyers rather than the interests of the parties or the public and it is not <u>essential</u> for the convenience of lawyers. Transactions relating to moveables - even transactions of great value and complexity - can be successfully managed without the use of "adopted as holograph" or any similar formula and other countries manage without any such formula even in contracts relating to immoveable property.[8] There are also disadvantages to set against the advantages of convenience and certainty. The required formality may be inadvertently omitted, particularly if parties other than Scottish solicitors are conducting negotiations, or may be included, without much understanding of its effect, on an arbitrary basis. The results in such a case will be distortion and potential injustice. Where

a formality is required for some other reason this "marking out" function may be a useful incidental advantage. It is not so clear that it would by itself justify the introduction or retention of a formality which had no other purpose.

6.6. The fourth function - to protect the weak or unwary - is also one on which there are arguments both ways. It can be argued that if something more than simple subscription is required then people may be protected against, say, inadvertently signing away their house or may be given a chance to withdraw from a transaction which, on reflection, they have come to regret.[9] Against this it can be argued that the need for any form of protection over and above subscribed writing, in the types of case under consideration, is not obvious. People are no more likely, it may be argued, to sign away their house inadvertently than to sign away their car or their bank balance inadvertently. If simple subscription is sufficient protection against inadvertence in the case of cheques, promissory notes and share transfers, why is more required in the case of land where the chances of inadvertent transfer are probably less? The argument on withdrawal from a transaction also cuts both ways. Cases where an innocent person is permitted justly to escape from a bargain on a technicality must be balanced against cases where an innocent person unjustly loses a bargain because of the absence of an empty formality. Protection, it may be argued, can be provided in a more rational and consistent way by resort to the rules on fraud, error, undue influence, insanity and facility and circumvention. There is also a difficult question about the level of

formality required to afford sufficient protection to make the exercise worthwhile. A requirement that a writing be holograph, adopted as holograph or attested may not provide an adequate level of protection. Nothing is more informal than a simple note in the granter's own handwriting. A gullible person may easily be induced to write the words "adopted as holograph" above his signature. In Harvey v. Smith,[10] for example, a barely literate man, allegedly under the influence of drink, was induced to write these words (inaccurately) above his signature to a letter offering to purchase a lodging house. The court managed to relieve him of the bargain but only by taking into account his lack of a proper mental awareness of what he was doing and not on the ground that the formal requirements were not, as such, complied with. Attestation is not an adequate safeguard: the witnesses can be supplied by the person inducing the granter to sign and the process of attestation can be completed afterwards outwith the granter's presence. To provide proper protection elaborate formalities involving an independent third party, such as a notary, would be required. This would clearly be unacceptably expensive and inconvenient for ordinary documents such as missives, wills and dispositions. The price of doubtful protection for some would be expense and inconvenience for all.

6.7. We now consider the merits of various possible formalities in relation to the functions identified and assessed above. To some extent this involves considering the same issues from another point of view. The formalities considered will be - (a) simple subscription (b) subscription plus holograph writing (c)

subscription plus sealing (d) subscription plus the "adopted as holograph" formula or some more meaningful alternative (e) subscription plus attestation and (f) subscription plus notarial authentication.

6.8. A requirement of subscribed writing goes a long way to fulfil the evidential function. A written and subscribed will, for example, is likely to provide a clearer record of testamentary intentions than an oral will established by the testimonies of witnesses. Subscription is also a widely accepted and, we believe, adequate way of indicating concluded intention. It does not "mark out" one letter from another in a bulky file: if that is thought to be necessary or desirable then something more is required. It does fulfil a useful protective function. This is closely linked to the "concluded intention" function. People are protected because of the rule that, for example, unsigned promissory notes or gratuitous obligations or holograph bonds cannot be taken as representing concluded intention. In short, it is only in relation to the "marking out" function that a requirement of subscribed writing is seriously deficient.

6.9. A requirement that writing be holograph as well as subscribed adds very little to the fulfilment of the various functions and there would seem to be a very weak case for continuing to regard the quality of being holograph as relevant to formal validity. Holograph writing (particularly if it is only partly holograph or even, as in McBeath's Trs. v. McBeath,[11] typed by the granter) fulfils the evidential function at best only marginally better than subscribed writing and, at worst,

no better at all. A holograph writing is not as such,and apart from subscription, an indication of concluded intention. One holograph letter does not stand out from other holograph letters on a bulky file. No protection is afforded by a requirement that a writing be holograph: indeed handwritten writings are in practice the most casual of all.

6.10. We consider sealing only because it was once used in Scotland even for writings by individuals and is still a requirement for a "deed" in England and Wales and some other common law jurisdictions. Its only merit would be in relation to the "marking out" function, which it would perform rather well. We would not, however, suggest reviving this formality which was sensibly abandoned in Scotland centuries ago (except in relation to bodies corporate) and which appears to be on the way out in anglo-american law.[12] This is not the time in the history of Scots law to start invalidating writings because of the absence of a meaningless red circle.

6.11. The "adopted as holograph" formula is of little value in relation to the "evidential" function or the "concluded intention" function. It is doubtful, as we have seen, whether it is of great value in relation to the "protective" function, although no doubt like any technical requirement it may on occasion lead to fortuitously just results. In all these respects it adds little to the requirement of subscription. It is, as a side effect of its main function under the present law, useful in "marking out" contractual documents from others. The formula is, however, open to criticism on the ground that it is likely to make little sense to the

average person even under the existing law.[13] It would, of course, be completely nonsensical if holograph writings were to cease to enjoy special privileges. If the marking out function were thought to be worth preserving on its own merits consideration would, in our view, have to be given to devising a better formula or technique. A more rational formula would be something like "Intended to be legally binding". The drawback of introducing a more rational formula of this nature would be, however, that people might wonder, with some justification, why it was only in relation to a few types of legal transaction that it was important to have an express indication that a document was intended to be legally binding. The main objection to any technical formula is that its omission is quite likely to occur from time to time, particularly in writings by those who are not solicitors trained in Scots law. The result in such cases may be invalidity on a technicality which is not a result that does credit to the law.[14]

6.12. Attestation is useful in relation to the evidential function and should certainly, in our view, be available as an option should parties wish to have a probative writing. We consider this later in relation to probativity.[15] It is doubtful whether it is of great value in relation to concluded intention and protection. It would perform the "marking out" function in relation to missives but would be too burdensome in such cases to be a desirable requirement. If attestation were to be a requirement for formal validity in relation to some writings we would envisage that, as suggested later in the context of probativity,[16] it would be attestation by one witness above the age of 16. A considerable

disadvantage of requiring attestation as a condition of formal validity (as opposed to probativity) is that it would retain many difficulties and complexities of the present law (such as the permitted time-scale for attestation, and the effect of defective attestation) which could be swept aside if attestation is simply a matter of probativity.[17]

6.13. We mention authentication by a notary only for the sake of completeness and because this is a common formality in a number of civil law countries. It would appear, if it works as it is supposed to, to perform the various functions extremely well but at a very high price in expense and inconvenience. We would not suggest that any of the writings presently under consideration should require, as a condition of formal validity, to be subscribed in the presence of a notary. Having examined the functions of formalities, and the advantages and disadvantages of various possible formalities, we proceed to consider the realistic options for reform.

First option: simple subscription

6.14. We regard subscribed writing as the minimum acceptable formality for writings - such as missives, gratuitous and cautionary obligations, wills, leases, dispositions and bonds - where formal validity is relevant. It would, in our view, be perfectly feasible to make subscribed writing the only requirement for formal validity in all these cases. Where parties to a transaction wished attested writing they could, of course, stipulate for it. It would also, of course, be open to the Keeper of the Registers of Scotland to require attested writs for certain purposes. Extra

formalities, such as attestation or notarial authentication, might be required for particular types of writing by existing or future statutes, but the general rule, which would apply to all the writings mentioned above, would be simple subscription.

6.15. This option has much to commend it. It would not require admittedly genuine and subscribed writings to be invalidated on a technicality. It would introduce a measure of flexibility into the system. The Keeper of the Registers of Scotland would be able, for example, to accept non-attested deeds in certain cases. There might be some scope for cutting down the number of deeds which have to be returned by the Keeper because of technical defects. The law could be made simpler and more principled. There would be no need for special rules on privileged writings - whether holograph, adopted as holograph, or in re mercatoria. There would be no need to rely on rei interventus or homologation to prevent a party to an informal but subscribed writing from escaping from his obligations by pleading formal invalidity. There would be no need for clauses in wills or other writings providing for later writings to be valid if "under my hand": later subscribed writings would be valid anyway. There would be no need for section 39 of the Conveyancing (Scotland) Act 1874 (providing that a writing subscribed by the granter and bearing to be attested by two witnesses is not to be deemed invalid because of any informality of execution): writings would be expressly declared to be valid if subscribed. There would be no need for any exceptions for matters under £8.33p. in value. The beneficial result of giving effect to genuine subscribed writings would be achieved

in a simple and direct way rather than by resort to a host of exceptions, qualifications and alleviating techniques which, inevitably, bring complications in their wake.

6.16. If this option were preferred, and implemented, we would not envisage that there would, in practice, be any great effect in the short term in relation to dispositions and conveyancing writs generally although there would, as we have noted, be scope for simplifications in the course of time, particularly in relation to transfers of registered interests in land. The fact that dispositions would be formally valid if subscribed would probably have no more practical effect than the fact that they are (probably) valid under the present law if holograph or adopted as holograph. The main practical effect would be in relation to missives, certain leases, wills and bonds. And the main difference would be that documents in these categories which at present are valid if adopted as holograph would in future be valid even without this formula.

6.17 The only significant disadvantage in this first option would appear to be the loss of the "marking out" function presently performed in the case of contracts relating to heritage by the "adopted as holograph" formula. We have already discussed this function, and its advantages and disadvantages, and would particularly welcome the views of consultees as to whether it justifies for certain cases, and if so which, the retention or introduction of some formality over and above subscription. Our tentative view, although it is

not quite a unanimous view, is that, on balance, it does not.

Second option: attestation or formula

6.18. Under this option all of the writings under consideration would be formally valid if, and only if, attested or graced with a formula such as "Intended to be legally binding". This would, in effect, preserve the substance of the present law in relation to missives, leases, dispositions and wills, with the exception that holograph writings would no longer be formally valid and that the "adopted as holograph" docquet would be replaced by a more meaningful alternative. The law would become more strict with regard to gratuitous obligations and cautionary obligations where simple subscription suffices at present (as a matter of proof, not constitution, in the case of gratuitous obligations). This option would be less radical than the first option and would preserve the "marking out" function of formalities in relation to missives. It would also, however, preserve much of the complexity of the existing law on attestation and it would have the serious disadvantage of invalidating admittedly genuine subscribed writings for purely formal reasons.

Third option: different rules for different cases

6.19. Under this option some writings (for example, gratuitous obligations, cautionary obligations and wills) might be valid if subscribed; others (for example, contractual documents relating to the sale of land or the lease of land for more than a year) might be valid if, and only if, subscribed with an added technical formula, for "marking out" purposes; yet others (for example,

dispositions and other writings creating or transferring real rights in land) might be valid if, and only if, attested. This option would be not unlike the existing law as it actually operates in practice. The special privilege of holograph writings would go. Wills would be valid if subscribed even without the addition of "adopted as holograph", a requirement which may not be known to the ordinary person acting without legal advice. There would be some rational basis for the various requirements. On the other hand, to have different rules for different writings might be confusing and would certainly add to the complexity of the law.

Assessment

6.20. Formal requirements for validity have advantages and disadvantages. In general, our assessment is that the disadvantages of any formal requirements over and above simple subscription outweigh the advantages. Our provisional, but not quite unanimous, preference would therefore be for the first option. We recognise, however, that there are arguments for some formal requirements in certain cases. There is, in particular, support within the Commission for the view that the "marking out" and possibly also the "concluded intention" functions may justify some formal requirements where they can be imposed without undue expense, inconvenience or danger of injustice. We shall welcome the views of consultees on these difficult issues. As it would, however, make some of the remaining parts of the memorandum indigestible if we were to try to keep all the options open we shall proceed on the assumption that the only requirement for formal validity in the cases under consideration will be simple subscription.

Provisional conclusion

6.21. 9. Views are invited on the following options with regard to the formal validity of writings (in those cases where writing is required by law or is used in order to provide a formal written obligation, such as a bond). In each case the rule would apply unless an enactment otherwise provided.

(a) Option 1. The sole requirement for formal validity (as opposed to probativity) should be subscription by the granter.

(b) Option 2. The requirement for formal validity (as opposed to probativity) should be subscription by the granter coupled with (i) attestation or (ii) the addition of a form of words such as "Intended to be legally binding" above the signature.

(c) Option 3. The requirements for formal validity (as opposed to probativity) should vary from case to case. In some cases (e.g. gratuitous obligations, cautionary obligations, wills) the requirement might be subscription: in others (e.g. missives) it might be the addition of a technical formula above the subscription: in others (e.g. dispositions) it might be attestation.

In relation to options 2 and 3 views are invited on what the appropriate formalities should be in each case. In particular, views are invited on what, if anything, would be an appropriate replacement for the formula "adopted as holograph". Our provisional preference (by a majority) is for option 1.

Vitiations and alterations.

6.22. Even if subscription were to be the sole requirement for the formal validity of a writing the question would arise as to what was included in the writing. Would the writing include, for example, marginal additions or interlineations? This would, in essence, be a question of fact. It would be necessary to ask in each case "What was subscribed?". The granter of a writing could make the resolution of the question easier by referring to alterations in a brief statement before his signature.[18] In many "home made" writings, however, the granter would not think of doing this and it is therefore for consideration whether there should be any presumptions to help resolve the question. We think that it would be reasonable to provide that any alteration or addition above the subscription, proved to be in the granter's hand or to be initialled or signed by him, should be presumed to have been made before subscription. For the avoidance of doubt[19] it should, we think, also be made clear that unsigned additions below or after the subscription should not be regarded as part of the writing. Postscripts which were themselves subscribed would, of course, under our preferred option,be formally valid in their own right. Views are, therefore, invited on the following propositions.

10(a) It should be presumed that any alteration in, or addition to, a subscribed but improbative writing, made above the subscription and proved to be in the granter's hand or to be initialled or signed by him, was made by him before subscription.

(b) Unsigned additions below or after the subscription by the granter should not be regarded as part of the writing.

"Setting up" a valid, but improbative, writing.

6.23. In some situations it will be necessary, or highly convenient, to "set up" a valid, but improbative, writing by means of court proceedings for what would be in effect a declarator of authenticity. We suggest later that this should be possible (a) in any court proceedings (which should be defined to include proceedings for confirmation of an executor) in which the writing is founded on or (b) by means of a special application.[20] We also invite views later on whether it would be convenient to allow a docquet to be added to a writing and signed by the clerk of court stating, in effect, that it had been found or declared to be authentic.[21] It could be provided that proof of authenticity in any such proceedings could be by affidavit (as is at present provided for in the case of testatmentary dispositions, by section 21 of the Succession (Scotland) Act 1964). Provisions on these lines could replace both section 21 of the Succession (Scotland) Act 1964 (on "setting up" holograph wills) and the latter part of section 39 of the Conveyancing (Scotland) Act 1874 (on "setting up" writings vitiated by an informality of execution). The result of the

procedure envisaged would be to confer on the writing the benefits of probativity in that, once docquetted by the clerk of court, it would carry around with it the proof of its own authenticity. As the procedure would be equally applicable to writings which were intended to be, but failed to become, probative we return to this question and state our provisional conclusion later.[22]

Meaning of subscription.

6.24. As this question arises also in relation to probative writings we discuss it later in a separate part of the memorandum.[23]

PART VII - PROBATIVITY OF WRITINGS

Introduction.

7.1. The first question for consideration in this part of the memorandum is whether Scots law should continue to make provision for writings which are probative - in the sense that they carry around with them proof of their own authenticity - by virtue of attestation. Two alternatives suggest themselves. First, no provision at all could be made for probative writings. Second, writings to be probative would have to be authenticated by a notary. The Scottish system of probativity by virtue of attestation appears to have advantages over both of these systems. It provides a method whereby the need to produce extrinsic evidence of a writing's authenticity can be avoided and whereby those accepting formal writings can have some assurance that they are genuine. It does so without the expense and inconvenience of notarial authentication in all cases. Our provisional view, on which we would welcome comments, is that Scots law should continue to make provision for writings which are probative by virtue of attestation.

7.2 In the remainder of this part of the memorandum we consider, on the assumption that writings probative by virtue of attestation are to continue, (a) what should be required to appear on the face of a writing if it is to be probative (b) how the required information could best be given on the face of the writing (c) the effects of probativity and non-probativity and (d) the sanctions for abuse of the attestation process. Our concern is limited to what appears on the face of the writing because this alone is relevant to probativity in the

proper sense of the term. It would be illogical to make probativity depend on extrinsic facts. It is self-contradictory to say "This document proves itself if certain extrinsic facts are proved".

What must appear on face of writing

7.3. Subscription of granter at end. Signature at the end of a writing by the granter or granters must, we think, be regarded as essential. If it were not, there would be writings which on their face were probative but formally invalid. This would not be desirable. Moreover what a witness expressly or impliedly affirms when he signs a writing as witness is that the granter has subscribed in the presence of the witness or at least has acknowledged his signature to the witness. It would be difficult, if not impossible, to adapt the rules on attestation to cover unsigned writings.

7.4. Subscription of granter on each page? Under the present law subscription of each sheet of a writing by the granter is required for probativity in the case of testamentary writings but not in the case of other writings.[1] The requirement formerly applied to all writings but was abolished for non-testamentary writings by section 44 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which implemented a recommendation of the Halliday Committee.[2] The reasons for the recommendation are explained by the Committee as follows.[3]

> "The requirements of the present law are designed to provide safeguards against forgeries and fraudulent substitutions, and we recognise the need for such safeguards. We agree, however, with representations which have

> been made to us that the requirement of execution on each page is unnecessarily stringent and unsuited to present-day business and commerce. It is clear that it occasions great inconvenience to persons simultaneously engaged in a large number of transactions and we have little doubt that a modification of the law would be generally welcomed, particularly by statutory authorities and corporations and by institutional lenders. We think that some relaxation might safely be permitted in the execution of deeds other than wills. The custody of deeds is generally in the hands of responsible persons and in many cases registration in the Register of Sasines or in the Books of Council and Session provides a further safeguard against malpractices."

It is interesting to return to these arguments after an interval of some years. They seem less conclusive, perhaps, than appeared at the time. The main argument in favour of the relaxation is the needs of parties engaged in commerce. But commercial transactions form only a minority of all transactions involving attested writings. It might be felt that in such transactions one possible solution would be to make far greater use of schedules and of pro forma printed material which can be adopted as part of the deed.[4] It is interesting to note that this solution has been widely adopted in recent years by institutional lenders, one of the categories specially singled out by the Committee. Nor do the other arguments developed by the Halliday Committee seem particularly strong. Thus, even if attested writings are generally in the hands of solicitors and other responsible professionals, there are bound to be a few members in any profession who fail to come up to the required ethical standards. It is, moreover, difficult to see how registration amounts to the safeguard suggested by the Halliday Committee, when by far the most

likely time for forgery is immediately after delivery and prior to registration. The arguments are not, of course, all one way. In defence of section 44 it can be said that it does save time and avoid inconvenience and that it has operated for fifteen years without leading to an epidemic of the forgeries which it appears to facilitate. Further, it is always open to the granter who is concerned about the risk of forgery to follow the old law and sign on each page. We consider that, as this branch of the law is now being reviewed for other reasons, the opportunity should be taken to invite comments on whether the policy of section 44 is right. A possible compromise solution, which could be applied to testamentary and non-testamentary writings alike, and which we put forward for consideration and comment (but without even provisional commitment to it), would be to require each page (including each page of any schedule or plan annexed) to be initialled by the granter. This would not be so burdensome as signature on each page but would provide some discouragement to the replacement of pages after signature.

7.5. Date and place of subscription by granter. The date of a writing is often of crucial importance. Not only may it affect the question whether the writing supersedes, or has been superseded by, another writing but it may also affect the ease with which its authenticity can be challenged. It may be much easier for a person to prove that he did not sign a writing on a particular date than to prove that he did not sign it on any date. The place where the writing was subscribed may also be important. It may be necessary, in a case with potential foreign elements, to decide whether the

writing was executed in accordance with the law of the place of execution. And again authenticity may be more easily challenged if the place of execution is stated. Probativity is a privilege which, in our view, ought to be conferred only on writings which, on their face, comply with certain minimum standards. We believe these ought to include a statement of the date and place of execution.

7.6. Subscription of witness. The basis of probativity is attestation by witnesses. The rationale is that the evidence of witnesses as to a writing's authenticity is unnecessary at the time when the writing is produced if it is, so to speak, given in advance and preserved in the writing itself. We conclude, therefore, that subscription of the writing at the end by a witness or witnesses should be an essential pre-requisite of probativity. It should not, however, be necessary for the witness or witnesses to sign every page.

7.7. How many witnesses should be required? This question is linked, in theory at least, with the question of the need for corroboration in civil cases generally. If two witnesses are the norm in the law of civil evidence then it is natural to require two witnesses for probativity. In our forthcoming Report on Corroboration, Hearsay and Related Matters we shall be considering whether corroboration (which at present is not required in certain civil cases) should no longer be required in any civil cases. Against the background of our work on the law of evidence we considered, therefore, whether one witness to a writing might suffice for

probativity. This would have the advantage of increased convenience. It is often a good deal easier to find one witness than it is to find two. It would make the execution of formal documents a slightly simpler and quicker process. It would probably not significantly increase the risk of forgery. We were therefore favourably disposed towards the view that one witness should suffice. Before reaching even a provisional conclusion on this matter, however, we sought advice from the Law Society of Scotland on the questions whether there should be a reduction in the number of witnesses and, if so, whether the reduction should apply to all obligations and deeds, including deeds of a testamentary character. The Council of the Law Society were clear that, whatever the number of witnesses required, that number should be the same for all documents and deeds (including testamentary documents) and by a majority favoured a general reduction to one witness. We agree with the view of the majority and provisionally conclude that one witness should suffice for probativity.

7.8. Statement that witness over minimum age? Should it be a requirement for probativity that a writing should bear on the face of it a statement that the witness is over the minimum age required? This is not a requirement for probativity under the present law although if a witness is under the required age a writing will be formally invalid.[5] Under our proposed scheme the writing would be formally valid if subscribed, so that the sanction of invalidity would not be available. We consider that there would be advantages in requiring a writing to include a statement that the witness is over the minimum age. This would add only a few words to the

testing clause or its equivalent. It would help to fulfil one of the requirements of probativity - namely that a writing should bear on its face the essential indications of proper attestation - and it would make it easier to provide a sanction against the use of witnesses under the required age.[6]

7.9. Under the present law the minimum age for a witness to a writing is 14 years. Our provisional view is that this should be raised to 16 years. Under the system of probativity by attestation much depends on the sense of responsibility of the witness. He or she is, as it were, acting in place of the notary under a more formal system. Although no doubt many children of 14 are highly responsible, there will be others who are somewhat immature at this age. The law has to fix an arbitrary limit for this purpose and it seems to us that 16 is a more appropriate age. At this age young people can leave school and get married. They cease to be dependent children for supplementary benefit purposes. Many will be working and living independent lives. The minimum age could be raised to 16 without any great disadvantage, but to raise it any higher would probably be unjustified. Adoption of the age of 16 would harmonise the rule on capacity to act as a witness with the proposals in our recent consultative memorandum on the legal capacity of minors and pupils[7] where we suggest that 16 should replace the present ages of 12 and 14 as the age when young people acquire considerable capacity in private law matters.

7.10. Statement that witness not subject to any incapacity? Although, at first sight, there would

appear to be similar arguments for requiring, as a condition of probativity, a statement in the writing that the witness was not subject to any mental incapacity which would disqualify him from acting as a witness, in fact the considerations are different. Age is a straightforward matter. A person who can sign his name will know, except in extremely unlikely cases, whether he is or is not under the age of 16. A person who can sign his name will not necessarily know whether or not he has sufficient mental capacity to act as witness to a writing. The more incapable he is, the less likely is he to give the matter rational thought. Moreover to apply sanctions to a mentally incapable person for saying he was mentally capable would be objectionable. For these reasons we think that the law in this area should simply rely on the general presumption that people are of full capacity and that it should not be a condition of probativity that the writing contains a statement that the witness is not subject to any mental incapacity which would disqualify him from acting as a witness. It can, we think, be fairly confidently anticipated that there will not be a rush to use mentally incapable people as witnesses. There is no point in inviting difficulties should the authenticity or date of the granter's signature ever be challenged.

7.11. It would also seem to be unnecessary to include any express statement in the writing that the witness is not blind. It is implicit in the process of attestation that the witness is able to see the granter's signature, either when it is appended or when it is acknowledged.[8] There is nothing to stop a deaf person from acting as a

witness under the present law and we suggest no change in this respect.

7.12. Statement that witness not a granter? Under the present law one of the granters of a writing cannot act as a witness to another granter's signature. It is for consideration whether, under the scheme we propose, the writing should contain a statement that the witness is not also a granter. We doubt whether this would be necessary or desirable. On principle there is no reason why a granter should not testify in advance, as it were, that he saw another granter sign and no reason for disregarding such testimony. And it would look odd if witnesses who were manifestly not granters had to solemnly assert this fact. Our provisional conclusion is therefore that a granter should be able to witness another granter's signature and that it should not be a requirement for probativity that the writing contains a statement that the witness is not a granter.

7.13. Designation or address of witness. It clearly is useful to have a statement in the writing which serves to identify the witness. The term "designation" is liable to be confusing to the layman who may be acting as a witness without the benefit of legal advice and we suggest that the normal requirement for probativity should be a statement of the address of the witness.

7.14. Statement of what witnessed. If a writing is to contain on the face of it evidence of its authenticity it is, we think, essential that it should include a statement, in the briefest terms, of what was witnessed.

This would be no more than a statement that the witness saw the granter sign, or saw or heard him acknowledge his signature.

7.15. Statement of authority to sign as witness? Under the present law, as established in the case of Walker v. Whitwell,[9] a witness cannot validly sign after the granter has died or withdrawn the witness's authority to act as such. The rationale is that the attestation by the witness is part of the essential formalities of execution, which must be under the control of the granter. It is for the same reason that the signature by the witness must take place more or less at the same time, as part of a single process, as the signature by the granter. Under the scheme which we propose the attestation by the witness would not be part of the essential formalities of execution. The writing would be formally valid by virtue of the granter's subscription. The witness's attestation would be merely a matter of evidence, going to proof of authenticity, not formal validity.[10] The signature of the witness as such is merely a convenient equivalent, given in advance, of the oral evidence of the witness that he saw the granter sign or heard or saw him acknowledge his signature. Just as the authority of the granter would not be necessary to permit a witness to give evidence in court that he saw the writing being signed, so it should not be necessary to permit the witness to sign the writing as such. We think therefore that it would be quite inappropriate for the writing to contain any statement to the effect that the witness has the authority of the granter to sign. It also follows from this view of the

function of attestation that an attestation would be effective even if it were manifest that the witness had signed after the granter's death.

7.16. Date when witness signed. Under a system where simple subscription is sufficient for formal validity and where attestation is seen as a question of evidence rather than formal validity, the problems of the "permitted timescale" disappear.[11] The precise time when the witness signs becomes immaterial. The date when he signs may be important if the authenticity of the writing was ever challenged, because it would be easier to hold that the witness was mistaken as to the writing in question if he appended his signature after any considerable time. We suggest, therefore, that the date when the witness signs should appear in the writing. We imagine that in practice, so as to minimise the risks should authenticity later be challenged, witnesses would continue to be expected to sign on the same date as the granter. However, since attestation would not be required for validity but only for probativity, we see no reason why a time gap between the signature of the granter and the signature of the witness should have any automatic effect. Under the scheme we propose a writing would be probative even although it was clear on the face of it that the witness had signed after an interval.

7.17. Place where witness signed? This seems to us to be immaterial and we suggest that no statement as to the place where the witness signed need appear in the writing. The place where the granter signed may be important if a question of private international law is involved because it may be necessary to know whether the

deed was executed in accordance with the laws of the place of execution. Under our proposals, however, the witness's attestation would be merely a sort of affidavit as to what he had seen or heard and not a part of the execution process.

Form of testing clause or equivalent.

7.18. We have already noted some criticisms that can be made of the present practice of inserting testing clauses, which may contain essential references to alterations or vitiations, after execution in a space left for the purpose above the signatures.[12] We believe that a testing clause or its equivalent should, if it is to fulfil its purpose, state

(a) the date when the granter signed

(b) the place where the granter signed

(c) that the granter has initialled each page (if this is required for probatitivity)[13] and any schedule or plan attached

(d) that the granter confirms that material alterations to the document were made before subscription[14]

(e) that the witness saw the granter sign or saw or heard him acknowledge his signature

(f) that the witness is over the age of 16 years and

(g) the date when the witness signed.

We also believe that the testing clause or its equivalent ought to appear in the writing in such a way that the granter can be assured that, under the sanction of loss of probativity, no alterations will be made, after the

document leaves his hands, to any part of it which appears above his signature. Every attempt should be made to ensure that the witness knows exactly what his signature is supposed to attest. The testing clause or its equivalent should be in plain and simple language.[15] All of this must be achieved in such a way as to minimise the risk of bungled attestations - which is one of the main reasons why testing clauses are at present inserted by solicitors after the process of attestation is complete. This means that granters and witnesses must not be asked to do anything complicated or difficult.

7.19. Any new form of testing clause would command acceptance only if it were clearly practicable and convenient and only if it were safe. A reason for the survival of traditional practices in relation to the execution of writings, even although they may be clearly open to criticism, is the very understandable one that no-one wishes to experiment with new styles if they involve the slightest risk of not achieving their object. To provide security for practitioners, therefore, it would be necessary for any new form of testing clause or the equivalent to be cloaked with statutory authority. What we have in mind is a statutory provision that a writing will be probative if it bears to be subscribed by the granter and a witness and if it includes the information listed in the previous paragraph, which information might be given in, or substantially in, the manner set out in specimen forms appended to the Act.

7.20. So far as the contents of the suggested forms are concerned we would particularly welcome the comments of experienced practitioners. As a basis for comment,

criticism and further suggestions we tentatively suggest that immediately after the end of the writing there might appear statements on the following lines for completion and signature by the granter and witness. There would, we believe, be no reason why the statement of execution should not be typed in before signature and we suggest later that the writing should lose the benefit of probativity if the statement authenticates material vitiations and appears to have been added after subscription.[16] We set out the forms below in their simplest form. We appreciate that they would need to be adapted for cases of notarial execution and for cases where a writing is executed on behalf of a partnership or corporate body. We deal with these important questions later.[17] In the forms below the words in square brackets would be deleted or adapted as required in any particular case.

Possible forms to replace testing clause.

Statement of execution.

I, John Smith, sign this as shown below. [I have initialled [each page][the schedule attached][the plan attached.]] [I confirm that the following alterations were made before I signed .....]

Signature of John Smith .....

Date when signed .....

Town or other place where signed .....

Statement by witness

I saw John Smith sign this document, or heard or saw him acknowledge his signature. I am over 16 years of age.

Signature of witness .....
Full name and address of witness (in legible letters)
.....
.....
.....
.....
Date when witness signed .....

7.21. The forms have been drafted for the case of a single granter. They could easily be adapted for the case of two or more granters. There would be nothing to prevent one person acting as witness to two or more signatures. In the case of two granters signing before different witnesses, for example, the forms might be as follows.

Statement of execution

We, John Smith and James Brown, sign this as shown below. [We have initialled (etc. as before).]

Signature of John Smith .....
Date when signed by John Smith .....
Town or other place where .....
signed by John Smith .....

Signature of James Brown .....
Date when signed by James Brown .....
Town or other place where .....
signed by James Brown .....

Statement by witness
to signature of John Smith

I saw John Smith (etc. as before).

Statement by witness
to signature of James Brown

I saw James Brown (etc. as before).

In the case of two or more granters, where it is not known whether they will or will not sign before the same witness, there would be nothing to prevent the statement or statements by the witness or witnesses from being completed later, as the testing clause is under the present law. The one statement by the one witness could then refer to all the granters. The addition of the statement by the witness at a later time would not be objectionable: the granter would know that nothing would be added above his signature, an assurance which he does not have under the present law.

Alterations

7.22. The forms set out above would enable alterations to be authenticated in a convenient and flexible manner. All that would be necessary would be for the alteration

to be clearly specified or identified. In the case of a single granter a marginal addition might, for example, be initialled and identified in the statement of execution as "the marginal addition on page 2 initialled by me". An interlineation might be similarly identified. Alternatively - and this would often be more practicable if there were several granters - the addition might be set out in full in the statement of execution in a formula like "the marginal [or interlineal] addition of the words 'whichever is earlier' on page 2". Erasures or deletions would usually not consist of more than one or two words and might, for example, be identified as "the erasure (or deletion), without replacement, of the words between 'completion' and 'of the work' on page 3". Words written on erasure could be simply identified by some such formula as "the insertion, on erasure, of the words 'three months' on page 4". Our provisional view, on which we invite comments, is that no special provision should be made to enable probative writings to contain blanks for completion after signature.

7.23. It may happen that an alteration appearing on the face of the document is not referred to in the statement of execution. If the alteration is manifestly immaterial - for example, the correction of an obvious spelling error in such a way that no change of meaning could result - it would be unduly rigorous to deny the document the benefit of probativity. If, however, it is, or could be, material then, in our view, probativity should be lost. The privilege of probativity should not be conferred on a writing which, on its face, is suspect in a material respect. For the same reason we suggest that probativity ought to be lost if the statement of

execution authenticates vitiations which are, or could be, material, but appears on the face of the writing to have been added after subscription by the granter.

Effect of probativity

7.24. We suggest that it should be provided by statute that a writing which is probative (i.e. which bears to be subscribed by the granter and a witness and to give the minimum required information about the attestation) should be treated as authentic until reduced and should be presumed to have been executed on the date and at the place stated.

Effect of non-probativity.

7.25. A writing which, on the face of it, failed to meet the required standards for probativity (e.g. because there was no signature by the witness, or because the statement by the witness omitted an essential element) would nonetheless be formally valid, under the scheme which we provisionally prefer[18] if subscribed by the granter. In some cases "invalidity" would not be material: the writing may be merely a record of a transaction which could be constituted and proved without writing. In such cases non-probativity would merely mean that a convenient method of proving the transaction became slightly less convenient. In cases where validity as such did matter, there might well be circumstances where the writing would be acceptable to a third party as a valid but non-probative writing. In some circumstances it might well be possible to get the witness to sign a corrective statement at the end of the deed. This could give the reason for it e.g. "This corrective statement by me is added because in the above

statement I mistakenly wrote my name in block letters instead of signing my usual signature". As the statement by the witness is, under the system proposed, merely a matter of evidence and not an essential formality of execution there is no reason why this type of corrective statement should not be perfectly acceptable. In some cases the witness might be dead or unobtainable or unwilling to act. In such cases it might be advantageous to have a provision to replace the latter part of section 39 of the Conveyancing (Scotland) Act 1874 and to make it clear that the fact that the writing was subscribed by the granter could be proved in any proceedings in which the writing is founded on or in a special application to the sheriff court for a declarator to that effect. It might be useful to make it clear that "proceedings" includes proceedings for confirmation of an executor and to provide that proof of authenticity might be by affidavit (as is presently the case in relation to holograph wills under section 21 of the Succession (Scotland) Act 1964). We invite views on whether it would be useful to provide also that a docquet setting out the result of the declarator could be added to the writing itself and signed by the clerk of court, after which the deed would conveniently carry around with it the proof of its own authenticity. These procedures would also be available for "setting up" valid writings which were merely subscribed without any attempt at attestation by a witness.[19] The provisions envisaged might, as mentioned earlier,[20] replace both section 21 of the Succession (Scotland) Act 1964 and the latter part of section 39 of the Conveyancing (Scotland) Act 1874.

Sanctions

7.26. Under the Subscription of Deeds Act 1681 a person who subscribes as witness to a deed without knowing the granter and seeing him subscribe or hearing him acknowledge his signature is liable to "be repute and punished as accessorie to forgerie". The role played by the witness in the process of attestation is crucial to the operation of the whole system. A convenient and flexible system, such as that operating in Scotland, is tolerable only if attestation is taken seriously. If attestation as a witness were to be taken, and known to be taken, lightly and if, for example, it was, and was known to be, a common practice for people who had not witnessed the granter's subscription to add their signatures later, then the whole system would fall into disrepute and there would be a strong argument for insisting on execution before a notary as a condition of probativity. We believe therefore that it should continue to be a criminal offence to make a false statement as a witness to a writing.

Summary of provisional conclusions

7.27. We invite views on the following propositions and questions.

11. Scots law should continue to make provision for writings to be probative by virtue of attestation.

12. Should a writing be probative if, and only if, it appears on its face to be

(a) subscribed by the granter
(b) subscribed by a witness
and if it states
(c) the date and place of subscription by the granter
(d) that the witness saw the granter sign or heard or saw him acknowledge his signature
(e) that the witness is over 16 years of age and
(f) the date when the witness signed?

13. Should it also be a requirement for probativity that each page of the writing (including any schedule or plan annexed) is initialled by the granter?

14. The present form of testing clause should be replaced by new forms (which should be given statutory authority) which would enable the granter of a writing to sign in the knowledge that nothing could later be added or changed above his signature without destroying the writing's probativity and which would contain in a clear and simple way the information necessary to decide whether or not the writing was probative.

15. Views are invited on whether the draft forms set out in paras. 7.20 and 7.21 would meet these requirements in a convenient and practicable way and, if not, on how they might be improved.

16. A writing should not lose the benefit of probativity merely because it contains manifestly immaterial alterations but should lose the benefit of probativity if it contains any alteration which is, or could be, material and which

(a) is not declared in the statement of execution or

(b) is so declared, but in a statement of execution which appears to have been added after execution.

17. A writing which is probative in the above sense should be treated as authentic until reduced and should be presumed to have been executed on the date and at the place stated.

18 (a) There should be statutory provision, (which would replace the latter part of section 39 of the Conveyancing (Scotland) Act 1874 and section 21 of the Succession (Scotland) Act 1964) to enable a subscribed writing which is not probative to be found or declared to be authentic in any proceedings (including proceedings for the confirmation of an executor) in which it is founded on, or on a special application to the court.

(b) Views are invited on whether proof of authenticity in any such proceedings or application might be by affidavit (as is

presently the case in relation to holograph wills under section 21 of the Succession (Scotland) Act 1964).

(c) Would it be useful to provide that when a document had been judicially found or declared to be authentic a docquet to that effect could be written on the document and signed by the clerk of court?

19. It should continue to be a criminal offence to make a false statement as a witness to a writing.

PART VIII - MISCELLANEOUS ISSUES

Introduction

8.1. In this part of the memorandum we consider various special questions relating to the subscription, execution and probativity of writings - including the question of whose subscription is required, what is meant by subscription in the case of individuals, and the execution of writings on behalf of partnerships and corporate bodies. We also deal with the question of how a writing can be executed for a person who is blind or unable to write.

Whose subscription?

8.2. In the case of a writing such as a cautionary obligation, a gratuitous obligation or a disposition the only subscription required for formal validity would be that of the granter or granters. Similarly in the case of a will or other testamentary writing the only subscription required for formal validity would be that of the testator. In the case of a contract to buy or sell heritable property or to lease such property for more than a year the subscription of both parties to the contract would be required. Such a contract could be validly constituted by an offer subscribed by one party met by an acceptance subscribed by the other: it would not be necessary for a single document embodying the terms of the contract to be subscribed by both parties.

8.3. In the case of a variation of a cautionary obligation or gratuitous obligation the writing should, we think, be subscribed by the person undertaking a

greater obligation or accepting a lesser obligation. Where the variation involved some reciprocal arrangements, or where it was not clear who was gaining an advantage, it should be subscribed by both parties.

8.4. We do not suggest any alteration in the rules whereby an agent may enter into contracts or undertake obligations on behalf of his principal. It is common practice for solicitors to sign missives, for example, on behalf of their clients.

Subscription by individuals

8.5. "Subscription", in the case of an individual, normally means, in ordinary language, the signing by that individual of his usual name, consisting of pre-name or initials or an abbreviation followed by the surname in full, at the end of the writing in question. The law is, however, more complicated and considerably more liberal than this.

First, there are special rules for the Sovereign (who superscribes), for peers (who subscribe their title), for the wives of peers (who subscribe their own christian names and their husband's title) and for the eldest sons of peers (who may subscribe their courtesy titles). We do not propose to recommend any change in these rules, unless there is a demand for change by those affected by them.

Secondly, there have been cases where it has been held, in relation to holograph testamentary writings, that subscription need not necessarily involve signing the usual name in the way described above

(e.g. "Robert Brown" or "R. Brown" or "Robt. Brown"). Thus, in one case a testamentary writing signed only by initials was held to be validly subscribed where there was evidence that it was the testator's custom to sign in that way.[1] In another case, a testamentary writing, in the form of a holograph letter, was held to be validly subscribed when it was signed "Connie".[2] More recently, testamentary writings have been upheld when initialled (even in the absence of proof that this was the testator's usual custom)[3] and when signed "Mum".[4]

8.6. There are very powerful arguments for taking a liberal approach to subscription in the case of testamentary writings, which may well be contained in letters to relatives. It would lead to highly artificial results, as pointed out by Lord Hunter in the case last cited, if the law were to require a formal signature to an informal letter to a near relative before it could be held to be validly subscribed. The arguments for a liberal approach to the subscription of other writings are perhaps not so strong. Indeed it is arguable that it is a defect in the present law that it fails to draw an express distinction between testamentary and other writings and that the liberal approach which is so useful in relation to testamentary writings could lead to undesirable laxity if applied to writings such as dispositions. We have no firm views on the need for, or possible nature of, any change in the present rules on what constitutes subscription but invite views on the following questions.

20. (a) Is there a need for any change in the law on what constitutes a valid subscription by an individual?

(b) If so, would it be desirable to have a more liberal rule for testamentary than for other writings?

(c) What should be the content of any new rule, or rules, on what constitutes a valid subscription by an individual?

8.7. Notarial execution. The governing statutory provision on this point is section 18 of the Conveyancing (Scotland) Act 1924 which provides as follows.

> "Notarial execution
>
> 18.-(1) Any deed, instrument or writing, granted after the commencement of this Act, whether relating to land or not may, after having been read over to the granter, be validly executed on behalf of such granter if he, from any cause, permanent or temporary, is blind or unable to write, by a law agent or notary public, or a justice of the peace, or, as regards wills or other testamentary writings, by a parish minister acting in his own parish, or his assistant [or colleague] and successor so acting, subscribing the same in the presence of the granter and by his authority, all before two witnesses who have heard such deed, instrument or writing read over to the granter, and heard or seen such authority given, and a holograph docquet in the form of Schedule I hereto, or in any words to the like effect, shall precede the signature of such law agent or notary public or justice of the peace, or parish minister, or his assistant [or colleague] and successor.
>
> (2) For the purposes of section 39 of the Conveyancing (Scotland) Act 1874, a deed executed on behalf of the granter or maker thereof in accordance with subsection (1) hereof shall be deemed to be a deed subscribed by such granter or maker."[5]

The docquet referred to is in these terms.

"DOCQUET WHERE GRANTER OF DEED IS BLIND OR CANNOT WRITE

Read over to, and signed by me for, and by authority of the above-named A.B. (without designation) who declares that he is blind (or is unable to write), all in his presence, and in presence of the witnesses hereto subscribing.

C.D., law agent (or notary public), Edinburgh (or as the case may be)

or E.F., justice of the peace for the county of

or G.H., minister (or assistant [or colleague] and successor to the minister) of the parish of

M.N., witness.

P.Q., witness.

Note.-The above docquet shall be written on the last page of the deed, instrument or writing, and signed by the law agent or notary public or other person authorised to sign the same in the manner indicated in the form, and such law agent or notary public or other person shall not require also to sign above the docquet at the end of such deed, instrument or writing, and (in the case of a will or other testamentary writing) the prior pages thereof (if any) shall be authenticated in the usual manner by such law agent or notary public or other person adhibiting his own signature thereto. The witnesses to the signatures of such law agent or notary public or other person shall subscribe as indicated in the form, and may be designed in the testing clause of such deed, instrument or writing; but if there be no testing clause thereto, the designations of the witnesses may be added after their respective signatures, and if desired a specification of the place and date of signing may be added to the docquet."

The Church of Scotland (Property and Endowments)(Amendment) Act 1933 provides that a minister of the Church of Scotland who has been appointed to a charge without limit of time or for a period of

years to officiate as minister shall, in any parish in which his charge or any part of it is situated, have the like power under section 18(1) of the 1924 Act as a parish minister acting in his own parish.[6] The same applies to the minister's assistant and successor or colleague and successor.[7]

8.8. An important restriction on notarial execution, not mentioned in the statutory provisions, is that the person signing on behalf of the granter must have no interest in the subject matter of the writing. This rule is applied very strictly. Writings have been held to be invalid because:-

(a) the notary was appointed as one of several trustees under the writing which gave power to the trustees to employ one of their own number as agent or factor[8]

(b) the notary was "appointed" law agent to the testamentary trust created by the writing[9]

(c) a partner of the notary was appointed as one of the trustees by the writing, which gave power to the trustees to appoint one of their number to act as law agent[10]

(d) the notary who executed a codicil (which itself conferred no benefit on him) was a partner of a trustee appointed by the earlier trust disposition and settlement which was altered by the codicil and which authorised trustees to appoint one of their own number as law agent.[11]

8.9. The reading of the writing to the granter and the completion and signature of the docquet by the notary and witnesses must all be done as part of one continuous

process (unico contextu). The writing is invalid if the writing is taken away and the solemnities completed later.[12]

8.10. Several criticisms may be made of the present law on notarial execution. First, the list of those who can act as notary seems rather arbitrary. Why are ministers of the Church of Scotland included but not other ministers or religious leaders of equivalent standing within their own religious communities? Given that many elderly people requiring notarial assistance to execute a will are in hospitals or similar institutions, is there a case for allowing doctors to execute wills notarially, just as ministers now can? Much would seem to depend on the rationale behind the list. If it is that people who are blind or unable to write should be able to call on the help of a trusted professional person, with whom they have regular contact, to help them to execute their will then there would be much to be said for placing all ministers and doctors (and possibly certain other professional people) on the same footing. If, on the other hand, the rationale behind the list is that only those who have the necessary legal expertise should be allowed to undertake the legal task of notarial execution(which has a number of pitfalls, as the decided cases show) then there would be much to be said for restricting the list to notaries and Scottish solicitors. On either view it is difficult to see why ministers of the Church of Scotland should be singled out. We have formed no concluded opinion, but invite views, on the question.

21. Should the list of those who are entitled to execute a writing notarially on behalf of a person who is blind or unable to write be altered and, if so, how?

8.11. Secondly, the law is perhaps too strict in making the participation of the witnesses in the prescribed way necessary for formal validity rather than probativity. If it can be proved, by any competent evidence, that a writing was duly read over to the granter by a person qualified to undertake its notarial execution and was signed by him for, and by the authority of, the granter then arguably the writing ought to be formally valid, although the burden of proving proper execution would lie on any person founding on the writing. We invite views therefore on the proposition that:-

22. A notarially executed writing should be formally valid if read over to the granter and signed on his behalf by a person qualified to undertake notarial execution. Attestation would be necessary for probativity but not for formal validity.

8.12. Thirdly, the requirement of two witnesses may be thought to be too burdensome. In line with our provisional conclusion on the number of witnesses necessary for attestation in normal circumstances we suggest that:-

23. One witness should suffice for the attestation of a notarially executed writing.

8.13. Fourthly, the requirement that the witnesses should sign the writing as part of one continuous process may be thought to be too strict. Indeed, this requirement would be inappropriate if attestation were seen as a matter of evidence rather than as a matter essential for formal validity. We suggest that:-

24. The witness to a notarial execution should be able to sign as such after an interval of time.

8.14. Fifthly, the rules on disqualifying interest may be too strict. It seems unfortunate that those who lose by a notarial execution tainted by a disqualifying interest (perhaps of a highly technical nature) are the beneficiaries under the writing. It would perhaps be sufficient to apply the sanction of nullity only to the provision conferring a benefit, or the possibility of a benefit, on the notary and to let the rest of the writing stand. We suggest therefore for consideration that:-

25. The effect of a disqualifying interest on the part of the person executing a writing notarially on behalf of the granter should not be to invalidate the whole writing but should only be to invalidate any provision conferring a benefit, or the possibility of a benefit, on that person.

8.15. Sixthly, it is for consideration whether the docquet appended to the writing should have to be holograph of the notary. It is very important that the terms of the docquet should be right. There would seem,

therefore, to be a strong argument for allowing the docquet to be typed on the writing in advance, when it could be checked and double checked and done again if necessary, rather than requiring it to be written out by hand in what may be difficult circumstances. A further advantage of having the docquet typed in advance is that it too could be read to the granter before signature so that the granter knows exactly what is happening. We suggest that:-

26. It should no longer be necessary that the docquet by the person executing a writing notarially should be holograph of that person and written at the time of the execution. It should be permissible to type the docquet on the writing in advance.

8.16. Seventhly, the form of docquets may have to be revised. If the question of probativity depends, as it must, on what appears on the face of the writing then much more needs to be said about the role and qualifications of the witness. We would welcome the views of experienced practitioners on this point but suggest for consideration that the docquets might be on the following lines.

Statement of execution

I am a notary public (or solicitor etc.). I have no financial interest, direct or indirect, in the subject matter of this document. I have read this document over to John Smith who declares that he is blind (or unable to write). [I have initialled each page of the document.]

[The document, as read over by me, includes the following alterations .....] With the authority of John Smith, and in his presence, I now sign this document on his behalf.

Signature of notary .....
Name and address of .....
notary (in legible letters) .....
Date when signed .....
Place where signed .....

Statement by witness

I heard this document read over to John Smith. I heard or saw him give authority to the person named above to sign it on his behalf. I am over 16 years of age.

Signature of witness .....
Name and address of .....
witness (in legible letters) .....
Date when signed by .....
witness .....

8.17. These forms follow the lines of those suggested earlier for individuals who can sign. We consider that it is desirable, in the interests of legal coherence, that the same principles should apply, with modifications being made only where necessary to deal with the special circumstances of notarial execution. Alterations could be dealt with in the same way as in normally executed writings.

8.18. We have little doubt that consultees will be able to suggest improvements to these forms, which are proposed very tentatively.

27. We invite views on whether the forms set out in paragraph 8.16 would meet the needs of notarial execution in a practicable and convenient way and, if not, on how they might be improved to enable them to do so.

Execution of writings by partnership.

8.19. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership.[13] In matters within the scope of the firm's business, therefore, the partnership name can be subscribed by any partner. In other matters, such as the execution of formal conveyancing deeds, the usual practice is for both the firm name (subscribed by a partner) and the signatures of all the partners to be adhibited.

8.20. We invite views as to whether there is a need for some clarification and simplification of the law on the execution of writings by partnerships. So far as formal validity is concerned it might be provided that a writing may be validly subscribed on behalf of a partnership by a partner or by any person acting under its authority, express or implied.[14] So far as probativity is concerned it might be provided that a writing purporting to be executed by or on behalf of a partnership would be pro-bative if it bears to be (a) subscribed on its behalf by one or more partners[15] and (b) attested by a witness

in substantially the same way as a probative writing by an individual.

8.21. If the above suggestion were adopted then the substitute for a testing clause in the case of writings by partnerships could be a simple adaptation of the forms used for individuals. They might be on the following lines.

Statement of execution

> I, John Smith, a partner in the firm of X and Co. sign this on behalf of the firm as shown below. [I have initialled etc.] [I confirm that the following alterations etc.] (Signature, date and place of execution, as before.)

Statement by witness

> I believe John Smith to be a partner in the firm of X & Co.. I saw him sign etc. (as before).

It will be noted that there is no signing of the firm name under these proposals. This would seem to be unnecessary. Someone has to sign on behalf of the firm and that, arguably, should be enough. However, it would be perfectly possible to modify the above formula to refer to the signing of the firm name if that were thought to be desirable. We would be grateful for views on this point.

8.22. 28(a) We invite views as to whether there is a need for clarification of the law on the execution of writings by partnerships.

(b) Should it be provided that a writing may be validly subscribed on behalf of a partnership by a partner or by any person acting under its authority, express or implied?

(c) Should it be provided that a writing purporting to be executed by or on behalf of a partnership will be probative if it bears to be (i) subscribed on its behalf by one or more partners and (ii) attested by a witness in substantially the same way as a probative writing by an individual?

(d) Would the forms set out in paragraph 8.21 provide a convenient and practicable substitute for the present form of testing clause in probative writings by partnerships? If not, how might they be improved?

Execution of writings by companies

8.23. Under this heading we are concerned only with companies incorporated under the Companies Acts. We deal later with other bodies corporate. The present law on the execution of writings by companies is, surprisingly for a matter of such general importance, in a state of some confusion and uncertainty. The difficulties appear to be at least partly due to the fact that the relevant statutory provisions represent an uneasy amalgam of English and Scottish practice.[16]

8.24. The main statutory provision[17] is section 36 of the Companies Act 1985. We set this out in full because of its importance.

> "36. (1) Contracts on behalf of a company may be made as follows:-
>
> (a) a contract which if made between private persons would be by law required to be in writing, and if made according to the law of England and Wales to be under seal, may be made on behalf of the company in writing under the company's common seal;
>
> (b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;
>
> (c) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.
>
> (2) A contract made according to this section -
>
> (a) is effectual in law, and binds the company and its successors and all other parties to it;
>
> (b) may be varied or discharged in the same manner in which it is authorised by this section to be made.
>
> (3) A deed to which a company is a party is held to be validly executed according to the law of Scotland on behalf of the company if it is executed in accordance with this Act or is sealed with the company's common seal and subscribed on behalf of the company by two of the directors, or by a

director and the secretary; and such subscription on behalf of the company is binding whether attested by witnesses or not."

8.25. Various criticisms may be made of this provision. First, the first two subsections refer only to contracts. For Scotland, it would be appropriate either to refer also to other voluntary obligations or to frame these subsections in terms of what counts as a valid subscription. The latter would seem to be the preferable course. The general law on the constitution of obligations says what contracts require to be in writing. The general law on agency, supplemented by a company's own internal rules and practices, says who can act on behalf of a company. All that is needed so far as the execution (as opposed to probativity) of writings is concerned is a clear statement of what is meant by "subscription" in the case of a company. This, it is suggested, might provide that a writing may be validly subscribed on behalf of a company by a director of the company, or by the secretary of the company, or by any person acting under its authority, express or implied. This would reproduce the substance of section 36(1)(b) while providing specifically for signature by a director or by the secretary, in relation to whom no question of authority ought to be allowed to arise. Anything less wide than this would, it is thought, be impracticable and unacceptable, given the great number and variety of writings requiring to be subscribed on behalf of companies.

8.26. A second criticism is that it is not clear whether section 36(3) is intended to have any effect on probativity as opposed to formal validity. The question

is most easily discussed in relation to the second alternative method of execution mentioned in the subsection[18] - that is, sealing with the common seal and subscription on behalf of the company by two of the directors or by a director and the secretary. Two views are possible as to the effect of this provision. The first is that it is concerned only with formal validity. A deed so executed is "validly executed" (the words used in the subsection) but is not necessarily probative. The whole process of sealing and subscription is, on this view, just the equivalent of signature by an individual of a holograph writing. The writing is valid but does not prove its own authenticity. To be probative it would have to be attested by witnesses in the usual way. This view fits the words of the subsection, which talks of valid execution and binding subscription but says nothing of probativity. The second view is that the subsection is to be interpreted as providing (somewhat obscurely) for probativity as well as validity. On this view the subsection can be squeezed into the general framework of the law on probative writings by regarding the common seal as the company's signature and the two directors (or a director and the secretary) as witnesses. Although this seems a somewhat forced interpretation,[19] it derives support from the case of Clydesdale Bank (Moore Place) Nominees Ltd. v. Snodgrass.[20] In that case, Lord Justice-Clerk Aitchison said:

> "I think the correct view is that the common seal is the signature of the Bank provided it is duly attested by the signatures of two directors",[21]

and Lord Wark expressed the opinion that

> "the signature of a company is its common seal adhibited in manner prescribed by the articles of the signing company .... The persons so signing are truly the witnesses to the adhibition of the company's seal.".[22]

On this authority, therefore, a deed bearing to be duly sealed with the common seal of the company and to be signed by two directors, or a director and the secretary, is probative.

8.27. A third critcism is that section 36(3) is difficult to construe when it provides that a deed by a company shall be validly executed "if it is executed in accordance with the provisions of this Act". This is puzzling. The only provisions in the Act (apart from section 36 itself and some provisions added as a result of consolidation but not in the original 1948 Act) which relate expressly to the execution of deeds by a company are sections 37 and 38 which deal with the execution of deeds abroad. It seems unnecessary and curious to have a special provision for the validity in Scots law of such deeds, when there is no similar provision for English law. Another possibility is that section 36(3) refers to section 182(1) which provides that, subject to the Stock Transfer Act 1963, shares in a company are transferable "in manner provided by the company's articles".[23] This again, however, is curious because a company would not normally make special provision as to how it is to execute transfers of its own shares, as distinct from documents in general. Yet another possibility, and the one of most importance in practice, is that the provision refers to regulation 101 in Table A

relating to the common seal of the company. This provides as follows.[24]

"The Seal

> The seal shall only be used by the authority of the directors or of a committee of directors authorised by the directors. The directors may determine who shall sign any instrument to which the seal is affixed and unless otherwise so determined it shall be signed by a director and by the secretary or by a second director."

This again is rather curious because the regulation is not a mandatory provision of the Act. It is part of a set of regulations which may, but need not, be adopted by a company in its articles of association.[25] Is a deed executed in accordance with a model regulation (which, it may be noted, purports to deal with the company's seal and does not refer either to "deeds" or to "execution" and which, since the consolidation of 1985, is contained in a separate statutory instrument and not even in a schedule to the Act) executed "in accordance with this Act"?. Is a deed executed in accordance with articles which do not adopt regulation 101 executed "in accordance with this Act"? If section 36(3) had been intended to say that a deed would be validly executed if executed in any manner provided for in the articles of association of the company, why did it not say so directly? Even if a deed executed in accordance with the company's articles is covered by section 36(3), what is the effect? Is it valid even if, say, the signature of only one person is required. Section 36(3), thus interpreted, seems to say it is.[26] However, some doubt is thrown on this view by the Clydesdale case, referred to above, where the validity of the document in question seemed to depend on the fact that there were two witnesses.[27] Even if such a document were valid, it is hard to see how on any view

it could be probative. The Act says nothing about probativity and a document signed by only one person could not by any feat of the intellect be squeezed into the existing Scots law on probative deeds. Yet another possibility is that the provision in section 36(3) refers back to the earlier subsections in that very section. On this view a deed embodying a contract by a company might be validly executed (but would assuredly not be probative) if signed, in accordance with section 36(1)(b), by a person acting under the company's authority, express or implied.

8.28. A fourth criticism of section 36(3) will already have become apparent. There is no definition of what is meant by a "deed". What is the difference, if any, between a document embodying a written contract and a deed?

8.29. Another doubt about section 36 is whether it is intended to replace, or merely add to, the general Scottish law on the authentication of writings. Is a writing signed by, say, the secretary of a company and attested by two witnesses in accordance with the old authentication statutes, a valid and probative writing under Scots law?

8.30. We would be grateful for comments on whether the law on the execution of writings by companies needs to be clarified and, if so, on how this might best be done. To provide a focus for comment we outline below a possible scheme, based on the principles already suggested in this memorandum in relation to the execution of writings by individuals. Again the essence of the

scheme is the distinction, which we believe to be essential for clear thinking on this issue, between formal validity and probativity. The reasons for the suggestions made below will be obvious in the light of our earlier discussions of formal validity and probativity. In brief, it would seem to be highly desirable that the rules on the formal validity of writings should be as uncluttered by technical restrictions as possible. If a writing is admitted or proved to be genuine and if it is subscribed (so as to indicate a concluded intention) there is little to be said for holding it to be invalid on formal grounds. Moreover the rules on subscription of writings for companies, as is already recognised by section 36(1) of the Companies Act 1985 in relation to contracts, must be extremely wide and flexible if all the likely needs of practice are to be met. So far as probativity is concerned rather more can be required. A probative writing is expected to be a reasonably formal document which carries the stamp of authenticity on its face. It seems not unreasonable, therefore, to require such a document by a company to bear to be subscribed by two directors, or by a director and the secretary of the company, and to be either sealed with the company's seal (which could be regarded, perhaps, as a badge of authenticity) or attested by a witness in the normal way (which might be a useful alternative if e.g. there were no common seal).[28] We would welcome views, however, as to whether it is excessive to require the signatures of <u>two</u> directors, or of a director and a secretary. Might, for example, the signature of one director or of the secretary suffice? The statements of execution and (where a witness is used) the statement by the witness

could follow the lines of those suggested for writings by individuals with some necessary modifications. We envisage that the rules of formal validity and probativity would be set out in legislation and would replace, for Scotland, the rules in section 36 of the 1985 Act. We also envisage that these rules would apply, in questions with third parties, no matter what the company provided in its own articles. It would seem to be clearly advantageous for those dealing with a company to be able to tell at a glance, without having to check the articles and possibly minutes of meetings, whether a writing appeared to be valid or probative. A company would not be free to prescribe for itself more lax rules on formal validity and probativity - because these are questions of the general law, not internal organisation - but would be free to prescribe more strict rules. Failure to observe any extra requirements imposed by the articles might expose an officer or employee of the company to internal company sanctions but would not affect third parties.

8.31. 29(a) We invite views as to whether there is a need for clarification of the law on the execution of writings by companies.

(b) Should it be provided that a writing may be validly subscribed on behalf of a company by a director of the company, or by the secretary of the company, or by any person acting under its authority, express or implied?

(c) Should it be provided that a writing purporting to be executed by or on behalf of a company will be probative if it

bears to be subscribed on its behalf by two directors of the company, or by a director and the secretary of the company, and to be

(i) sealed with the common seal of the company, or

(ii) attested by a witness in substantially the same way as a probative writing by an individual?

(d) Should it be made clear that compliance with (b) or (c) above would be necessary and sufficient for formal validity or probativity, as the case may be, irrespective of any provisions in the company's articles of association?

(e) Would it be desirable to relax the requirement in (c) above so that the signature of one director or of the secretary, along with sealing or attestation, would suffice for probativity?

8.32. If forms of execution and attestation were to be modelled on those used in writings by individuals they might look something like this.

Statement of execution on behalf of a company

I, John Smith, a director (or the secretary) of X plc sign this on behalf of the company as shown below. [I have initialled etc.] [I confirm that the following

alterations etc. .....] [The document is sealed with the common seal of the company.]

Signature of John Smith .....
Date when signed .....
Town or other place where signed .....

Statement by witness (where used).

I believe John Smith to be a director (or the secretary) of X plc. I saw him sign this document or heard him acknowledge his signature. I am over 16 years of age.

Signature of witness .....
Full name and address .....
of witness (in legible letters) .....
.....
.....
Date when witness signed. .....

8.33. 29(f) Would the forms set out in paragraph 8.32 provide a convenient and practicable substitute for the present form of testing clause in probative writings by companies? If not, how might they be improved?

8.34. Section 462(2) of the Companies Act 1985 provides that a floating charge by a company may be created

> "only by the execution, under the seal of the company, of an instrument or bond or other written acknowledgement of debt or obligation which purports to create such a charge".[29]

This provision, and others like it,[30] should possibly be amended if new statutory rules on the execution of probative writings by companies were to be introduced. It would seem to be desirable to enable a floating charge to be executed in the same way as, say, a disposition of heritage or a bond. The provision might, perhaps, simply refer to the execution of a probative document, leaving it to the new general rules to say what that would involve.

29(g) We invite views as to whether, if new statutory rules on the execution of probative writings by or on behalf of companies were introduced, there are any specific provisions (e.g. those on the execution of floating charges) which should be amended in consequence.

Execution of writings by other bodies corporate

8.35. Many bodies corporate other than companies registered under the Companies Acts require to execute documents, sometimes in large numbers. These bodies include, for example, local authorities, building societies incorporated under the Building Societies Acts, university courts under the Universities (Scotland) Acts and many bodies incorporated by Royal Charter.

8.36. Local authorities. In the case of local authorities, the main statutory provisions are in sections 193 and 194 of the Local Government (Scotland) Act 1973, which provide as follows.

"**193.**--(1) Any notice, order or other document which a local authority are authorised or required by or under any enactment (including any enactment in this Act) to give, make or issue may be signed on behalf of the authority by the proper officer of the authority, and may be withdrawn by a notice similarly authenticated.

(2) Any document purporting to bear the signature of the proper officer of the authority shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority of the local authority.

(3) Where any enactment or instrument made under an enactment makes, in relation to any document or class of documents, provision with respect to the matters dealt with by one of the two foregoing subsections, that subsection shall not apply in relation to that document or class of documents.

194.--(1) Save as otherwise provided in[any enactment], a deed to which a local authority are a party shall be held to be validly executed on behalf of the authority if it is sealed with the common seal of the council and subscribed on behalf of the council by two members of the council and the proper officer of the council, whether attested by witnesses or not, or if it is executed in such other manner as may be provided in a local Act.

(2) The seal of a council may be affixed to a deed or other document if authority to affix the seal to the deed or other document has been given at a meeting of the council, or has been given otherwise in accordance with standing orders of the council:

Provided that a person entering into any transaction with any such council shall not be bound to inquire whether authority to affix the seal has been given in accordance with the provisions of this subsection, and all deeds executed by such a council if otherwise valid shall have full force and effect notwithstanding that such authority may not have been given."

Although the side-note to section 193 is "authentication of documents" the section seems to deal with authority to sign. It does not seem to say anything about the formal validity or probativity of writings executed on behalf of local authorities. Section 194, on the other hand, is clearly concerned with formal validity but it is not clear what is meant by a "deed" and it is not clear whether the section is saying anything about probativity. On the terms of the section it is certainly arguable that, say, a disposition of heritage executed as provided for in section 194, but not attested by witnesses, is formally valid but not probative. There is, on the face of it, a case for saying that the position ought to be clarified by provisions analogous to those suggested for companies.[31]

30(a) We invite views as to whether there is a need for clarification of the law on the execution of writings by local authorities.

(b) Should it be provided that a writing may be validly subscribed on behalf of a local authority by the proper officer of the authority, or by any person acting under its authority, express or implied?

(c) Should it be provided that a writing purporting to be executed by or on behalf of a local authority will be probative if it bears to be subscribed on its behalf by two members of the council and the proper officer of the council, and to be

(i) sealed with the common seal of the council, or

(ii) attested by a witness in substantially the same way as a probative writing by an individual?

(d) Would it be desirable to relax the requirement in (c) above so that the signature of, say, one member of the council and the proper officer of the council, along with sealing or attestation, would suffice for probativity?

8.37. Building Societies. The Building Societies Acts contain no direct provisions on the formal validity or probativity of writings executed by or on behalf of building societies. Under the Building Societies Act 1962, however, a building society to be incorporated under the Act must have rules[32] and those rules must set out, among other things

> "the powers and duties of the board of directors and other officers",[33] and
>
> "provision for the device, custody and use of the society's common seal".[34]

It is surprising that there should be no statutory provision as to the formal validity or probativity of writings executed on behalf of a building society in Scotland. There seems to be no reason to suppose that the rules of a society, even if they are binding on its members and officers,[35] and even if the society is incorporated, can modify the general law on the formal

validity and probativity of writings and it seems therefore that the general law applies, with the result that those writings by building societies which come under the authentication statutes require to be attested if they are to be valid and probative. It is possible that, at common law, the seal of the society would be regarded as its signature and the signatures of, say, two directors or a director and a secretary, designed as such, would be regarded as the subscription of two attesting and properly designed witnesses and that accordingly a writing executed in this way would be valid even if not otherwise attested, but the old authentication statutes do not apply very happily to execution by bodies corporate. Must, for example, the pseudo-witnesses see the seal adhibited? It seems most undesirable that there should be any room for doubt on this matter.

31(a) We invite views as to whether there should be statutory provisions on the formal validity and probativity of writings executed on behalf of building societies.

(b) If such provisions were to be introduced should they be analogous to those suggested for companies incorporated under the Companies Acts?

8.38. Other bodies. There appear to be no express statutory provisions on the formal validity or probativity of writings executed by other bodies corporate. Sealing, coupled with subscription by authorised officers or members of the governing body, and

attestation by witnesses in the usual way would be the safe method, but might be considered unnecessarily burdensome. Sealing and subscription by, say, the secretary and a member of the governing body in accordance with the rules of the body corporate itself might be regarded as sufficient on the view that the seal is the signature of the body corporate and that the other two signatures are, despite appearances, those of attesting witnesses, but this is not entirely certain. The considerations appear to be the same as in the case of building societies.

32(a) We invite views as to whether there should be statutory provisions on the formal validity and probativity of writings executed on behalf of other corporate bodies.

(b) If such provisions were to be introduced should they be analogous to those suggested for companies incorporated under the Companies Acts?

PART IX - SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

Note. Attention is drawn to the notice at the front of the memorandum concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this memorandum may be referred to or attributed in our subsequent report.

1. Any rule of the common law that restricts to writing in any form the manner in which any agreement or obligation may be constituted, varied or cancelled should cease to have effect.
(Paras. 4.2 to 4.13)

2. Section 6 of the Mercantile Law Amendment (Scotland) Act 1856 should be repealed in so far as it deals with "guarantees, securities or cautionary obligations", and replaced as noted in 3(b) below.
(Paras. 4.6 and 4.13)

3. It should be provided by statute that, in addition to any other case where writing is required by statute, writing is required for the constitution, variation or cancellation of
   (a) an agreement to buy or sell heritable property or to lease, or take on lease, such property for a period of more than one year

(b) a cautionary obligation and

(c) a gratuitous obligation.

Views are invited as to whether writing should be required for any other contracts relating to heritage - such as those relating to excambion, licences or grants of servitudes

(Paras. 4.3, 4.6, 4.8 and 4.13)

4. Nothing in the above proposals should affect the law of personal bar.

(Paras. 4.9 and 4.13)

5. Nothing in the above proposals should affect

(a) the constitution of any agreement or obligation

(b) the variation of any agreement or obligation or

(c) the cancellation of any agreement or obligation

before any implementing legislation comes into force.

(Paras. 4.10 and 4.13)

6. (a) Writing should continue to be required for testamentary dispositions.

(b) The exception for nuncupative bequests of moveables of a value not exceeding £8.33p. should be abolished.

(c) There should be no other exceptions.

(Para. 4.14)

7. The procedure of reference to the oath of a party should be abolished.

(Para. 5.2)

8. Any enactment or rule of law that restricts proof of the constitution, variation or performance of any agreement or obligation to writ or oath should cease to have effect. This is without prejudice to proposal no. 3 above that writing should be required as a matter of substantive law for the constitution, variation or cancellation of certain obligations. (Paras. 5.3 to 5.13)

9. Views are invited on the following options with regard to the formal validity of writings (in those cases where writing is required by law or is used in order to provide a formal written obligation, such as a bond). In each case the rule would apply unless an enactment otherwise provided.

(a) Option 1. The sole requirement for formal validity (as opposed to probativity) should be subscription by the granter.

(b) Option 2. The requirement for formal validity (as opposed to probativity) should be subscription by the granter coupled with (i) attestation or (ii) the addition of a form of words such as "Intended to be legally binding" above the signature.

(c) Option 3. The requirements for formal validity (as opposed to probativity) should vary from case to case. In some cases (e.g. gratuitous obligations, cautionary obligations, wills) the requirement might be subscription: in others (e.g. missives) it might be the

addition of a technical formula above the subscription: in others (e.g. dispositions) it might be attestation.

In relation to options 2 and 3 views are invited on what the appropriate formalities should be in each case. In particular, views are invited on what, if anything, would be an appropriate replacement for the formula "adopted as holograph". Our provisional preference (by a majority) is for option 1.
(Paras. 6.1 to 6.21)

10. (a) It should be presumed that any alteration in, or addition to, a subscribed but improbative writing, made above the subscription and proved to be in the granter's hand or to be initialled or signed by him, was made by him before subscription.

    (b) Unsigned additions below or after the subscription by the granter should not be regarded as part of the writing.

    (Para. 6.22)

11. Scots law should continue to make provision for writings to be probative by virtue of attestation.
    (Paras. 7.1 and 7.27)

12. Should a writing be probative if, and only if, it appears on its face to be

(a) subscribed by the granter

(b) subscribed by a witness

and if it states

(c) the date and place of subscription by the granter

(d) that the witness saw the granter sign or heard or saw him acknowledge his signature

(e) that the witness is over 16 years of age and

(f) the date when the witness signed?

(Paras. 7.2 to 7.17 and 7.27)

13. Should it also be a requirement for probativity that each page of the writing (including any schedule or plan annexed) is initialled by the granter?

(Paras. 7.4 and 7.27)

14. The present form of testing clause should be replaced by new forms (which should be given statutory authority) which would enable the granter of a writing to sign in the knowledge that nothing could later be added or changed above his signature without destroying the writing's probativity and which would contain in a clear and simple way the information necessary to decide whether or not the writing was probative.

(Paras. 7.18 to 7.21 and 7.27)

15. Views are invited on whether the draft forms set out in paras. 7.20 and 7.21 would meet these

requirements in a convenient and practicable way and, if not, on how they might be improved.
(Paras. 7.18 to 7.21 and 7.27)

16. A writing should not lose the benefit of probativity merely because it contains manifestly immaterial alterations but should lose the benefit of probativity if it contains any alteration which is, or could be, material and which (a) is not declared in the statement of execution or (b) is so declared, but in a statement of execution which appears to have been added after execution.
(Paras. 7.23 and 7.27)

17. A writing which is probative in the above sense should be treated as authentic until reduced and should be presumed to have been executed on the date and at the place stated.
(Paras. 7.24 and 7.27)

18. (a) There should be statutory provision, (which would replace the latter part of section 39 of the Conveyancing (Scotland) Act 1874 and section 21 of the Succession (Scotland) Act 1964) to enable a subscribed writing which is not probative to be found or declared to be authentic in any proceedings

(including proceedings for the confirmation of an executor) in which it is founded on, or on a special application to the court.

(b) Views are invited on whether proof of authenticity in any such proceedings or application might be by affidavit (as is presently the case in relation to holograph wills under section 21 of the Succession (Scotland) Act 1964).

(c) Would it be useful to provide that when a document had been judicially found or declared to be authentic a docquet to that effect could be written on the document and signed by the clerk of court?

(Paras. 7.25 and 7.27)

19. It should continue to be a criminal offence to make a false statement as a witness to a writing.

(Paras. 7.26 and 7.27)

20. (a) Is there a need for any change in the law on what constitutes a valid subscription by an individual?

(b) If so, would it be desirable to have a more liberal rule for testamentary than for other writings?

(c) What should be the content of any new rule, or rules, on what constitutes a valid subscription by an individual?

(Paras. 8.5 and 8.6)

21. Should the list of those who are entitled to execute a writing notarially on behalf of a person who is blind or unable to write be altered and, if so, how?
(Paras. 8.7 to 8.10)

22. A notarially executed writing should be formally valid if read over to the granter and signed on his behalf by a person qualified to undertake notarial execution. Attestation would be necessary for probativity but not for formal validity.
(Para. 8.11)

23. One witness should suffice for the attestation of a notarially executed writing.
(Para. 8.12)

24. The witness to a notarial execution should be able to sign as such after an interval of time.
(Para. 8.13)

25. The effect of a disqualifying interest on the part of the person executing a writing notarially on behalf of the granter should not be to invalidate the whole writing but should only be to invalidate any provision conferring a benefit, or the possibility of a benefit, on that person.
(Para. 8.14)

26. It should no longer be necessary that the docquet by the person executing a writing notarially should be holograph of that person and written at the time of

the execution. It should be permissible to type the docquet on the writing in advance.
(Para. 8.15)

27. We invite views on whether the forms set out in paragraph 8.16 would meet the needs of notarial execution in a practicable and convenient way and, if not, on how they might be improved to enable them to do so.
(Paras. 8.16 to 8.18)

28 (a) We invite views as to whether there is a need for clarification of the law on the execution of writings by partnerships.

(b) Should it be provided that a writing may be validly subscribed on behalf of a partnership by a partner or by any person acting under its authority, express or implied?

(c) Should it be provided that a writing purporting to be executed by or on behalf of a partnership will be probative if it bears to be (i) subscribed on its behalf by one or more partners and (ii) attested by a witness in substantially the same way as a probative writing by an individual?

(d) Would the forms set out in paragraph 8.21 provide a convenient and practicable substitute for the present form of testing clause in probative writings by partnerships? If not, how might they be improved?
(Paras. 8.19 to 8.22)

29 (a) We invite views as to whether there is a need for clarification of the law on the execution of writings by companies.

(b) Should it be provided that a writing may be validly subscribed on behalf of a company by a director of the company, or by the secretary of the company, or by any person acting under its authority, express or implied?

(c) Should it be provided that a writing purporting to be executed by or on behalf of a company will be probative if it bears to be subscribed on its behalf by two directors of the company, or by a director and the secretary of the company, and to be

(i) sealed with the common seal of the company, or

(ii) attested by a witness in substantially the same way as a probative writing by an individual?

(d) Should it be made clear that compliance with (b) or (c) above would be necessary and sufficient for formal validity or probativity, as the case may be, irrespective of any provisions in the company's articles of association?

(e) Would it be desirable to relax the requirement in (c) above so that the signature of one director or of the secretary, along with sealing or attestation, would suffice for probativity?

(f) Would the forms set out in paragraph 8.32 provide a convenient and practicable substitute for the present form of testing clause in probative writings by companies? If not, how might they be improved?

(g) We invite views as to whether, if new statutory rules on the execution of probative writings by or on behalf of companies were introduced, there are any specific provisions (e.g. those on the execution of floating charges) which should be amended in consequence.
(Paras. 8.23 to 8.34)

(a) We invite views as to whether there is a need for clarification of the law on the execution of writings by local authorities.

(b) Should it be provided that a writing may be validly subscribed on behalf of a local authority by the proper officer of the authority, or by any person acting under its authority, express or implied?

(c) Should it be provided that a writing purporting to be executed by or on behalf of a local authority will be probative if it bears to be subscribed on its behalf by two members of the council and the proper officer of the council, and to be

(i) sealed with the common seal of the council, or

(ii) attested by a witness in substantially the same way as a probative writing by an individual?

(d) Would it be desirable to relax the requirement in (c) above so that the signature of, say, one member of the council and the proper officer of the council, along with sealing or attestation, would suffice for probativity?
(Para. 8.36)

31 (a) We invite views as to whether there should be statutory provisions on the formal validity and probativity of writings executed on behalf of building societies.

(b) If such provisions were to be introduced should they be analogous to those suggested for companies incorporated under the Companies Acts? (Para. 8.37)

32 (a) We invite views as to whether there should be statutory provisions on the formal validity and probativity of writings executed on behalf of other corporate bodies.

(b) If such provisions were to be introduced should they be analogous to those suggested for companies incorporated under the Companies Acts? (Para. 8.38)

NOTES TO PART I

1. Memorandum No. 39. This memorandum was part of a series of six published under our programme subject of Obligations (Item 2 of our First Programme of Law Reform). Some of the topics covered in that memorandum, and in this, (such as proof by writ and the nature of probative writing) also fall under the heading of Evidence which is also one of our programme subjects (Item 1 of our First Programme of Law Reform).

2. The only body which did express support for it in general disagreed with specific aspects of it, including the proposed additions to the category of obligationes literis.

3. Writing is already required by statute in this case but there are difficulties which could be removed by a new statutory provision. See para. 2.20 below.

NOTES TO PART II

1. Memorandum 39, para. 4(a). There is an area of uncertainty in relation to contracts which relate only incidentally to heritage. See Walker & Walker, Evidence, pp.88-89. The grant of an option to purchase heritage is an obligation relating to heritage and must be created by writing but the exercise of the option does not need to be in writing. See Stone v. Macdonald 1979 S.C. 363.

2. Memorandum 39, para. 4(b).

3. Memorandum 39, para. 4(c). On the doubt regarding moveables, contrast Dickson Evidence (3rd. edn.) para. 562 with Walker & Walker, Evidence p.98. There are special statutory rules on arbitrations relating to agricultural leases: Agricultural Holdings (Scotland) Act 1949 ss.75, 76, 99 and S.I. 1960 No. 1337.

4. Memorandum 39 para. 7. Contrast McElroy v. London Assurance Corp. (1897) 24R. 287 (esp. per Lord McLaren at p.290) with Christie v. North British Insurance Co. (1825) 3S. 519 at p.522 and Parker & Co. (Sandbank) Ltd. v. Western Assurance Co. 1925 S.L.T. 131. Contracts of marine insurance are inadmissible in evidence unless embodied in a written marine policy: Marine Insurance Act 1906, ss.21, 22-24.

5. See Walker & Walker, Evidence, p.109; B.O.C.M. Silcock v.Hunter 1976 S.L.T. 217. The main difficulties regarding cautionary obligations turn, however, on s.6 of the Mercantile Law Amendment (Scotland) Act 1856. See para. 2.20 below.

6. Paras. 2.20 to 2.24 below.

7. Memorandum 39 paras. 8-12. Writs in re mercatoria are discussed below in another context. See para. 2.24

NOTES TO PART II

8. Memorandum 39, paras. 13-19. In both cases the actings must be "unequivocally referable" to the contract. See Secretary of State v. Ravenstone Securities Ltd. 1976 S.C. 171; Law v. Thomson 1978 S.C. 343.

9. 1966 S.C. 93. Although the result reached in this case was equitable its consistency with the previous law has been questioned. See Stewart, 1966 Journal of the Law Society of Scotland 263. We suggest later that rules requiring proof of any obligation to be by writ or oath should be abolished (paras. 5.1 to 5.13). This would fortify and extend the decision in Errol v. Walker and remove any doubts about the law on this point.

10. In Law v. Thomson 1978 S.C. 343 it was held that homologation in the form simply of actings of one party, not impinging on the other, could not have this effect.

11. Statutory provisions relating to the transfer of property are considered separately at para. 2.5 below.

12. Mercantile Law Amendment (Scotland) Act 1856, s.6.

13. Consumer Credit Act 1974, ss.60, 61.

14. Bills of Exchange Act 1882, s.3(1), 83(1).

15. Partnership Act 1890, s.2(3)(d).

16. Companies Act 1985, ss.2(6) and 7(3).

17. Merchant Shipping Act 1970, s.1.

18. Employment Protection (Consolidation) Act 1978, s.1.

19. Truck Act 1831 s.23; Truck Act 1896, ss.1(1)(a), 2(1)(a), 3(1)(a).

20. Mobile Homes Act 1975, s.1.

21. Matrimonial Homes (Family Protection)(Scotland) Act 1981, ss.1(5), 6(3)(a).

NOTES TO PART II

22. Stair, III.8.36; Erskine III.9.7. Walker and Walker, Evidence pp.98-99.

23. Stair, II.3.11.

24. Registration of Leases (Scotland) Act 1857 s.3.

25. Stair, II.3.13 and 14.

26. Stair, II.6.6.

27. Conveyancing and Feudal Reform (Scotland) Act 1970, s.9(1)-(3).

28. McMurrich's Trs. v. McMurrich's Trs. (1903) 6F. 121 at p.126. Walker and Walker, Evidence, pp.111-112. An optional form of assignation is given in the Transmission of Moveable Property (Scotland) Act 1862.

29. Companies Act 1985, s.183; Stock Transfer Act 1963, s.1.

30. Patents Act 1977, s.31.

31. Copyright Act 1956, s.36(3).

32. The documents required in relation to carriage by road, rail or air are not essential for the validity of the contracts in question. See Walker, Contracts, p.186. Writing is often required, expressly or impliedly, in relation to judicial or quasi-judicial or governmental or administrative proceedings including the keeping of registers of various kinds.

33. See Memorandum 39 paras. 4(d) and 5. Stobo Ltd. v. Morrisons (Gowns) Ltd. 1949 S.C. 184.

34. Memorandum 39 paras. 34-52. Walker & Walker, Evidence, pp.113-134.

35. Paterson v. Paterson (1897) 25R. 144. In some cases (e.g. entries in business books, or holograph jottings in books, or approved minutes) the writ need not even be signed. See Walker & Walker, Evidence, p.332.

NOTES TO PART II

36. But not necessarily in e.g. an action for reconveyance of security subjects. See Smith's Tr. v. Smith 1911 S.C. 653, as explained by Lord President Cooper in McKie v. Wilson 1951 S.C. 15, at p.20.

37. Walker & Walker, Evidence, pp.114-119.

38. Scot v. Fletcher (1665) Mor. 11616; Geddes v. Geddes (1678) Mor. 12730.

39. Robb v. Robb's Trs. (1884) 11R. 881; Boyd v. Millar 1933 S.N. 106, 1934 S.N. 7.

40. Walker & Walker, Evidence, pp.123-124.

41. Evidence, 3rd edition, para. 606.

42. Devlin v. McKelvie 1915 S.C. 180.

43. See Memorandum 39, para. 38; Walker & Walker. Evidence, pp.119-23; Wilson & Duncan, Trusts, Trustees and Executors, pp.50-61.

44. Cairns v. Davidson 1913 S.C. 1054; Newton v. Newton 1923 S.C. 15; Kennedy v. Macrae 1946 S.C. 118; Weissenbruch v. Weissenbruch 1961 S.C. 340. See, however, Dunn v. Pratt (1898) 25 R. 461 where the Act was held to apply to missives. There was a strong dissenting opinion by Lord Kinnear and the decision of the majority has been criticised as confusing right and title. See McConnachie v.Geddes 1918 S.C. 391.

45. Horne v. Morrison (1877) 4 R. 977; Dunn v. Pratt (1898) 25 R. 461; McConnachie v. Geddes 1918 S.C. 391.

46. Marshall v. Lyell (1859) 21 D. 514 at p.521; Wink v. Speirs (1867) 6 M. 77; Galloway v. Galloway 1929 S.C. 160.

47. Dunn v. Pratt (1898) 25 R. 461 esp. at p.468; Beveridge v. Beveridge 1925 S.L.T. 234.

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48. Cairns v. Davidson 1913 S.C. 1054; McConnachie v. Geddes 1918 S.C. 391; in both cases per Lord Salvesen. See also Wilson & Duncan, Trusts, Trustees and Executors, pp.56-57.

49. Baptist Churches v. Taylor (1841) 3 D. 1030; Forrester v. Robson's Trs. (1875) 2 R. 755.

50. Laird & Co. v. Laird & Rutherfurd (1884) 12 R. 294 esp. per Lord President Inglis at p.297. In Munro v. Stein 1961 S.C. 362 it was held that the 1696 Act, if it applied in partnership cases at all, applied only in respect of assets acquired during the course of the partnership and not to those brought in by the partners when their association began.

51. See Walker & Walker, Evidence, pp.132-134 where examples are given of the application of this peculiarly vague rule.

52. See Walker & Walker, Evidence, p.134; Smith v. Oliver 1911 S.C. 103.

53. Hawick Heritable Investment Co. v. Huggan (1902) 5 F. 75 per Lord Kyllachy at pp.78-9; Gloag, Contract, 2nd edition, p.52.

54. See Walker & Walker, Evidence, pp.124-128. Keanie v. Keanie 1940 S.C. 549.

55. On which see next paragraph.

56. Including an exception for performance of obligations ad factum praestandum and a sweeping exception for cases where the creditor's actings, or the circumstances generally, are such as to lead to the inevitable inference that the obligation has been discharged. See Memorandum 39, para. 42. The Bills of Exchange Act 1882 s.100 provides that "any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence ...". See, on this section, Thompson v. Jolly Carters Inn Ltd. 1972 S.C. 215.

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57. Walker & Walker, Evidence, pp.128-130.

58. Stewart v. Gordon (1831) 9 S. 466; Shaw v. Wright (1877) 5 R. 245, p.247.

59. Dickson, Evidence, 3rd. edn., para. 616; Burt v. Laing 1925 S.C. 181 at p.184.

60. Tod v. Flockhart 1799 Hume's Dec. 498; Young v. Thomson 1909 S.C. 529,

61. Thiem's Trs. v. Collie (1899) 1 F. 764; Jackson v. Ogilvie's Exr. 1935 S.C. 154 at p.160. For other examples of cases where the restriction did, or did not, apply, see Walker & Walker, Evidence, pp.128-130.

62. Walker & Walker, Evidence, pp.130-31; Lord Craigmiller v. Chalmers (1639) Mor. 12,308; Scot v. Cairns (1830) 9 S. 246; Reid v. Gow (1903) 10 S.L.T. 606; Keanie v. Keanie 1940 S.C. 549.

63. Anderson's Trs. v. Webster (1883) 11 R. 35; Lavan v. Gavin Aird & Co. 1919 S.C. 345 at p.348.

64. III.4.8.

65. Contract (2nd. edn.,) p.722.

66. In Armia Ltd. v. Daejan Development Ltd. 1979 S.C. (H.L.) 56, the leading modern case on waiver or "abandonment of a right", there is no suggestion that such abandonment need be proved by writ or oath. Indeed Lord Keith of Kinkel said (at p.72) that "the question whether or not there has been a waiver of a right is a question of fact, to be determined objectively upon a consideration of all the relevant evidence."

67. Evidence, 3rd. edn., para. 629.

68. Evidence, p.131.

69. See para. 2.13 above. See also Kilpatrick v. Dunlop 1909, 2 S.L.T. 307.

70. Walker & Walker, Evidence, pp.303-308.

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71. See Walker & Walker. Evidence p.303; Law v. Gibsone (1835) 13S. 396; Dumbarton Glass Co. v. Coatsworth (1847) 9D. 732; Skinner v. Lord Saltoun (1886) 13 R. 823. Burrell v. Russell (1900) 2 F. (H.L.) 80.

72. E.g. Stevenson v. Manson (1840) 2 D. 1204.

73. E.g. Carron Co. v. Henderson's Trs. (1896) 23 R. 1042 at pp.1048 and 1054; Perdikou v. Pattison 1958 S.L.T. 153.

74. E.g. Baillie v. Fraser (1853) 15 D. 747; Wark v. Bargaddie Coal Co. (1859) 3 Macq. 467; Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R. 327 at p.337; Lavan v. Gavin Aird & Co. 1919 S.C. 345.

75. See para. 2.2 above.

76. See Carron Co. v. Henderson's Trs. Perdikou v. Pattison, cit. sup.

77. See e.g. Stevenson v. Manson; cit. sup.;

78. Carron Co. v. Henderson's Trs. (1896) 23 R. 1042 at p.1049 per Lord Kyllachy,

79. See e.g. Wark v. Bargaddie Coal Co. (1859) 3 Macq. 467; Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R. 327; Lavan v. Gavin Aird & Co. 1919 S.C. 345.

80. Sutherland v. Montrose Shipbuilding Co. (1860) 22 D. 665 at p.673 .

81. Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R. 327.

82. Lavan v. Gavin Aird & Co. 1919 S.C. 345.

83. Walker & Walker, Evidence, pp.84 and 85; Paterson v. Paterson (1897) 25 R. 144. The requirements for these types of writings are explained and discussed below at paras. 2.25 to 2.60. For writs in re mercatoria, see para. 2.24 below.

84. Companies Act 1985, ss.2(6) and 7(3).

NOTES TO PART II

85. S.1(5) and (6). The non-entitled spouse must at the time of making the renunciation swear or affirm that it was made freely and without coercion of any kind.

86. S.6(3)(a) and S.I. 1982/971.

87. The Employment Protection (Consolidation) Act 1978, s.1, for example, requires only "a written statement" of particulars of the terms of employment.

88. Section 6 also deals with fraudulent representations as to character and credit etc. See Andrew Oliver & Son Ltd. v. Douglas 1981 S.C. 192. We are not here concerned with this aspect of the statute.

89. Walker's Trs. v. McKinlay (1880) 7 R. (H.L.) 85 at pp.88 and 89; Wallace v. Gibson (1895) 22 R. (H.L.) 56 at p.59.

90. National Bank v. Campbell (1892) 19 R. 885 at p.892 per Lord McLaren; Snaddon v. London, etc Assurance Co. (1903) 5 F. 182. In B.O.C.M. Silcock v. Hunter 1976 S.L.T. 217 the respondent did not challenge the appellant's contention that holograph or attested writ was required. For the application of the rule on writs in re mercatoria see para. 2.24 below.

91. The rule excluding extrinsic evidence to contradict, modify or explain the terms of a written obligation would not, it is thought, apply to evidence designed to show that a writing was not binding on a party. Here it is not a question of contradicting, modifying or explaining the terms of the writing but of showing that it is fundamentally null. The position is analogous to cases where a writing is challenged on the ground of fraud, essential error or illegality. See Walker & Walker, Evidence pp.269-270.

92. Cf. Campbell's Trs. v. Campbell (1903) 5 F. 366 at p.370.

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93. Paterson v. Paterson (1897) 25 R. 144. For writs in re mercatoria see para 2.24 below.

94. Stair III.8.34 and 36; Erskine III.9.7; Walker & Walker, Evidence, pp.98 and 99.

95. See e.g. the forms in the Titles to Land Consolidation (Scotland) Act 1868; the Conveyancing (Scotland) Act 1874; the Conveyancing (Scotland) Act 1924 and the Conveyancing and Feudal Reform (Scotland) Act 1970.

96. See Walker & Walker, Evidence, p.87. This is because of the general rule that holograph writings "are as valid for their purposes in point of form as deeds which comply with the statutory solemnities." Ibid. p.86.

97. Conveyancing and Feudal Reform (Scotland) Act 1970, ss.9(2), 14(1), 15(1), 16(1), 17 and Scheds. 2 and 4.

98. Scheds. A and B.

99. See also the Stock Transfer Act 1982 providing for the transfer of certain securities through the medium of a computer-based system.

100. Copyright Act 1956 s.36(3).

101. Patents Act 1977, s.31(6). In England and Wales it is sufficient if the writing is signed by or on behalf of the parties to the transaction s.30(5).

102. Walker & Walker, Evidence, p.100. Cf. Danish Dairy Co. v. Gillespie, 1922 S.C. 656 (where it was not argued that a lease was in re mercatoria).

103. Stewart v. McCall (1869) 7 M. 544.

104. See Johnston v. Grant (1844) 6 D. 875; National Bank v. Campbell (1892) 19 R. 885; B.O.C.M. Silcock v. Hunter 1976 S.L.T. 217.

105. See para. 2.2 above.

NOTES TO PART II

106. Walker & Walker, Evidence, p.100.

107. Ibid.

108. See the Subscription of Deeds Acts 1540 and 1579.

109. See e.g. Paterson v. Paterson (1897) 25 R. 144 which greatly limited the sphere of application of the authentication statutes. On the attempts by judges in the 19th century to reduce the role of formal writing in the Scottish law of obligations see Gow, "The Constitution and Proof of Voluntary Obligations" 1961 Jur. Rev. 1, 119 and 234. The result has been confusion, as Gow demonstrates, but the attempts may nonetheless be regarded as laudable.

110. See e.g. The Stock Transfer Act 1963.

111. Bell, Commentaries, I, 342.

112. Accounts of the development of the law of attestation may be found in: Walter Ross, Lectures (2nd edn.) Vol. I, pp.121-34; Robert Bell, Testing of Deeds pp.29-42 (cited as "Robert Bell"); Erskine III.2.6-14.

113. Ferguson 1959 S.C. 56 per Lord Mackintosh at p.61.

114. W. Ross, Lectures (2nd. edn.) I, 127-8.

115. Robert Bell pp.32-4.

116. The 1540 Act requirement of sealing must be taken as having fallen into desuetude. The 1584 Act was repealed by the Statute Law Revision (Scotland) Act 1964.

117. Repealed by the Statute Law Revision (Scotland) Act 1964.

118. Robert Bell pp.35-6.

119. Conveyancing (Scotland) Act 1874 s.38.

NOTES TO PART II

120. Simpson's Trs. v. Macharg & Son 1902 9 S.L.T. 398. Since 1874 the Titles to Land Consolidation (Scotland) Act 1868 s.149, which authorises deeds to be partly printed and partly written, has not been necessary.

121. Apart from the rules where the deed extends beyond one sheet. See para. 2.29 below.

122. Baird's Trs. v. Baird 1955 S.C. 286 at p.293.

123. Baird's Trs. v. Baird 1955 S.C. 286; Ferguson 1959 S.C. 56; McNeill v. McNeill 1973 S.L.T. (Sh. Ct.) 16.

124. The other conditions in the Act, that the pages be numbered and enumerated at the end, were removed by the Deeds (Scotland) Act 1856 s.1 and the Conveyancing (Scotland) Act 1874 s.38 respectively. The 1856 Act was itself repealed by the Statute Law Revision Act 1892, but under the Interpretation Act 1978 s.15 this does not revive the repealed provisions.

125. Hume, Lectures VI, 6; Peter v. Ross (1795) Mor. 16,957; Baird's Trs. v. Baird 1955 S.C. 286; Ferguson 1959 S.C. 56.

126. Conveyancing and Feudal Reform (Scotland) Act 1970 s.44.

127. See paras. 8.5 to 8.38 below.

128. Bankton I.11.27.

129. Robert Bell p.96.

130. Titles to Land Consolidation (Scotland) Act 1868 s.139.

131. Miller v. Farquharson (1835) 13 S. 838; Robert Bell pp.88-94. But see Erskine III.2.23.

132. Erskine IV.2.27; Ross, Lectures I, 148; Robert Bell pp.99-100; Hume, Lectures VI, 18. See also Dickson, Evidence (3rd. edn.) s.695.

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133. (1883) 10 R. 1247.

134. The first method was required by the 1681 Act but in practice designation in the testing clause, the second method, was permitted. This was justified by regarding the testing clause, for this purpose, as part of the body of the deed. The third method was added by the Conveyancing (Scotland) Act 1874 s.38.

135. McDougall v. McDougall (1875) 2 R. 814 per Lord Justice-Clerk Moncreiff at p.819.

136. Robert Bell pp.79-84; Hume Lectures VI, 19-20.

137. Lectures VI, 18-19. See also McDougall v. McDougall (1875) 2 R. 814; Speirs v. Speirs' Trs. (1878) 5 R. 923.

138. Cumming v. Skeoch's Trs. (1879) 6 R. 963 per Lord Justice-Clerk Moncreiff at p.966. See also Sutherland v. W.M. Low & Co. Ltd.(1901) 8 S.L.T. 395.

139. Hogg v. Campbell (1864) 2 M. 848.

140. 1908 S.C. 964, per Lord Low at p.967.

141. Per Lord Justice-Clerk Macdonald at p.966.

142. Erskine III.2.18; Robert Bell pp. 68-76; Cairney v. Macgregor's Trs. 1916 1 S.L.T. 357. An error in place and date, where included, is not fatal to the writing: see Dickson, Evidence (3rd. edn.) s.718.

143. Para. 2.33 above.

144. See para. 2.40 to 2.44 below.

145. Smiths v. Chambers' Trs. (1877) 5 R. 97; Blair v. Assets Co. (1896) 23 R. (H.L.) 36.

146. See Blair v. Assets Co. (1896) 23 R. (H.L.) 36 per Lord Watson at p.47.

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147. Conveyancing (Scotland) Act 1874 s.38. See para. 2.33 and note 134 above.

148. Hill v. Arthur (1870) 9 M. 223; Veasey v. Malcolm's Trs. (1875) 2 R. 748.

149. Conveyancing (Scotland) Act 1874 s.38.

150. By which is meant registration in the Books of Council and Session or sheriff court books, and not registration in the Register of Sasines or Land Register.

151. For the meaning of this expression, see Millar v. Birrell (1876) 4 R. 87.

152. Veasey v. Malcolm's Trs. (1875) 2 R. 748. In the case of an attested will it might be argued that the will must be formally valid at the time of death. Cf. Walker v. Whitwell 1916 S.C. (H.L.) 75. This argument, in this precise form, was not considered in Veasey (which was decided on the question of filling up testing clauses after an interval) but now seems to be met by the Conveyancing (Scotland) Act 1874, s.38. See para. 2.39 below.

153. (1892) 20 R. 59 at p.62.

154. See Walker v. Whitwell 1914 S.C. 560 per Lord Johnston at p.576 and Lord Skerrington at p.589. Lord Shaw of Dunfermline, in the House of Lords, expressly agreed with Lord Skerrington on this point. 1916 S.C.(H.L.) 75 at p.92.

155. Stewart v. Burns (1877) 4 R. 427 at p.432. And see also: Frank v. Frank (1795) Mor. 16,824 affd. (1809) 5 Pat. 278 (judgments in Robert Bell pp. 256-71); Arnott v. Burt (1872) 11 M. 62.

156. 1916 S.C. (H.L.) 75. Lord Shaw of Dunfermline was clear to this effect (p.92). None of the other judges drew any distinction between seeing the granter sign and hearing him acknowledge his signature. Lord Loreburn was prepared to accept that in certain circumstances even a considerable interval, if explained, might not be fatal to the

validity of a deed. Even he, however, drew no distinction between seeing the granter sign and hearing him acknowledge his signature.

157. At p.82.

158. Walker v. Whitwell 1916 S.C. (H.L.) 75 per Lord Dunedin at p.79.

159. See para. 2.35 above.

160. Hill v. Arthur (1870) 9 M. 223 per Lord Neaves at p.231; Walker v. Whitwell 1914 S.C. 560; 1916 S.C.(H.L.)75.

161. Erskine III.2.20.

162. See further para. 2.42 below.

163. Brown v. Duncan (1888) 15 R. 511 per Lord Young at p.516.

164. Bankton I.11.34; Erskine III.2.20; Robert Bell pp.104-10.

165. (1834) 12 S. 781, affd. (1840) 1 Rob. App. 183. See also Boswell v.Boswell (1852) 14 D. 378.

166. Para. 2.44.

167. Reid v. Kedder (1840) 1 Rob. App. 183 per Lord Brougham at p.211; Munro v. Butler Johnstone (1868) 7 M. 250 per Lord Neaves at p.256.

168. See paras. 2.46 and 2.47 below.

169. Stair IV.42.19.

170. The use of s.149 in this way is suggested in Walker & Walker, Evidence pp.199-200. but it seems unlikely that this is truly the purpose of the section. See further para. 2.27 above and Simpson's Trs. v. Macharg & Son 1902 9 S.L.T. 398.

171. Erskine III.2.6; Hume, Lectures VI, 33-4.

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172. Donaldson v. Donaldson (1749) Mor. 9,080 is usually cited as the main support for the Stair view. As, however, it was clear from the deed in question that the addition was made after subscription, the case does not seem especially helpful.

173. Hamilton v. Lindsey-Bucknall (1869) 8 M. 323.

174. Para. 2.40 above.

175. Para. 2.43 below.

176. Stair IV.42.19.

177. Gollan v. Gollan (1862) 24 D. 1410 per Lord Benholme at p.1418.

178. (1862) 24 D. 1410; rev. (1863) 4 Macq. 585. And see also: Peddie v. Doig's Trs. (1857) 19 D. 820; McDougall v. McDougall (1875) 2 R. 814.

179. (1863) 4 Macq. 585 at p.590.

180. Walker & Walker, Evidence, p.197.

181. Pattison's Trs. v. University of Edinburgh (1888) 16 R. 73; Walker & Walker. Evidence, p.191.

182. Conveyancing (Scotland) Act 1924 s.6(1).

183. Titles to Land Consolidation (Scotland) Act 1868 s.144.

184. For the background to the 1836 Act, see: Bell Prin. s.875; Hoggan v. Ranken (1840) 1 Rob. App. 173 per Lord Brougham at p.204.

185. Grant v. Stoddart (1849) 11 D. 860; Gray's Trs. v. Dow (1900) 3 F. 79. And see para. 2.51 below, and Walker & Walker, Evidence, pp.191-192.

186. See para. 2.40 above.

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187. This is certainly current practice. Bare signature, without separate declaration, is insufficient authentication: see Walker & Walker, Evidence, p.190 and authorities there cited.

188. Para. 2.35 above.

189. See, however, Cattanach's Trs. v. Jamieson (1884) 11 R. 972 for a case where the testing clause was not ex facie valid.

190. For example: Robert Bell p.121; Reid v. Kedder (1840) 1 Rob. App. 183, per Lord Brougham at p.214; Brown v. Duncan (1888) 15 R. 511 per Lord Young at p.517.

191. Reid v. Kedder (1834) 12 S. 781 affd. (1840) 1 Rob. App. 183.

192. Boswell v. Boswell (1852) 14 D. 378 per Lord Cowan at p.390; Brown v. Duncan (1888) 15 R. 511 per Lord Young at p.517.

193. Earl of Fife v. Duff (1825) 4 S. 335; Smyth v. Smyth (1876) 3 R. 573.

194. McLaren v. Menzies (1876) 3 R. 1151 at p.1159.

195. Although s.39 applies to a writing "subscribed" by the granter but only "bearing to be attested" by two witnesses, it appears that no distinction is intended and that in both cases all that is required is that the subscription bears to have been made. See McLaren v. Menzies (1876) 3 R. 1151 per Lord Neaves at p.1159.

196. It is, of course, possible to approach the problem from the other end, by first defining "informality of execution" in order to determine what it is the party upholding the deed has to prove. See Walker v. Whitwell 1914 S.C. 560 per Lord Johnston at p.578.

197. McLaren v. Menzies (1876) 3 R. 1151.

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198. Bare subscription: Tener's Trs. v. Tener's Trs. (1879) 6 R. 1111; Geddes v. Reid (1891) 18 R. 1186; Thomson v. Clarkson's Trs. (1892) 20 R. 59. Subscription in conformity with attested deeds: Smyth v. Smyth (1876) 3 R. 573; Forrests v. Low's Trs. 1907 S.C. 1240.

199. 1916 S.C. (H.L.) 75.

200. Addison (1875) 2 R. 457; Thomson's Trs. v. Easson (1878) 6 R. 141.

201. Richardson's Trs. (1891) 18 R. 1131.

202. Elliot's Exrs. 1939 S.L.T. 69. But contrast Cairney v. Macgregor's Trs. 1916 1 S.L.T. 357.

203. McLaren v. Menzies (1876) 3 R. 1151; Brown (1883) 11 R. 400; Inglis' Trs. v. Inglis (1901) 4 F. 365; Shiell 1936 S.L.T. 317.

204. Ross v. Caunters [1980] 1 Ch. 297. And see Bankton I.11.28.

205. Simon Fraser (1859) 3 Irv. 467; G.H. Gordon, Criminal Law (2nd. edn.) Chapter 18.

206. See further Erskine IV.4.73.

207. 1935 S.C. 471.

208. 1949 S.C. 434.

209. Nisbet v. Neil's Tr. (1869) 7 M. 1097; Littlejohn v. Mackay 1974 S.L.T. (Sh.Ct.) 82. The writing may be by one partner and the subscription by another: McLaren v. Law (1871) 44 Sc. Jur. 17.

210. Stair IV.42.6. And see also Erskine III.2.22 and Bell Prin. s.20.

211. Or, possibly, whether it can be regarded as an adopted writing: see Maitland's Trs. v. Maitland (1871) 10 M. 79 per Lord Deas at pp.85-6, and para. 2.32 et seq. below.

212. Maitland's Trs. v. Maitland (1871) 10 M. 79; Macdonald v. Cuthbertson (1890) 18 R. 101; Carmichael's Exrs. v. Carmichael 1909 S.C. 1387; Bridgeford's Ex. v. Bridgeford 1948 S.C. 416; Tucker v. Canch's Tr. 1953 S.C. 270; Gillies v. Glasgow Royal Infirmary 1960 S.L.T. (N) 71.

213. Stair IV.42.6.

214. 1914 S.C. 79.

215. Robbie v. Carr 1959 S.L.T. (N.) 16. For the meaning of end of the writing, see: Russell's Exr. v. Duke 1946 S.L.T. 242; Boyd v. Buchanan 1964 S.L.T. (N.) 108; and para. 2.6 above.

216. McLay v. Farrell 1950 S.C. 149.

217. As suggested, obiter, in Manson v. Edinburgh Royal Institution 1948 S.L.T. 196.

218. Robertson v. Ogilvie's Trs. (1844) 7 D. 236.

219. See paras. 2.40 to 2.44 above.

220. And see para. 2.43 above.

221. Para. 2.50 above.

222. Pattison's Trs. v. Unversity of Edinburgh (1888) 16 R. 73 per Lord McLaren at p.77 (proposition (3)); McLay v. Farrell 1950 S.C. 149.

223. Fraser's Exrx v. Fraser's Curator Bonis 1931 S.C. 536 (described as decided on very special grounds in McLay v. Farrell, supra); Reid's Exrs. v. Reid 1953 S.L.T.(N.) 51. Cf. also the cases cited in note 185 above.

224. Walker & Walker, Evidence, pp.216-217.

225. Walker & Walker, Evidence, p.212; Gavine's Trs. v. Lee (1883) 10 R. 448. For an exceptional case where words typed by the granter were given effect as if written by him, see McBeath's Trs. v. McBeath 1935 S.C. 471.

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226. Gavine's Trs. v. Lee (1883) 10 R. 448.

227. See Maitland's Trs. v. Maitland, (1871) 10 M. 79 at p.84; McBeath's Trs. v. McBeath 1935 S.C.471.

228. Harvey v. Smith (1904) 6 F. 511 at p.521. In this case the court held that the words "adopted as holograph" were not binding because the granter did not realise that they had the effect of making the writing irrevocably binding on him. There are, however, doubts as to how far this principle can apply. See Walker & Walker, Evidence, p.212 note 42; Maclaine v. Murphy 1958 S.L.T. (Sh.Ct.) 49.

229. 1935 S.C. 471 at pp.485-6.

230. Stenhouse v. Stenhouse 1922 S.C. 370 at pp.372-3.

231. It is normal practice to sign schedules and plans incorporated into a conveyance. This practice is recognised, but not made obligatory, by the Conveyancing and Feudal Reform (Scotland) Act 1970 s. 44.

232. Incorporation of descriptions and real burdens is now regulated by statute: see the Conveyancing (Scotland) Act 1874 ss. 32 and 61.

233. (1831) 5 W. & S. 785.

234. (1863) 2 M. 291.

235. Lords Benholme, Neaves and Cowan.

236. Lord Deas.

237. Lords McNeill, Curriehill, Mackenzie, Barcaple and Jerviswoode.

238. McGinn v. Shearer 1947 S.C. 334 per Lord President Cooper at p.346.

239. Cross' Trs. v. Cross 1921 1 S.L.T. 244 per Lord Sands at p.245.

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240. 1947 S.C. 334.

241. For an example of such criticisms, see the opinions of the minority in Baird v. Jaap (1856) 18 D. 1246.

242. In Campbell's Trs. v. Campbell (1903) 5 F. 366, at p.372, Lord McLaren doubted whether as a matter of principle enfranchising clauses were possible in inter vivos writings; but it is difficult to see any basis for this doubt.

243. Para. 2.54 above.

244. Wilsone's Trs. v. Stirling (1861) 24 D. 163 at p.175.

245. Waterson's Trs. v. St. Giles Boys' Club 1943 S.C. 369 at p.376; Stewart's Trs. 1953 S.L.T. (N.)25.

246. Baird. v. Jaap (1856) 18 D. 1246; Crosbie v. Wilson (1865) 3 M. 870.

247. Ronalds' Trs. v. Lyle 1929 S.C. 104 per Lord Hunter at p.113.

248. Gray's Trs. v. Murray S.C.1.

249. In the following cases subscription was held not to be required: Baird v. Jaap (1856) 18 D. 1246; Crosbie v. Wilson (1865) 3 M. 870; and Ronalds' Trs. v. Lyle 1929 S.C. 104. The opposite, and ultimately successful, view was expressed in Hamilton's Trs. v. Hamilton (1901) 4 F. 266.

250. 1943 S.C. 369.

251. See, for example, Inglis v. Harper (1831) 5 W. & S. 785.

252. Ferrie v. Ferrie's Trs. (1863) 1 M. 291 per Lord Curriehill at p.298.

253. McLaren v. Menzies (1876) 3 R. 1151 per Lord Deas at p.1156.

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254. Ferrie v. Ferrie's Trs. (1863) 1 M. 291 per Lord Deas at p.301.

255. See references in three preceding footnotes.

256. Smith v. Bank of Scotland (1824) 2 Sh. App. 265 at p.287; McArthur v. McArthur's Trs. 1931 S.L.T. 463.

257. Boyd v. Shaw 1927 S.C. 414.

NOTES TO PART III

1. Memorandum No. 39.

2. See paras. 2.2 and 2.19 above.

3. See paras. 2.14, 2.15 and 2.24 above.

4. See paras. 2.11 and 2.38 above.

5. See para. 2.8 above; Paterson v. Paterson (1897) 25 R. 144; Gow "The Constitution and Proof of Voluntary Obligations" 1961 Jur. Rev. 1, 119 and 234.

6. See paras. 2.49 to 2.51 above.

7. See para. 2.52 above.

8. See paras. 2.53 to 2.60 above.

9. See paras. 2.20, 2.24 and 2.26.

10. See Fuller, "Consideration and Form" (1941) 41 Columbia L.R. 799 especially at pp.800 to 806.

11. See Park v. Mackenzie (1764) 5 Br. Supp. 639.

12. An Introduction to Comparative Law, vol. II, p.50 (translated by Tony Weir).

13. See para. 3.5.

14. In particular ss.38 and 39 of the Conveyancing (Scotland) Act 1874.

15. 1960 S.C. 1.

16. At p.5. See also Coyle v. Lees 1976 S.L.T. (Sh.Ct.) 58.

17. Walker & Walker, Evidence p.84.

18. See paras. 2.2 and 2.20 above.

19. See para. 2.2 above.

20. See para. 2.24 above.

NOTES TO PART III

21. See paras. 2.9 to 2.19 above.

22. See paras. 2.36 to 2.39 above.

23. See paras. 2.44 and 2.51 above.

24. See para. 2.49 above.

25. See paras. 2.35 and 2.44 above.

26. Reliance on authentication of vitiations by a testing clause added some time after signature was described as "dangerous" in Reid v. Kedder (1834)) 12 S. 781 at p.786. See also Earl of Strathmore v. Paul (1840) 1 Rob. App. 189 where Lord Brougham said at p.209 - "Every consideration shows abundantly that the admission of a notice of erasures in the testing clause without more as proof that the erasures existed before the execution, and were known to the maker of the instrument, is liable to much objection, and exposes the right of parties to great hazard" - and Brown v. Duncan (1888) 15 R. 511 where Lord Young said at p.517 "...the person who vitiates a deed in his own favour is only exercising the power allowed to him by law when he mentions [in the testing clause] that the vitiation was written on an erasure. And that makes it all right. It is a little ridiculous when you come to think it over that a deed may be set aside on the notion of the fraudulent vitiation of it by the holder, only because he had omitted to put it into the testing clause, - which he may have written himself, and may have written at any distance of time after the execution of the deed."

27. In one unreported case which has been brought to our attention the defender, a solicitor, substituted another two pages for the first two pages of a disposition in favour of his client. The effect of the substitution was to make the defender grantee instead of his client.

28. Paterson v. Paterson (1897) 25 R. 144 at p.167.

NOTES TO PART IV

1. Memorandum No. 39.

2. See Parts V, VI and VII.

3. See para. 2.2 above.

4. Park v. Mackenzie (1764) 5 Br. Supp. 639.

5. McGinn v. Shearer 1947 SA.C. 334 at pp.344-345.

6. We are not, of course, concerned at this point with dispositions and similar deeds conveying or creating real rights in heritage.

7. Land Tenure Reform (Scotland) Act 1974, s.8.

8. Employment Protection (Consolidation) Act 1978 s.1.

9. In Picken v. Hawkes (1878) 5 R. 676 the requirement was held not to apply to an engagement for five years at an annual salary and a commission on goods sold.

10. See Gloag, Contract (2nd. edn.) p.179.

11. See e.g. the Agricultural Holdings (Scotland) Act 1949, ss.75, 76 and 99 and S.I. 1960 No. 1337.

12. See para. 2.20 above

13. The section also deals with the question of fraudulent representations as to character and credit etc. with which we are not here concerned.

14. See para. 2.2 above

15. See e.g. the Marine Insurance Act 1906, ss.21, 22 to 24.

16. 1911 S.C. 103 at p.111.

17. See paras. 4.13 and 6.21 below.

18. Our proposals on proof by writ or oath will, however, make it easier to rely on personal bar in some cases. See para. 5.12 below.

NOTES TO PART IV

19. Our later proposals on the formal validity of writings will, however, require amendments to the type of writing required by statute in certain cases. The old authentication statutes would, for example, be repealed and replaced. See Part VI.

20. See Parts VI and VII below.

21. See para. 2.22 above; Kelly v. Kelly (1861) 23 D. 703.

22. In Stuart v. Stuart 1942 S.C. 510 a bold attempt was made to argue that the Roman law doctrine of the testamentum militare was part of the common law of Scotland. The court did not find it necessary to express a concluded opinion on this question but Lord President Cooper and Lord Mackay were clearly far from convinced.

23. See para. 2.23 above.

NOTES TO PART V

1. See para. 3.5 above.

2. Walker & Walker, Evidence pp.337-338.

3. Paterson v. Paterson (1897) 25 R. 144 at p.179. see also Thiem's Trs. v. Collie (1899) 1 F. 764 per Lord Trayner at p.778 and McKie v. Wilson 1951 S.C. 15 where Lord President Cooper said, at p.20, "This branch of the law exhales the odour of antiquity, but it is too deeply rooted to be disturbed."

4. Because of the Consumer Credit Act 1974 these arguments are important mainly for loans not made in the course of the creditor's business.

5. See Haldane v. Speirs (1872) 10 M. 537.

6. See Paterson v. Paterson (1897) 25 R. 144 at p.191.

7. Walker & Walker, Evidence, pp.114-118.

8. Walker & Walker, Evidence, pp.56-57.

9. See Robb v. Robb's Trs. (1884) 11 R. 881 at p.885.

10. See para. 4.8 above.

11. See para. 2.11 above.

12. 1925 S.C. 15 at p.25.

13. See Weissenbruch v. Weissenbruch 1961 S.C. 340.

14. Beveridge v. Beveridge 1925 S.L.T. 234.

15. Dunn v. Pratt (1898) 25 R. 461.

16. Cairns v. Davidson 1913 S.C. 1054.

17. See Young v. Thomson 1909 S.C. 529; Jackson v. Ogilvie's Exr. 1934 S.C. 154; Hope Bros. v. Morrison 1960 S.C. 1; Coyle v. Lees 1976 S.L.T. (Sh.Ct.) 58.

18. (1899) 1 F. 764.

NOTES TO PART V

19. See our Report on Rectification of Contractual and Other Documents (Scot. Law Com. No. 79, 1983); Law Reform (Miscellaneous Provisions)(Scotland) Bill 1985 clause 8.

20. See Walker & Walker, Evidence, pp.254-308. This general rule will not apply to proceedings for rectification. See the Law Reform (Miscellaneous Provisions)(Scotland) Bill 1985 clause 8(2).

21. See Memorandum 39 paras. 16 and 17.

22. 1966 S.C. 93.

NOTES TO PART VI

1. There was an exception to this at one time in the case of entails, which were unpopular and which were cheerfully cut down because of trivial formal defects. "It was almost a profession to hunt up entails and try to find an erasure and then bring a reduction of the deed on the ground that there was an erasure in essentialibus. Such things were hailed enthusiastically, and were generally received with great favour." Brown v. Duncan (1888) 15 R. 511 per Lord Young at p.516.

2. Para. 3.2 above.

3. This function is also, and extremely effectively, served by registration requirements with which we are not here directly concerned.

4. Land Registration (Scotland) Act 1979, s.3.

5. Walker & Walker, Evidence pp.85-86.

6. Ibid. p.86 note 13.

7. See Taylor's Exrs. v. Thom 1914 S.C. 79 at p.83.

8. In England and Wales, for example, no action may be brought upon any contract or other disposition of land or any interest in land unless the agreement, or some memorandum or note of it, is in writing "signed by the party to be charged" or someone authorised by him: Law of Property Act 1925, s.40. Even the requirement of signature has been fairly liberally interpreted. See e.g. Hill v. Hill [1947] Ch. 231.

9. Cf. Harvey v. Smith (1904) 6 F. 511.

10. (1904) 6 F. 511.

11. 1935 S.C. 471.

NOTES TO PART VI

12. In the Parliamentary debate on the Powers of Attorney Bill 1971 Lord Wilberforce referred to sealing as "now a completely fictitious matter" and said "I would have hoped that we might have got rid of that mumbo-jumbo and aligned ourselves with most other civilised countries": H.L. Deb. Vol. 315, col. 1213 (Feb. 25, 1971). In its Nineteenth Annual Report the Law Commission said that "the requirement of sealing has long been stigmatised as an archaic formality ripe for removal or replacement by some meaningful requirement". The topic is currently under active examination by the Commission. Nineteenth Annual Report, 1983-1984 (Law Com. No. 140) paras. 2.36 to 2.40. In the United States of America the requirement of sealing has now been abolished in many states.

13. See Part VII.

14. The defect may, in some cases be "cured" by rei interventus or homologation but that involves a consideration of difficult issues of fact concerning the actings and knowledge of the parties.

15. See paras. 7.6 to 7.17.

16. See Part VII below.

17. See paras. 2.36 and 2.45 above.

18. See para. 7.20 below for a suggested form of statement.

19. For the uncertainty in the existing law see para. 2.51 above.

20. See para. 7.25 below.

21. See para. 7.25 below.

22. See para. 7.25 below.

23. See Part VIII.

NOTES TO PART VII

1. See para. 2.29 above.

2. Conveyancing Legislation and Practice (1966, Cmnd. 3118)

3. Para. 17.

4. Adopted material need not itself be subscribed: see para. 2.54 above.

5. It is thought that this would not be a mere "informality of execution" under s.39 of the Conveyancing (Scotland) Act 1874: there is, in law, no proper witnessing at all. Cf. Smyth v. Smyth (1876) 3 R. 573; Forrests v. Low's Trs. 1907 S.C. 1240.

6. See para. 7.26 below.

7. Consultative Memorandum No. 65 (1985).

8. See also para. 7.14 below.

9. 1916 S.C. (H.L.) 75. See para. 2.38 above.

10. This is on the assumption that subscription alone will be sufficient for formal validity. See paras. 6.14 to 6.21 above. If attestation were to be required for formal validity consideration would need to be given to the question whether the law should continue to be, for purposes of formal validity, as laid down in Walker v. Whitwell

11. See paras. 2.36 to 2.39 above. Again, if attestation were to be required for formal validity these problems would have to be dealt with for that purpose. See paras. 6.18 to 6.21 above.

12. See paras. 2.44 and 3.8 above.

13. See para. 7.4 above.

14. See para. 2.44 above.

NOTES TO PART VII

15. This is not true of the present form of testing clause. The only words which the granter and witnesses see are "IN WITNESS WHEREOF". These are followed by a space. These words are not only uninformative but also nonsensical. The granter does not sign "in witness" of anything. He signs in execution. The witness does not sign in witness "of" the contents of the deed, which the formula might suggest, but only in witness of the granter's subscription.

16. This might be the case if, for example, insufficient space has been left and the statement of execution has to run on past the signature, or if it is squeezed in in tiny writing. See e.g. Reid v. Kedder (1834) 12 S. 781; Veasey v. Malcolm's Trs. (1875) 2 R. 748.

17. See Part VIII.

18. See paras. 6.14 to 6.21 above. If attestation were required for formal validity then there might be cases where a writing was not probative (because e.g. it did not contain the required information on its face) but was nonetheless formally valid because it actually had been properly attested. The converse could also apply (e.g. if an under-age witness stated on the writing that he was over 16).

19. See para. 6.23 above.

20. See para. 6.23 above.

NOTES TO PART VIII

1. Speirs v. Home Speirs (1879) 6 R. 1359.

2. Draper v. Thomason 1954 S.C. 136.

3. Lowrie's J.F. v. McMillan's Exrx. 1972 S.C. 105 .

4. Rhodes v. Peterson 1972 S.C. 56.

5. The words in square brackets are inserted by virtue of the Church of Scotland (Property and Endowments)(Amendment) Act 1933, s.13(4).

6. S.13(1).

7. S.13(2).

8. Ferrie v. Ferrie's Trs. (1863) 1 M. 291.

9. Newstead v. Dansken 1918, 1 S.L.T. 136. The word "appointed" is in inverted commas because technically the testator could do no more than express a desire that the trustees should make the appointment.

10. Finlay v. Finlay's Trs. 1948 S.C. 16. See also Gorrie's Tr. v. Stiven's Exrx. 1952 S.C.1. The mere fact that the notary's partner is appointed as a trustee is not by itself fatal to the deed (e.g. if there is no clause authorising remuneration for professional services). McIldowie v. Muller 1979 S.C. 271.

11. Crawford's Trs. v. Glasgow Royal Infirmary 1955 S.C. 367. Cf. Hynd's Tr. v. Hynd's Trs. 1955 S.C.(H.L.) 1 (in which it was said that the fact that a solicitor who executed a writing notarially was an employee of a firm of solicitors who had an interest in the subject matter of the writing would not have invalidated the writing) and Irving v. Snow 1956 S.C. 257 (where the writing was valid because valid by English law - the law of the place of execution - although it would clearly have been invalid if executed in Scotland unless the above cases were overruled by a larger court).

12. Hynd's Tr. v. Hynd's Trs. 1955 S.C. (H.L.) 1.

NOTES TO PART VIII

13. Partnership Act 1890, s.5.

14. Cf. the rule for companies, discussed in paras. 8.23 to 8.33 below.

15. It would be neither necessary nor desirable to extend the privilege of probativity to writings signed by non-partners. Cf. Littlejohn v. Mackay 1974 S.L.T. (Sh.Ct.) 82.

16. See Halliday, "Execution of deeds by limited companies", Journal of Law Society of Scotland, January 1979 (Workshop) pp.iii to iv.

17. Sections 37 to 41 of the Companies Act 1985 deal respectively with bills of exchange and promissory notes, execution of deeds abroad, power to have seal for use abroad, and "authentication" of documents or proceedings (where the word "authentication" is not used in the Scottish conveyancing sense). We do not discuss these provisions here. There are other statutory provisions on the execution of specific writings by companies. See, for example, s.462(2) and 466(2) of the Companies Act 1985 (floating charges and alterations of floating charges).

18. For the further difficulties which arise in relation to the first alternative see para. 8.27 below.

19. If the legislature had wished to say that a deed could be executed by sealing and could be attested by the subscription of two directors etc., and that a deed bearing to be so executed and attested would be probative, it could easily have done so in clear terms.

20. 1939 S.C. 805.

21. At p.815.

22. At p.827.

NOTES TO PART VIII

23. See the Clydesdale Bank Co., supra. It is now only in very exceptional cases that a company can acquire its own shares. Companies Act 1985, s.143.

24. Table A was formerly in a schedule to the Companies Act 1948 but is not reproduced in the consolidating Companies Act 1985. Instead it is now in a statutory instrument. See S.I. 1984 No. 1717.

25. 1985 Act, s.8.

26. This is the opinion of Professor Halliday. See "Execution of deeds by limited companies", Journal of Law Society of Scotland, January 1979 (Workshop) p.iii.

27. See Swinney, "Execution of deeds by limited companies", Journal of Law Society of Scotland, July 1979, (Workshop) p.xlvii.

28. This problem can arise in the case of foreign companies.

29. S.462(3) provides that execution under the section "includes execution by an attorney authorised for such purpose by the company by writing under its common seal; and any such execution on behalf of the company binds the company".

30. E.g. the Companies Act 1985 s.466(2) on the execution of an instrument altering a floating charge.

31. See paras. 8.30 to 8.32 above.

32. S.1(3).

33. S.4(1)(1).

34. S.4(1)(p).

35. S.5.