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Testamentary Formalities in Scotland

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Abstract

There are no separate rules of testamentary formality in Scotland, and wills are solemnised in the same way as other juridical deeds for which writing is required. The reason is historical. Until 1868 it was not possible to make a will in respect of immoveable property, and heirs could only be disinherited by a deed which had at least the appearance of an *inter vivos* conveyance. In practice such conveyances tended to be used for moveable property as well although a will was competent. The result was that wills were little used until the second half of the nineteenth century, by which time it was too late to develop distinctive rules of execution. This paper examines the history of testamentary formalities in Scotland, considers the influences, internal and external, on the development of the law, and evaluates the role played by legal policy.

Keywords

legal history, Scottish law, wills, deeds, authentication, formalism

Testamentary Formalities in Scotland

KENNETH G C REID

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I. CONVEYANCES AND TESTAMENTS

1. Introduction

For much of its history, succession law in Scotland treated moveable and immoveable property separately and differently.¹ 'The channel of succession', wrote Viscount Stair, 'is with us divided into two currents, by the one whereof all heritable rights, and by the other all

¹ For a historical overview, see W David H Sellar, 'Succession Law in Scotland – a Historical Perspective', in Kenneth G C Reid, Marius J de Waal and Reinhard Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (Edinburgh Studies in Law vol 5, 2007) 49.

moveable rights, are conveyed from the dead to the living.² ‘Heritable rights’ or ‘heritage’ – the name reflects prospective inheritance by the deceased’s heir³ – were, more or less, the same as immoveable property and were the subject of universal succession. The identification of the heir was determined by primogeniture, a rule justified or at least explained on the basis that, land being held on feudal tenure, only a single person was capable of performing what might be an exacting range of feudal services.⁴ Moveable property, by contrast, was the subject of an equal distribution among direct descendants,⁵ and there was no liability for the deceased’s moveable debts over and above the value of the assets themselves.⁶ With some modifications, this divided system survived until 1964, almost as long as the feudalism on which it was based.⁷ Since 1964 the rules of intestate succession have favoured the spouse (or civil partner)⁸ of the deceased over the children, although in the case of large estates the children too receive a substantial inheritance.⁹ Further adjustments to the law have been proposed by the Scottish Law Commission.¹⁰

The rules just described were, and are, default rules only, for forced heirship has only a limited role to play in Scottish succession law, especially in relation to heritable property. On the whole, people are free to determine the distribution of property after their deaths, although only a bare majority take the trouble to do so.¹¹ Until modern times, however, the way in which this could be done depended on whether the property in question was heritable or moveable.

2. Heritable property: transmission by *de praesenti* conveyance

When in *Guy Mannering* (1815) a funeral is followed by a search for the will, Sir Walter Scott has the lawyer, the smug and uncommunicative Mr Protocol, quieten the mourners – now aspirant beneficiaries – with these words:

A moment’s patience, if you please – she was a good and prudent woman, Mrs Margaret Bertram – a good and prudent and well-judging woman, and knew to chuse friends and

² James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (6th edn, by David M. Walker, 1981) III, 4, pr. This is based on the 2nd edition of 1693.

³ Stair (n 2) III, 4, 23.

⁴ Henry Home, Lord Kames, *Essays upon Several Subjects concerning British Antiquities* (Edinburgh, 1747) 131-2; Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Edinburgh, 1751-53; reprinted by the Stair Society, vols 41-3, 1993-5) III, 4, 9; Sir John Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain* (London, 1759) 201-2.

⁵ John Erskine of Carnock, *An Institute of the Law of Scotland* (Edinburgh, 1773) III, 9, 2. This can most conveniently be consulted in the 8th edition (Edinburgh, 1871, reprinted 1989) by James Badenach Nicolson.

⁶ Bankton (n 4) III, 4, 7.

⁷ The feudal system of land tenure was abolished on 28 November 2004: see Abolition of Feudal Tenure etc (Scotland) Act 2000 s 1.

⁸ The Civil Partnership Act 2004 makes provision for the registration of same-sex relationships as civil partnerships. For the purposes of the law of succession a civil partner is treated in the same way as a husband or wife.

⁹ Succession (Scotland) Act 1964 ss 1-13. For an account of what are rather complex rules, see eg D R Macdonald, *Succession* (3rd edn, 2001) ch 4.

¹⁰ Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009, available at <www.scotlawcom.gov.uk>).

¹¹ The most recent study, based on a sample of 1009 adults, found that 37% had a will but that this figure rose to 69% for those aged 65 and above: see Scottish Consumer Council, *Wills and Awareness of Inheritance Rights in Scotland* (2006, available at <<http://scotcons.demonweb.co.uk/publications/reports/reports06/rp10wrep.pdf>>).

depositories – she will have put her last will and testament, or rather her *mortis causa* settlement as it relates to heritage, into the hands of some safe friend.¹²

As an advocate, Scott knew his law, and even as late as 1815 it was not competent to dispose of heritable property by means of a testament. Instead Mrs Bertram would have needed to use a ‘*mortis causa* settlement’ – a deed containing a present (*de praesenti*) conveyance of the property and which, to all appearances, was to take effect at once, during the lifetime of the granter. Further, such a deed could not be signed – and the heir deprived of his inheritance – when the granter was in his last illness and so vulnerable to the ‘importunity of friends’.¹³ Instead, by an elaborate doctrine known as the law of deathbed, a granter had to be in good health (*‘in liege poustie’*) at the time of signing or, if ill, have demonstrated subsequent recovery either by surviving for 60 days or by going to kirk or market unsupported.¹⁴

The origins of this ‘most ancient law’ can be traced back to *Regiam Majestatem*, a work on Scots law of the fourteenth century,¹⁵ and indirectly to Glanvill’s *De Legibus et Consuetudinibus Regni Anglie*, which was written around 1200 and on which the relevant passages in *Regiam Majestatem* are based.¹⁶ Later writers, not always convincingly, attributed the exclusion of testaments to feudalism.¹⁷ A mere vassal, it was said, had no power to transmit land without the interposition of the feudal superior; nor could he breach unilaterally the provision made as to heirs in the original feudal grant. In any event, a testament did not admit of the sasine¹⁸ that was needed to complete the intended beneficiary’s title. The conclusion was inescapable: if land was to be transferred away from the heir whom the law had selected to succeed, this could only be done by an ordinary conveyance granted and completed in the ordinary way and in the lifetime of the granter. A testament would not do.¹⁹

¹² Chapter 17. The quotation can be found at p 219 of the text as printed in the *Edinburgh Edition of the Waverley Novels* (1999). In fact the lawyer has it in his pocket all the time.

¹³ Erskine (n 5) III, 8, 95.

¹⁴ For detailed accounts of what were complex rules, see Stair (n 2) III, 4, 26 -31; Bankton (n 4) III, 4, 32-53; Erskine (n 5) III, 8, 95-100; Baron David Hume, *Lectures 1786-1822* (ed G Campbell H Paton; Stair Society vols 5, 13, 15-19; 1939-58) vol V, 26-53; George Joseph Bell, *Principles of the Law of Scotland* (4th edn, Edinburgh, 1839, reprinted 2010) §§ 1786-1816. See also Hector McKechnie, ‘Notes on Death-Bed and Dying Declarations’ (1929) 41 *JR* 126 and 238.

¹⁵ Erskine (n 5) III, 8, 95. See Lord Cooper (ed), *Regiam Majestatem* (Stair Society vol 11, 1947) II, 18, 7; II, 37.

¹⁶ Glanvill, *De Legibus et Consuetudinibus Regni Anglie* (ed G. D. H. Hall, 1963) VII, 1; VII, 5.

¹⁷ Thomas Craig of Riccarton, *Jus feudale* II, 1, 25. This work was written around 1600 and first published in 1655; a translation by Lord Clyde was published in 1934. See also Erskine (n 5) III, 8, 20; Hume (n 14) vol V, 13.

¹⁸ A required solemnity for the transfer of land until 1845, ‘sasine’ was the giving of possession by means of the delivery of a symbol representing the land. The ceremony took place on the land itself in the presence of a notary public and two witnesses.

¹⁹ This conclusion was also supported by the traditional maxim that it is for God not man to make an heir: see Hume (n 14) vol V, 17; James Watson, *A Treatise on the Law of Scotland respecting Succession as depending on Deeds of Settlement* (Edinburgh, 1826) 49. The maxim can be traced to Glanvill (n 16) VII, 1. Of the equivalent rule in England, it has been argued that the true reason was not feudalism but the desire to protect the heir from deathbed gifts: see Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (2nd edn, Cambridge, 1898) vol II, 326-30.

Although the rule just described was feudal in origin, and although it was accepted more generally that ‘all succession in heritage with us is founded in the feudal customs’,²⁰ the writers of the institutional period,²¹ schooled in the *Corpus Iuris Civilis*, found traces of Roman law wherever they looked.²² The attributions were of varying plausibility. ‘The law of death-bed’, wrote Bankton, ‘was introduced with us upon the same principle as the *Querela inofficiosi testamenti* among the Romans. The party who makes the settlement in prejudice of his heir on death-bed, is holden incapable on account of the disease; in the same manner as one, without cause, disinheriting his children by his testament, was supposed *non compos* by the civil law, on account of his unnatural settlement.’²³ According to Erskine, *liege poustie* – the state of health required for disposing of heritage – ‘gets its name because persons in health have the *legitima potestas*, or lawful power of disposing of their property at pleasure’.²⁴ And in the idea that heritage could only be transmitted by *de praesenti* conveyance, the writers found echoes of the mancipatory will (*testatum per aes et libram*) of Roman law.²⁵ Indeed the preservation of that rule, several centuries after it had been abandoned in England,²⁶ was attributed to ‘respect to the Roman law and the feudal notions’, in that order.²⁷

The evolution of the *de praesenti* conveyance is a fascinating study in the adaptability of legal institutions.²⁸ In principle the deed employed, an *inter vivos* disposition, was hopelessly ill-suited to the transmission of property on death, for it took effect at once, during the granter’s lifetime, and could not be revoked. Yet in practice a form of disposition was developed which, while satisfying the strict requirements of the law, nonetheless operated in a manner which was often indistinguishable from a will. There were two basic models. One was to convey the land in the normal way, with sasine and registration, but under reservation of a usufruct,²⁹ of a power to burden, and a right of revocation. So nominal, even fictitious, was the ownership thus conferred that the grantee did not satisfy the property requirement for a right to vote.³⁰ The other method, soon to become the dominant one, did not even go so far. The disposition was signed but, containing a clause dispensing with delivery, was retained by the granter and not activated until his death. In a cautious spirit it too reserved a usufruct and a right of revocation.³¹ This method had the advantage of allowing a ‘general’ conveyance – a conveyance of the granter’s whole property without further specification – and so would carry future property as well as the property owned by the granter at the time of signing.³²

²⁰ Bankton (n 4) III, 4, 4. See also Stair (n 2) III, 4, 25 (‘succession in moveables is more near to the course of natural succession, and to the civil law of the Romans, especially their ancient and middle laws; but the succession in heritable rights agreeth more to the recent feudal customs of most nations’); Erskine (n 5) III, 8, 3.

²¹ I.e. 1681-1839, the period of the publication of the ‘institutional’ works of Stair, Bankton, Erskine, Hume and Bell.

²² The first book published on succession law – Watson (n 19) – devotes two full chapters to Roman law. For a parallel development in property law, see Grant McLeod, ‘The Romanization of Property Law’, in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 220.

²³ Bankton (n 4) III, 4, 32.

²⁴ Erskine (n. 5) III, 8, 95.

²⁵ Hume (n 14) vol V, 14; Watson (n 19) 46-7, 69-70.

²⁶ By the Statute of Wills 1540: see Sir John Baker, *The Oxford History of the Laws of England*, vol VI (2003) 679-83

²⁷ Watson (n 19) 48.

²⁸ For details, see: Hume (n 14) vol V, 13-26; Watson (n 19) Pt I, ch III; Erskine Douglas Sandford, *A Treatise on the Law of Heritable Succession in Scotland* (Edinburgh, 1830) vol I, 59-72.

²⁹ Known in Scotland as a (proper) liferent.

³⁰ Hume (n 14) vol IV, 16.

³¹ Cautious because, if the deed did not take effect until death, a usufruct (liferent) could never arise.

³² Thus achieving something which was not possible in England until 1837: see Pollock and Maitland (n 19) vol II, 315.

The disadvantage was that sasine was not given, meaning that this would have to be done after the granter's death. That was straightforward enough if, as often, the grantee was the person who would in any case be heir under the general law, but if he was not the co-operation of that person was still needed and, albeit with difficulty, could be insisted on.³³

In the course of the eighteenth century the law became more relaxed about form so that, as Lord Kames observed, 'the difference betwixt this deed and a testament in point of form, is so slight, that it is not to be understood, except by those who are daily conversant in the forms and solemnities'.³⁴ Although the position was maintained that a testator of heritage 'must conceal his true purpose under a disguise',³⁵ that disguise was increasingly threadbare. Thus it was competent and common to combine the *de praesenti* conveyance with words which disposed of the moveable estate on death and appointed an executor;³⁶ it no longer mattered what name was given to the deed; and any pretence that the grant was *inter vivos* had now been abandoned.³⁷ In *Welsh v. Cairnie*,³⁸ for example, a deed was upheld which assigned and disposed every 'moveable and immoveable subject of whatever denomination the same, that presently pertaining or belonging, or shall be pertaining or belonging to me at my death', appointed an executor, omitted the usual mandate for completion of title, and was called a 'latter will and testament'.

If, however, matters had become straightforward for those with access to legal advice, the fact that the Scottish rule was out of step with the rest of Europe could make life difficult for those who owned land in Scotland but lived abroad. The law reports record a number of cases involving wills made in accordance with the law of England,³⁹ Ireland⁴⁰ or the Netherlands⁴¹ and which, omitting a *de praesenti* conveyance, were held ineffective to carry heritage in Scotland.

3. Moveable property: transmission by testament

Until modern times a testament could only be used in respect of moveable property. Its original function was to nominate the person – known as the 'executor'⁴² – who was to 'execute' the deceased's testamentary intentions, and a deed which distributed the deceased's property without naming an executor, although legally effective, was not a testament.⁴³ By the start of the nineteenth century, however, this usage was no longer insisted on,⁴⁴ and long before that testaments had routinely contained legacies disposing of moveable property. The law of deathbed did not apply.

³³ Robert Bell, *A System of the Forms of Deeds used in Scotland* (Edinburgh, 1804) vol III, 65-6 ('a profusion of troublesome forms'). At one time, the precept warranting the giving of sasine lapsed with the granter's death but the position was changed by an Act of 1693: see *Records of the Parliament of Scotland to 1617* (available at <<http://www.rps.ac.uk>>; henceforth 'RPS') 1693/4/138. See also Watson (n 19) 47.

³⁴ Henry Home, Lord Kames, *Historical Law Tracts* (4th edn, Edinburgh, 1792) 124.

³⁵ Watson (n 19) 5.

³⁶ Executors could only act in respect of moveable property: see I.3 below.

³⁷ The shift from an *inter vivos* to a *mortis causa* deed can be seen in Erskine (n 4) III, 8, 20.

³⁸ 28 June 1809 FC.

³⁹ *Crichton's Ex. v Crichton's Tr* (1795) Mor 4489; *Robertson's Creditors v Mason* (1795) Mor 4491.

⁴⁰ *Burgess v Stantin* (1764) Mor 4484.

⁴¹ *Crawfurd v Crawfurd* (1774) Mor 4486.

⁴² For a historical study, see A E Anton, 'Medieval Scots Executors and the Courts Spiritual' (1955) 67 *JR* 129.

⁴³ Bankton (n 4) III, 8, 1 drew a parallel with the nomination of heirs in Roman law. See also Stair (n 2) III, 8, 33-34; Erskine (n 5) III, 9, 1 & 5; Hume (n 14) vol V, 195-9.

⁴⁴ Bell (n 14) §§ 1862 and 1869.

For legacies writing could sometimes be avoided.⁴⁵ Although the privileged wills of Roman law, such as the *testamentum militare*, seem never to have been adopted,⁴⁶ oral legacies were allowed provided that the value of each such legacy – and there could be more than one⁴⁷ – did not exceed £100 in the old Scottish currency.⁴⁸ The £100 limit – attributable to a rule of the general law that prevented more valuable obligations from being proved by witnesses alone⁴⁹ – was later justified on the basis that, in the agitation of a final illness, ‘the mind is too much engrossed to pay a minute attention to verbal expressions; and the real intention of the party would often be in danger of being misunderstood or misrepresented, if left entirely to the memory of interested relatives’.⁵⁰ When the law was re-cast in 1995, the nuncupative will was discarded and writing became necessary in all cases.⁵¹

4. The fall and rise of the testament

Today the testament is the dominant instrument for allocating property on death. But that has been true for less than a hundred years. Until as recently as 1868, testaments could not be used for heritable property at all,⁵² and even in respect of moveable property they were for a long time ‘scarcely to be met with in practice’.⁵³ For the latter the main reason was financial.⁵⁴ Executors, whose role was confined to the deceased’s moveable property, took title by grant of confirmation from the Commissary Court. Confirmation, however, was expensive – five per cent of the confirmed estate until 1701 and between one and three and a half per cent thereafter – and in the Confirmation Act of 1690⁵⁵ a means of avoiding it was supplied. In acknowledgement of ‘the great vexatione’ created by the cost of confirmation, the Act provided, in respect of moveable property, ‘that where speciall assignations and dispositions are lawfully made by the defunct, tho neither intimate nor made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruike, enjoy, pursue or defend, albeit the soumes of money or goods therein contained be not confirmed’. This was a signal to abandon the testament in favour of a *de praesenti* conveyance – as a ‘speciall assignation and disposition’ – and so to adopt for moveables the practice which was already in use for heritage.⁵⁶ And it then made practical sense to combine the conveyances of moveables and heritage in a single deed, which came to be known as a (general) disposition and settlement. Once abandoned, the testament was slow to revive, even after the reforms of 1868.

⁴⁵ A nuncupative will could not, however, appoint an executor.

⁴⁶ Although, strictly, the question was left open in *Stuart v Stuart* 1942 SC 510. The military will was received in English law: see ch 13 above.

⁴⁷ Bell (n 14) § 1868. It could also be used for a universal legacy of all moveables: see Erskine (n 5) III, 9, 7.

⁴⁸ £8.33 sterling. Hume (n 14) vol. V, 193 would extend the exception to ‘wearing apparell’ without financial limit.

⁴⁹ Erskine (n 5) III, 9, 7.

⁵⁰ Watson (n 19) 318.

⁵¹ Requirements of Writing (Scotland) Act 1995 s 1(2)(c). This implemented a recommendation of the Scottish Law Commission: see Report on *Requirements of Writing* (Scot Law Com No. 112 (1998)) para 2.49.

⁵² The law was changed by the Titles to Land Consolidation (Scotland) Act 1868 s 20. The abolition of the law of deathbed followed three years later: see Law of Deathbed Abolition (Scotland) Act 1871.

⁵³ Bell (n 33) vol III, 13.

⁵⁴ For details, see James G Currie, *Confirmation of Executors in Scotland* (Edinburgh, 1884) 92-7.

⁵⁵ RPS 1690/4/117.

⁵⁶ It quickly came to be accepted that a special legacy, although overtly testamentary, could nonetheless qualify as a special conveyance under the 1690 Act, although it does not seem to have been much used in practice. See Erskine (n 5) III, 9, 30, citing *Gordon v Campbell* (1729) Mor 14384.

Evolving practice can be traced in the pages of the leading styles book of the period, *Juridical Styles*, which was published in six editions between 1794 and 1907.⁵⁷ The (general) disposition and settlement contained a general conveyance of both heritable and moveable property and also a special conveyance, often by reference to a subsequently prepared inventory, of particular items of moveable property.⁵⁸ Confirmation could be avoided only in respect of the latter. A variant was the trust disposition and settlement in which the property was conveyed to trustees rather than to heirs; by the fourth edition of *Juridical Styles* in 1865, this was said to be ‘now almost universally adopted where the succession is not likely to be insignificant in amount’.⁵⁹ As both versions of the disposition and settlement were *inter vivos* deeds, they contained the usual clauses reserving a usufruct and a right of revocation and dispensing with delivery,⁶⁰ and that remained true even of the styles given in the fifth edition of *Juridical Styles* in 1883, a full fifteen years after the pretence of a *de praesenti* conveyance had ceased to be necessary for immoveables.⁶¹ It was only with the final edition, published in 1907, that the clauses were dropped, that, in some but not all of the styles, words of bequest (‘do hereby leave and bequeath’) replaced words of conveyance (‘assign and dispone’),⁶² and that the disposition and settlement was re-born as a *mortis causa* deed.⁶³ Surprisingly, a style for the special assignation of moveables survived, despite the fact that the charges for confirmation which it was designed to avoid had been abolished almost a century before.⁶⁴

By the beginning of the twentieth century, the configuration of deeds had largely assumed its modern form.⁶⁵ As estates became simpler, and testators less controlling of their heirs, so the testament revived and began to replace the (general) disposition and settlement. But the trust disposition and settlement remained in use where there were continuing purposes – for example, money to be held for unborn children or minors – which required the setting up of a trust.⁶⁶ To the layman, and often to lawyers too, both deeds are ‘wills’, and this convenient term is used in the rest of the chapter.⁶⁷

⁵⁷ Although always known as *Juridical Styles*, the proper title is *A Complete System of Conveyancing adapted to the Present Practice of Scotland .. by the Juridical Society of Edinburgh*. Bell (n 33) vol III also contains styles as well as a helpful commentary.

⁵⁸ See eg *Juridical Styles* (n 57), 4th edn (Edinburgh, 1865) vol II, 558-61. A style of special assignation of moveables can be found at 556-7.

⁵⁹ *Juridical Styles* (n 57) 4th edn (Edinburgh, 1865) vol II, 562-3. Styles are given on 564-72.

⁶⁰ After 1858 it was possible for the grantee to complete title without the heir’s co-operation by means of a notarial instrument: see Titles to Land (Scotland) Act 1858 s 12, later replaced by the Titles to Land Consolidation (Scotland) Act 1868 s 19.

⁶¹ *Juridical Styles* (n 57), 5th edn (Edinburgh, 1883) vol II, 576-93. This was not simply a failure to update. As late as 1903, John Philp Wood, the recently retired Professor of Conveyancing at Edinburgh University, seemed unperturbed by the obsolete clauses in *Juridical Styles*, commenting merely that: ‘In name and outward appearance this deed differs from a will or testament; in substance and effect it is precisely the same’: see *Lectures delivered to the Class of Conveyancing in the University of Edinburgh* (1903) 723.

⁶² The use of words of bequest for immoveables was an innovation expressly permitted by s 20 of the Titles to Land Consolidation (Scotland) Act 1868. They were treated as words of conveyance (‘equivalent to a General Disposition’). For the continuing use of ‘dispone’, see WPMB, ‘That Indispensable Word “Dispone”’ (1894) 10 *Scottish LR* 160.

⁶³ *Juridical Styles* (n 57) 6th edn (1907) vol. II, 596-611.

⁶⁴ *Juridical Styles* (n 57) 6th edn (1907) vol II, 595-6. This seems likely to have been no more than editorial fatigue because Currie (n 54) 96-7, writing in 1884, said that special assignations ‘are now unknown in practice’, although the legislation on which they were based – the Confirmation Act 1690 – remains in force even today. The main charges for confirmation were abolished by s 1 of the Commissary Courts (Scotland) Act 1823.

⁶⁵ Wood (n 61) 717-26.

⁶⁶ See eg Archibald H Elder, *Forms of Wills in accordance with the Law of Scotland* (1947) ch XVII.

⁶⁷ For styles, see eg Alan Barr et al, *Drafting Wills in Scotland* (2nd edn, 2009).

The testament's slow and uncertain progress had implications for the rules as to authentication. For if succession was regulated mainly by *inter vivos* deed, then a separate body of law for testaments, little used and confined to moveables, would have been an unnecessary complication. Thus it was that testaments, with minor exceptions, were made subject to 'the ordinary solemnities of other writings'⁶⁸ – the same rules as applied to, for example, conveyances of heritable property, contracts in relation to land, and unilateral promises – and so to rules which had rarely been formulated with testaments in mind. For the most part, therefore, an account of how wills are authenticated is an account of the authentication of all juridical acts for which writing is a constitutive requirement.⁶⁹

II. SEALS, SIGNATURES AND WITNESSES

1. Attested wills

(a) Authentication statutes

In medieval Scotland, as in many other countries at that time, a person authenticated a document by impressing on it a seal which incorporated his coat of arms or initials.⁷⁰ The drawbacks were obvious and widely acknowledged: neither initials nor even coats of arms were unique to a particular person, and the seals themselves could be copied, doctored or stolen.⁷¹ To improve the security of deeds⁷² an Act of 1540⁷³ – the first of the 'authentication' statutes – required that the seal be supplemented by a signature, either of the granter of the deed, if he could write, or of a notary, if he could not. Abolished in one type of case in 1584,⁷⁴ sealing soon disappeared from practice altogether.

Normally, sealing, or later signing, was carried out in the presence of witnesses, and early deeds often contain lengthy, if unreliable, witness lists.⁷⁵ The witnesses, however, did not sign, and it was not until an Act of 1681 that signing became compulsory. In setting out the rules for attestation by witnesses, the Subscription of Deeds Act 1681⁷⁶ laid the foundations of the modern law. Witnesses were required to sign, 'seing writting is now so ordinary', and the deed must 'design' (i.e. name and identify) the witnesses and also the person who had written out the words (the 'writer'). Further, the witnesses must either have seen the granter sign or heard him acknowledge his signature, 'otherways the saids witnesses shall be repute and punished as accessorie to forgerie'. Although the number of witnesses was not specified, the requirement was universally understood as being two.⁷⁷ The 1681 Act, and the Acts that

⁶⁸ Bankton (n 4) III, 8, 2.

⁶⁹ A list of such juridical acts is set out in s 1 of the Requirements of Writing (Scotland) Act 1995.

⁷⁰ For the history of authentication, see Robert Bell, *Lectures on the Solemnities used in Scotland in the Testing of Deeds* (Edinburgh, 1795) 29-42; Walter Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence* (2nd edn, Edinburgh, 1822) vol I, 121-34.

⁷¹ Stair (n 2) IV, 42, 5; Bankton (n 4) I, 11, 37; Erskine (n 5) III, 2, 7; Bell (n 70) 17.

⁷² In Scotland 'deed' is not a technical term, and there is no requirement, as there is in England, that certain types of juridical act must be accomplished by deed.

⁷³ Subscription of Deeds Act 1540 (RPS 1540/12/92).

⁷⁴ Act of 1584 (RPS 1584/5/85).

⁷⁵ G W S Barrow, 'Witnesses and the Attestation of Formal Documents in Scotland, Twelfth-Thirteenth Centuries' (1995) 16 *Legal History* 1.

⁷⁶ RPS 1681/7/27.

⁷⁷ A requirement of two witnesses for wills can be traced as far back as the *Regiam Majestatem* (n 15) II, 38, 1.

preceded it, remained in force until 1995 when, as we will see, the law was fundamentally re-cast.

(b) Applicability to wills

In *Crichton Ptr* (1802)⁷⁸ it was argued in support of a will which had been signed and witnessed but had no designations, that it was wrong to suppose that the authentication statutes applied to wills. On the contrary, it was pointed out, the 1681 Act referred only to ‘instruments of sasine, instruments of resignation *ad remanentiam*, instruments of intimation of assignments, translations or retrocessions to bands, contracts or other writs’ and made no mention of wills; and English law was prayed in aid as allowing wills ‘destitute of the solemnities requisite to the authenticity of contracts and obligations .. if there exist sufficient proof of intention’. By 1802, however, it was far too late for arguments of this kind. It was plain that the authentication statutes applied to wills. The only question was whether they might apply in a modified way.

The case for a less stringent application of the statutes was easy to make. Testamentary deeds’, wrote Erskine, ‘are so much favoured, that if the testator’s intention appear sufficiently, they are sustained, though not quite formal, especially if they be executed where men of business cannot be had’.⁷⁹ Yet where the authenticity of a signature was at stake, formalism was thought to have its merits. ‘The strict observance of the statutory solemnities’, it was argued in one case, are ‘particularly necessary with regard to a deed executed *mortis causa*. Indeed, one great object of their introduction was to protect dying persons from the frauds of those around them.’⁸⁰ In the event, both types of argument were reflected in the rather modest departures from the general law which were allowed for wills. On the one hand, the cumbersome requirement that only ‘twa famous notaris befor foure famous witnesses’⁸¹ could sign on behalf of a person unable to write was modified in the case of wills to two witnesses and a single notary – or even a parish minister, on the basis that ministers ‘are obliged, by their office, to be frequently with dying persons, where notaries cannot easily be got’.⁸² On the other hand, when, in 1970, it ceased to be necessary for a granter to sign on each separate sheet of a deed, the requirement was retained for wills to prevent the substitution of sheets by would-be beneficiaries.⁸³

(c) Provenance

In the first treatise on solemnities in deeds in Scotland, published in 1795, Robert Bell devoted an introductory chapter to the subject’s history, beginning with the law of Rome, proceeding into the Dark Ages, and ending with developments in France and England. It might have been expected, Bell said, that Scotland would have adopted the public or quasi-public deed favoured in France and attributable to the influence of Rome. That it did not do

⁷⁸ (1802) Mor 15952.

⁷⁹ Erskine (n 5) III, 2, 23. The two cases which he cites in support were, however, concerned with holograph wills which were not, therefore, subject to the authentication Acts.

⁸⁰ *Frank v Frank* (1795) Mor 16824, 16825.

⁸¹ Act of 1579 (RPS 1579/10/33).

⁸² Erskine (n 5) III, 2, 23. See also Stair (n 2) III, 8, 34.

⁸³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 44. The modern law is, in effect, the same: see Requirements of Writing (Scotland) Act 1995 s 3(2).

so was due to ‘the low state into which the order of notaries fell in this country’⁸⁴ – to which might be added that notaries did not exist in significant numbers until around 1400.⁸⁵ Instead, Scotland favoured private deeds, as in England, although Bell did not argue for direct influence.⁸⁶ Within the realm of private deeds some Roman influence might be detected, at least by those who wished to find it.⁸⁷ Later one judge was to make the implausible claim that the 1681 Act was ‘almost a literal transcript’ of Novel 73.⁸⁸

What is missing from this account, of course, is any special consideration of testaments, reflecting the absence of a distinct doctrine in Scots law.⁸⁹ Bell’s complacent conclusion – ‘that our own law joins to a sufficient degree of security, a facility and ease in the execution of our deeds, admirably fitted for the purposes of a rich and commercial people’⁹⁰ – takes no account of the needs of wills.

(d) Constitution or proof?

In signing a deed the granter was both performing a juridical act and also at the same time providing evidence to others that the act had taken place. In other words the signature was necessary both for constitution and for proof. Whether the former was also true of the witnesses’ signatures was at first controversial. For if, as the 1681 Act stated, the purpose of having witnesses sign was in case ‘by their forgetfulness’ they ‘dissowne ther being witnesses’, it was possible to argue that the matter went to proof alone. The relative informality of attestation seemed to point in the same direction. Thus under the 1681 Act witnesses need not observe the actual signing provided the signature was acknowledged to them later; they need not be present, or sign, at the same time as each other; and, unlike the position in England,⁹¹ there was no requirement that they sign in the granter’s presence. In short, witnesses added so little to either the solemnity or the security of the occasion that it was not clear why their participation should be invested with special status. And if that was correct, it was a short step to saying that a deed was valid so long as the granter had signed and his signature could be proved, whether by witnesses or by some other means.⁹² In this extreme form the argument did not prosper, for it was never seriously doubted that there must be witnesses and that the witnesses must sign. But as late as 1822 Baron Hume was still

⁸⁴ See Bell (n 70) 26. See in similar vein, Craig (n 17) II, 7, 7 (‘the capacity for wickedness’); Stair (n 2) II, 3, 19.

⁸⁵ J Durkan, ‘The early Scottish Notary’, in I B Cowan and D Shaw (eds), *The Renaissance and Reformation in Scotland* (1983) 22.

⁸⁶ That the principal statutes in the two jurisdictions – the (English) Statute of Frauds of 1677 and the (Scottish) Subscription of Deeds Act 1681 – were so close in time is of interest but there is no sign of mutual influence. For the interest in solemnities in the seventeenth century, see Ernst Rabel, ‘The Statute of Frauds and Comparative Legal History’ (1947) 63 *LQR* 174.

⁸⁷ Eg *McBeath’s Trs v McBeath* 1935 SC 471, 491 (Lord Murray) (‘founded on the civil law’).

⁸⁸ *Duff v Earl of Fife* (1826) 2 W & S 166, 176 (Lord Alloway). Novel 73 is discussed (though not by name) in Bell (n 70) 10-11. The point of resemblance is perhaps merely that it sought to support *comparatio literarum* with the evidence of (three) witnesses.

⁸⁹ But see Bankton (n 4) III, 8, 2 which draws a parallel between Scots law and Canon law in respect of the number of testamentary witnesses (‘the canon law .. requires two witnesses for testaments, whereas by the civil law, seven were necessary’).

⁹⁰ Bell (n 70) 4.

⁹¹ Under the Statute of Frauds. The difference between this rule in the two jurisdictions was emphasised in *Frank v Frank* (1809) 5 Pat 278, 283 (LP Campbell). The modern law in England is the same: see Wills Act 1837 s 9.

⁹² That indeed was the rule for testaments under Canon law: see ch 2.

suggesting that a deed might be valid even if a witness had neither seen the granter sign nor heard him acknowledge his signature.⁹³ That particular idea was squashed by decision of the House of Lords in 1826,⁹⁴ and in 1915 the House of Lords settled the matter beyond doubt by holding that attestation was a matter of solemnity, not merely of evidence.⁹⁵ Yet in the long run, as we shall see, this approach has not prevailed.

2. Holograph wills

That it was the signature and not the attestation which was the essential formal requirement might seem borne out by the acceptance of holograph deeds. This had happened by the beginning of the seventeenth century, at latest,⁹⁶ and extended to all juridical acts for which writing was required and not merely to wills. But wills were included without restriction.⁹⁷ A holograph deed was one written in the hand of the granter and signed by him. There was no need to include the place and date of signing, even for wills, although the issue was initially controversial.⁹⁸ There was also no need for witnesses, despite the Subscription of Deeds Act 1681. This was explained on the basis that, by making reference to the ‘writer’, the Act excluded the case where the deed was written out by the granter himself.⁹⁹ But the real reason was probably the practical one that, a whole deed being harder to forge than the signatures of two witnesses,¹⁰⁰ a holograph deed was better evidence of authenticity than one which had been written out in another hand and then attested by witnesses. Holograph writs, Stair said, ‘are unquestionably the strongest probation by writ, and the least imitable’.¹⁰¹

Over time this advantage came to be eroded. Especially in the context of wills, there was a growing impatience with requirements of form if they seemed likely to defeat the clear intention of the granter. A first step, already explicit in Stair’s *Institutions*,¹⁰² was to require that no more than the essential words be in the granter’s hand. The rest could then be treated as holograph by legal fiction. In the case of wills, this could have the happy result of rescuing those who, rather than incur the expense of a lawyer, had bought a will form (usually

⁹³ Hume (n 14) vol VI, 14. Read literally, the 1681 Act did not provide for nullity in respect of this particular shortcoming.

⁹⁴ *Duff v Earl of Fife* (1826) 2 W & S 166. The opinions of the judges of the Court of Session, given in full, are of great value.

⁹⁵ *Walker v Whitwell*, 1916 SC (HL) 75 especially at 79-82 (Lord Dunedin). In this case the second witness to a will had signed after the testator’s death. The will was held to be void.

⁹⁶ ‘It is impossible to say when holograph writings came first to be recognised in the law of Scotland’: *McBeath’s Trs v McBeath* 1935 SC 471, 480 (LJC Aitchison). Their privileged status arose ‘by usage’: see George Joseph Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (7th edn, by John McLaren, Edinburgh, 1870) vol I, 341. In *Titill* (1610) Mor 16959 a holograph will was found to be ‘a solemn and lawful testament’. Oddly, it was unsigned. The imposition of a reduced prescriptive period in respect of ‘holograph missive letters and holograph bands’ by an Act of 1669 (RPS 1669/10/27) shows that by then the holograph deed was well established.

⁹⁷ Stair (n 2) III, 8, 34; Watson (n 19) 336-42.

⁹⁸ For the arguments, which were partly founded on the civil law, see *Pennyquick v Campbell* (1709) Mor 16970. Scotland thus avoided the difficulties over missing or pre-printed dates and places encountered by countries such as Germany: see ch 8 above.

⁹⁹ Bankton (n 4) I, 9, 33; *Macdonald v Cuthbertson* (1890) 18 R 101, 107 (Lord McLaren).

¹⁰⁰ Erskine (n 5) III, 2, 22; *Callander v Callander’s Trs* (1863) 2 M 291, 301 (Lord Cowan).

¹⁰¹ Stair (n 2) IV, 42, 5.

¹⁰² Stair (n 2) IV, 42, 6: ‘Writs are accounted holograph, where large sentences are written with the party’s hand, though not the whole writ’.

designed for the English market) in a shop and filled in the blanks in their own handwriting.¹⁰³

Next came acceptance of the curious practice of adopting a deed, typed or written by another, as holograph of the grantor. In the leading case, decided in 1883,¹⁰⁴ a person had signed a document, written by a third party, and then added in his own hand the words ‘adopted as holograph’. It appears that he thought that ‘holograph’ was a French word meaning that parties were to stick to their bargain. The court held that the deed was validly executed. The basis of this, and later, decisions was unclear. On one view, the handwritten words ‘adopted as holograph’ were itself the deed, into which the non-holograph part was deemed to be incorporated.¹⁰⁵ On another, the three words – whether by magic or by an application of the principle of party autonomy – had the effect of changing words typed or written by another into words written by the grantor.¹⁰⁶

Finally, in *McBeath’s Trs v McBeath* (1935), a bare majority of a seven-judge court accepted as valid a will which had been typed by the testator and then signed, on the basis that the law must ‘keep pace with the march of science’,¹⁰⁷ that ‘typewriting is a modern form of handwriting’,¹⁰⁸ and that a typewritten will is hardly less secure than one containing the words adopted as holograph, ‘however illegibly written’.¹⁰⁹

These changes did not go unopposed. In respect of the recognition of adopted as holograph, for example, Lord McLaren was later to complain that ‘the Court came dangerously near to legislation’,¹¹⁰ while in *McBeath’s Trs* the minority resorted to a floodgates argument:

[I]f a deed may be typewritten, why not also a signature? If a deed be typewritten, why may it not also be dictated to a gramophone, where there is at least the check of the sound of the individual voice, for what that is worth?¹¹¹

At bottom the objection concerned authenticity and the risk of forgery. There was little evidential value in a deed in which the only handwritten words were ‘adopted as holograph’ and a signature. To allow such startling informality was to move from a system of written evidence to one where almost everything was periled on the ‘lubricity of oral testimony’.¹¹²

3. Probativity

¹⁰³ See eg *Gillies v Glasgow Royal Infirmary* 1960 SC 438.

¹⁰⁴ *Gavine’s Trs v Lee* (1883) 10 R 448. The doctrine can be traced back as far as *McIntyre v McFarlane’s Trs* 1 March 1821 FC.

¹⁰⁵ *McBeath’s Trs v McBeath* 1935 SC 471, 477 (LP Clyde). For incorporation, see III.2(e) below. An obvious difficulty with this view is that the writing thus incorporated is not itself holograph.

¹⁰⁶ *McBeath’s Trs v McBeath* 1935 SC 471, 491 (Lord Murray) (‘holograph constructively’).

¹⁰⁷ At 485 (Lord Anderson).

¹⁰⁸ At 489 (Lord Morison). Venturing into the realms of science fiction, Lord Morison went on to suggest that: ‘It may in future be easy for particular typewriting machines to operate with special characteristics’.

¹⁰⁹ At 485 (Lord Anderson).

¹¹⁰ *Harvey v Smith* (1904) 6 F 511, 521.

¹¹¹ 1935 SC 471, 492 (Lord Murray).

¹¹² *McBeath’s Trs v McBeath* 1935 SC 471, 493 (Lord Murray).

The suspicion of oral testimony was indeed long-standing. ‘In other nations’, Stair noted, ‘writs are not fully probative by the subscription of parties’.¹¹³ In Scotland, however, the position was different for, by requiring witnesses at the time of the signing, the 1681 Act was thought to have made them unnecessary later on. And in the course of the eighteenth century this thought ripened into the formal presumption that a deed which appeared to comply with the Act, by being apparently signed by the granter and by two (designed) witnesses, was taken to be ‘a genuine and authentic writing’.¹¹⁴ At one stage the law threatened to go even further, for if no evidence was needed to support an attested deed, then it might be that no evidence was competent at all. The issue came to a head in the mid-1790s in the great litigation concerning the settlement of Charles Frank.¹¹⁵ Mr Frank had signed while ill in bed. One of the witnesses, a servant, had ‘from modesty, stood near to the door’. Although he signed the deed as a witness, the servant was later to claim that he had neither seen Frank sign nor heard him acknowledge his signature. In an action to reduce the settlement, the question arose whether this evidence might be admitted. The unanimous view of the Court of Session was that it might.¹¹⁶

Yet the approach to oral evidence remained one of considerable suspicion. It was necessary to bear in mind, Hume said, ‘how wavering and inaccurate the memory of witnesses, especially those of the lower rank, is apt to be, at any distance of time .. and also how open such witnesses may often be to favor and influence of different kinds’.¹¹⁷ The presumption of authenticity was thus a powerful one and not easily rebutted, and contrary evidence ‘must be very strong and decisive, as it would be very dangerous to cut down deeds *ex facie* regular upon doubtful or equivocal testimony, whether of instrumentary witnesses or others’.¹¹⁸ So in *Frank* itself the court had little difficulty in dismissing the recollections of the bashful servant,¹¹⁹ and in later cases the result was often the same.¹²⁰ It was only in relation to other types of extrinsic evidence – *comparatio litterarum*, for example, or the fact of a deed having been written on paper ‘industriously sullied as to appear to be old’¹²¹ – that the court showed much in the way of sympathy.

Although terminology has varied, a deed which carries a presumption of authenticity is, in modern usage, known as ‘probative’. Thus a deed which appeared to be attested in accordance with the 1681 Act was a probative deed. Whether the presumption extended to holograph deeds was for a long time uncertain and contested. The initial view was in favour of probative status, at least where the deed contained a statement to be the effect that it was

¹¹³ Stair (n 2) IV, 42, 7.

¹¹⁴ Hume (n 14) vol VI, 28. And see also Erskine (n 5) III, 2, 20; Bell (n 96) vol I, 341.

¹¹⁵ *Frank v Frank* (1795) Mor 16824 affd (1809) 5 Pat 278.

¹¹⁶ Decision of 9 July 1793. An account of the opinions of individual judges is given in Bell (n 70) 235-9 and, in summary form, in (1809) 5 Pat 278, 281.

¹¹⁷ Hume (n 14) vol. VI, 15.

¹¹⁸ *Frank v Frank* (1809) 5 Pat 278, 282 (LP Campbell).

¹¹⁹ Decision of 2 December 1794. An account of the opinions of individual judges is given in Bell (n 70) 256-71 and, in summary form, in (1809) 5 Pat 278, 282. LJC Braxfield is reported by Bell as saying (at 257): ‘In balancing two testimonies, the one arising from the deliberate attestation of the witness in writing, the other from his deposition, I would rather suppose a failure of memory on the part of the witness, than that he was guilty of a criminal act’ (ie false witnessing under the 1681 Act)

¹²⁰ See eg: *Cleland v Cleland* (1838) 1 D 254; *Baird’s Trs v Murray* (1883) 11 R 153; *Sutherland v. W M Low & Co Ltd* (1901) 8 SLT 395. For a case in which the presumption of validity was overcome, see *Young v Paton* 1910 SC 63.

¹²¹ Stair (n 2) IV, 42, 19.

written by the grantor,¹²² but during the nineteenth century the position came to be doubted, with authorities supporting both sides.¹²³ The matter was not finally resolved until 1937 when the Court of Session decided that a holograph but unwitnessed deed could not be probative and that, unless its authenticity was admitted or otherwise not at issue, the onus of showing validity rested on the person seeking to rely on it.¹²⁴

III. THE MODERN LAW

1. Introduction

When the rules of authentication came to be re-examined by the Scottish Law Commission in the late 1980s, they had remained largely unchanged for 300 years. Two types of deed – the attested and the holograph – were available for wills, as for other juridical acts for which writing was needed. The first was signed by the grantor and attested by two witnesses in accordance with the authentication statutes and in particular the Subscription of Deeds Act 1681. The second was signed by the grantor and either substantially written out by him or containing in his hand the words ‘adopted as holograph’. Only the first was ‘probative’ in the sense of being self-proving; in respect of the second, it was necessary to prove that the writing and signature were those of the grantor. These rules, the Scottish Law Commission concluded, were ‘most unsatisfactory’.¹²⁵ The law rested on ancient legislation supplemented by an ‘encrustation of case law’.¹²⁶ In places it was obscure or illogical or plain out-of-date. And it was overly formalistic. There was, the Commission thought, little merit in formality for its own sake:

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.¹²⁷

Particular scorn was reserved for the holograph deed, long rendered obsolete, it was said, by the invention of the typewriter, to say nothing of the computer. ‘Most people regard a handwritten document as *less* formal than a typed one. To say that a subscribed typed document is invalid but a subscribed holograph writing is valid seems perverse.’¹²⁸ The evidential value of handwriting was acknowledged but dismissed with the thought that authenticity, if in dispute, could be proved by other means.

The key to reform lay in the existing concession for deeds containing the handwritten words ‘adopted as holograph’. The words themselves added little either to formality or authenticity

¹²² Erskine (n 5) III, 2, 22, relying on *Earl of Rothes v Leslie* (1635) Mor 12605; Bell (n 96) vol I, 341. Bell explained the special status on the basis of compliance with the requirement, first imposed by an Act of 1593 (RPS 1593/4/44) and later confirmed by the 1681 Act, that the writer of a deed be named and designed.

¹²³ The last clear authority in favour of probativity was *Robertson v Ogilvie’s Trs* (1844) 7 D 236. A different view was suggested in *Anderson v Gill* (1858) 3 Macq 180 and *Cranston Ptrs* (1890) 17 R 410. Hume (n 15) vol VI, 28 thought that holograph deeds were improbativ.

¹²⁴ *Harper v Green*, 1938 SC 198. Even so, one judge (Lord Carmont at 205) was willing to cede probative status if (i) the authenticity of the signature was proved or admitted and (ii) the deed contained the statement that it was written ‘by my hand’ or equivalent. This was an attempt to reconcile the previous authorities.

¹²⁵ Report on *Requirements of Writing* (n 51) para 4.12.

¹²⁶ Report, para 4.10.

¹²⁷ Report, para 4.1.

¹²⁸ Report, para 4.16.

and could readily be dispensed with. But if this were to be done, the only requirement left would be the granter's signature. In the Commission's view, there was much to be said in favour of such a reduced requirement – of a rule that a deed is valid simply by being signed.¹²⁹ On the one hand, no one could be surprised by the idea that they were bound by things that they signed. On the other hand, the proposed rule was simple, elegant, and unlikely to cause trouble in practice.

That left the question of probativity. If this was to be retained, as the Commission thought that it ought to be, there was still a place for attested writings, for a deed that was merely signed could hardly be given the status of self-proving. But the number of witnesses could be reduced from two to one, in line with the recent abolition of corroboration in civil actions.¹³⁰

The overall result was to retain the dual character of the existing law. Attested writings were to continue as before and, apart from the reduction in witnesses, to be subject to virtually the same rules. But holograph writings were to be replaced by subscribed writings, i.e. writings which could be written by anyone and in any way, including by typewriter or computer, and then 'subscribed' – signed at the end – by the granter. As before, only the former were to be probative. These recommendations of the Scottish Law Commission were accepted by the government and implemented by the Requirements of Writing (Scotland) Act 1995. The current law is thus to be found in that Act.

A key advantage of the new law is structural. Under the rules previously in force, a deed which failed as an attested deed usually failed altogether. A modern example is *Williamson v Williamson*.¹³¹ Mrs. Williamson signed her will on 11 April 1988. The witnesses were a Mr and Mrs Wilson. Unhappily, when Mr. Wilson, a solicitor, came to sign, he confused his own surname with that of the testator and signed 'D C R Williamson'. As is usual in such cases, the mistake was not discovered until after the testator's death. The will was held by the Court of Session to be invalid. With the signature of only one witness, it could not be an attested deed; but nor could it be a holograph deed because it was typed and, naturally enough, lacked the words 'adopted as holograph'. The new law would produce a different result. The will would be valid from the moment that Mrs Williamson signed, and the only purpose of attestation would be to procure probativity.¹³² Hence even if the witnessing is defective, the deed – provided it is subscribed – is still valid. An attested deed thus carries within it a subscribed deed – it is simply a subscribed deed with the addition of a witness.

Viewed more broadly, the 1995 reform can be seen as a well-judged blend of continuity and change. The change was indeed a radical one, reducing the requirements of formal validity to what must be almost the lowest possible level. But the continuity was no less striking: the requirements for a probative deed under the Act would have caused little surprise to legislators of the seventeenth century. And it was partly for that reason that, after some initial grumbling, the legal profession came to terms with the new law. Today it is regarded with the indifference which is the hallmark of success.

It would, of course, have been possible to exempt wills from the new informality of the subscribed writing, and indeed this issue was specifically considered by the Scottish Law

¹²⁹ Report, para 4.19.

¹³⁰ Report, paras 5.1, 5.2, 5.9.

¹³¹ 1997 SC 94.

¹³² As only one witness is now needed, it would be probative as well.

Commission.¹³³ But while conceding that it was not ‘an easy question’, the Commission decided against any such exemption. To have ‘different requirements for different classes of writings’, contrary to the long tradition in Scotland, would be confusing and lead to error. And if it was desirable to allow people to make wills on their own, without legal advice, as the Commission thought it was, then it must follow that the rules should be as simple as possible.

The Commission took for granted that writing should continue to be needed for wills, and indeed recommended the abolition of the existing exception, rendered irrelevant by inflation, which allowed oral wills of £100 Scots (£8.33).¹³⁴ There was no consideration of such new media as video recording or electronic documents. As restated by the 1995 Act, writing is required for ‘the making of any will, testamentary trust disposition and settlement or codicil’.¹³⁵ In Scotland a codicil is simply an addition to an existing will and it has always been subject to the same formalities.

In practice, most wills are drawn up by solicitors and are attested in order to gain the benefit of probativity. Home-made wills, however, are almost invariably subscribed without witnesses. Both types of will must now be considered in greater detail.

2. Formal validity: the subscribed will

The United Kingdom has yet to ratify the Washington Convention on the Form of an International Will (1973) although framework legislation has been in place since 1982.¹³⁶ Consequently, the entire law of testamentary formalities in Scotland is contained in the Requirements of Writing (Scotland) Act 1995. The Act makes only two requirements of a will: it must be in a ‘written document’ and the document must be subscribed by the testator.¹³⁷ Nothing else, the Act explains, ‘shall be required’.¹³⁸ So it does not matter whether the document is handwritten or typed or written in some other way, and there is no need for witnesses or for a statement of the date or place of signing.

(a) A ‘written document’

‘Document’ suggests paper but without excluding other media. The definition in the *Oxford English Dictionary*¹³⁹ carries the enticing suggestions of tomb-stones, coins, and pictures, although the first of these, at least, is likely to come too late to be of service. But while a castaway on a Hebridean island could write his will in the sand, and hope for gentle tides, data contained in an electronic medium are not a ‘written document’ and, even if they were, could not be signed in the manner required by the Act.¹⁴⁰

¹³³ Report, paras 4.32-4.35.

¹³⁴ Report, para 2.49.

¹³⁵ Requirements of Writing (Scotland) Act 1995 s 1(2)(c).

¹³⁶ Administration of Justice Act 1982 ss 27 and 28 (not in force).

¹³⁷ Requirements of Writing (Scotland) Act 1995 ss 1(2)(c), 2(1). In this section I talk only of wills, but it should be recalled that the same rules apply to all juridical acts for which writing is needed, including contracts and deeds in respect of real rights in land.

¹³⁸ 1995 Act s 2(1).

¹³⁹ 2nd edn, 1989 (online version).

¹⁴⁰ The 1995 Act, as amended, is careful to distinguish a ‘written document’ from the ‘electronic document’ which is now available for electronic conveyancing in respect of land. See s 1(2A), (2B).

(b) Method of signature

The normal method of signing is by a combination of forename (or forenames) and surname, although an initial will do instead of a forename, and familiar forms of forenames are permitted.¹⁴¹ The Act also allows informal signatures, as in many other countries, provided they can be shown to be the testator's usual way of signing or are otherwise intended as a signature. So, especially in cases where testamentary provisions are found in a letter to a relative or friend, a person can sign by forename alone ('Connie')¹⁴² by description ('lots of love, Mum')¹⁴³ or even by initial or mark.¹⁴⁴ Usually a signature is written by pen, but it is sufficient to sign by pencil or other less permanent materials such as chalk.¹⁴⁵ However, the signature must be written, and it is not permitted to use words which have been typed, cyclostyled, affixed by stamp or 'drawn' on a computer screen.¹⁴⁶ Digital signatures are not recognised.¹⁴⁷ The writing need not be by hand, and person may sign using a foot or mouth or in some other way.¹⁴⁸ There is no requirement that a signature be legible.¹⁴⁹ A blind person can sign although the will may be open to challenge on the ground that the testator was misled as to what was being signed¹⁵⁰ and it is usually better to use a 'notarial' signature in the manner described below.¹⁵¹

Normally a testator must sign unaided. So when, for example, in November 1707, George Moncrieff was too weak to write more than 'George' and 'Mon', and a bystander 'boldly took him by the wrist, and led his hand till he had added "crieff"', the will was held to be invalid.¹⁵² More limited assistance is, however, allowed. Thus it is permissible to support the testator's body or even the testator's arm or wrist so long as the pen is not actually guided.¹⁵³ Tracing letters in advance with a pin or a pencil is regarded as guidance for this purpose.¹⁵⁴ But it does not invalidate the signature if the testator copies, in her own handwriting, from a style of signature provided by an assistant, 'merely to keep her right in her spelling'.¹⁵⁵

(c) Place of signature

¹⁴¹ 1995 Act, s 7(2)(b). So the following are all valid: James Andrew Murray; James Murray; J A Murray; J Murray; Jimmy Murray; and Jas Murray. Note also s 7(2)(a) which permits signature by the full name by which the person is identified in the document.

¹⁴² *Draper v Thomason* 1954 SC 136.

¹⁴³ *Rhodes v Peterson* 1971 SC 56.

¹⁴⁴ 1995 Act s 7(2)(c).

¹⁴⁵ *Stirling Stuart v Stirling Crawford's Trs* (1885) 12 R 610, 617 (Lord McLaren).

¹⁴⁶ *Stirling Stuart v Stirling Crawford's Trs* (1885) 12 R 610; *Whyte v Watt* (1893) 21 R 165; *McBeath's Trs v McBeath* 1935 SC 471.

¹⁴⁷ Although they can be used for certain documents involved in electronic conveyancing: see 1995 Act s 2A.

¹⁴⁸ Scottish Law Commission, Report on *Requirements of Writing* (n 51) para 6.14.

¹⁴⁹ *Stirling Stuart v Stirling Crawford's Trs* (1885) 12 R 610. As LP Inglis points at (at 625), illegible signatures are usually the product of infirmity, and 'the infirmity of affectation is perhaps, of all others, most productive of illegible signatures'.

¹⁵⁰ 1995 Act s 9(7).

¹⁵¹ See III.2(d).

¹⁵² *Moncrieff v Monypenny* (1710) Mor 15936. Among the authorities cited in support of this view was Ulric Huber's *De Testamentis* (1688).

¹⁵³ *Noble v Noble* (1875) 3 R 74.

¹⁵⁴ Bankton (n 4), I, 11, 38; *Crosbie v Picken* (1749) Mor 16814.

¹⁵⁵ Watson (n 19) 323. The case is *Wilson v Raeburn* (1800) Hume 912.

Unlike some other countries,¹⁵⁶ Scotland has persevered with the requirement that the testator *subscribe*, i.e. sign at the end, as evidence of ‘deliberate and final testamentary intention’.¹⁵⁷ The statutory phrase is that the testator must sign ‘at the end of the last page’, by which seems to be meant on the same page as and underneath the final lines of the will.¹⁵⁸ Perhaps uncharacteristically, the courts have approached this requirement with formalistic zeal. Thus on the one hand, words will be disregarded if they appear underneath the signature;¹⁵⁹ on the other, the whole will is invalid if the signature is on a different page.¹⁶⁰ In the unexpectedly common case of a person putting an unsigned will into an envelope but signing the envelope, usually accompanied by words such as ‘my last will’, the courts have repeatedly refused to uphold the will.¹⁶¹ The position might possibly be different if the envelope contained words which could plausibly be viewed as a continuation of the will,¹⁶² or if the words on the envelope could be regarded as the will into which the unsigned deed had somehow been incorporated.¹⁶³

(d) Signature where testator blind or unable to write

Special provision is made for a testator who is blind or who, whether for temporary reasons (such as a broken wrist) or due to some permanent disability, is unable to write. Under the previous law, a signature was appended on behalf of the testator by a notary public.¹⁶⁴ The 1995 Act abandons notaries – today an unimportant category – in favour of solicitors, advocates, justices of the peace, and sheriff clerks.¹⁶⁵ After reading the will to the testator and receiving due authorisation, the solicitor or other functionary signs with his own name. The signatory must not benefit from the will, directly or indirectly, and any provision which would confer such benefit is void.¹⁶⁶

(e) Alterations, incorporation, and enfranchising clauses

Where the text of a will is altered, for example by deleting or adding words, the status of the alteration depends on when it was carried out. Now embodied in statute, the rule is just as one would expect: an alteration made before the testator signed is part of the will and so must be given effect whereas one made later is disregarded.¹⁶⁷ The difficulty, of course, lies in knowing when the alteration was made. In the case of attested wills, a statement in the will or testing clause that the change was made before subscription is taken to be true unless the

¹⁵⁶ Eg Australia: see ch 14 above.

¹⁵⁷ *McLay v Farrell* 1950 SC 149, 152 (Lord Birnam). As has been observed, to sign at the end is no more than ‘ordinary human practice’: see Ashbel G Gulliver and Catherine J Tilson, ‘Classification of Gratuitous Transfers’ (1941) 51 *Yale LJ* 1, 5.

¹⁵⁸ Requirements of Writing (Scotland) Act 1995 s 7(1).

¹⁵⁹ *McLay v Farrell* 1950 SC 149.

¹⁶⁰ *Baird’s Trs v Baird* 1955 SC 286.

¹⁶¹ See eg *Stenhouse v Stenhouse* 1921 SLT. The cases are collected and discussed in James G Currie, *The Confirmation of Executors in Scotland* (8th edn by Eilidh M Scobbie, 1995) para 3.69. In Germany the courts have been more indulgent: see ch 8 above.

¹⁶² *Ferguson* 1959 SC 56 (concerning an additional page).

¹⁶³ For incorporation, see III.2(e) below.

¹⁶⁴ See II. (1)(b) above.

¹⁶⁵ 1995 Act s 9.

¹⁶⁶ 1995 Act s 9(4). This is a considerable improvement on the previous law, which was that the entire will fell.

¹⁶⁷ 1995 Act s 5(1).

contrary is shown;¹⁶⁸ but as changes are rarely made to attested wills this is of little help in practice. More important is the rule for subscribed wills, which is that an alteration is not counted unless it can be proved to have been added before subscription – often an impossible task given that the person who is most likely to know (i.e. the testator) is dead.¹⁶⁹

The alterations discussed so far appear above the testator's signature. But where words are added beneath the signature, they are disregarded altogether, for reasons already considered,¹⁷⁰ except where separately subscribed so as to make a formal codicil to the will. Words on a separate sheet of paper are likewise disregarded unless subscribed or, being already in existence at the time of the will, are referred to in and so incorporated as part of that will.¹⁷¹ The latter in particular is virtually never encountered in modern practice.

At one time it was common for wills to contain a clause which authorised future legacies, however informal in character, the idea being to facilitate that favourite sport of the elderly – the drawing up of lists of small and usually personal items of property which indicate, often with many scorings-out, their intended recipients. Such 'enfranchising clauses' were effective if the list in question was signed and, probably, even if it was not.¹⁷² Today, enfranchising clauses are unnecessary in the first case (for signing is sufficient for formal validity) and, arguably, ineffective in the second (because the 1995 Act requires subscribed writing for all wills and codicils).

3. Probativity: the attested will

Although valid from the moment of subscription, a will is not probative unless or until it is attested by a witness. To put the same point in a different way, the only function of attestation in the modern law is to achieve probativity.

(a) Formal requirements

An attested will is one which has been subscribed by the testator and signed by a single witness. The rules as to the testator's subscription have already been described, and only one thing need be added. If a will extends to more than a single sheet of paper, the testator must sign on each sheet as well as signing, in the usual way, at the end of the last.¹⁷³ In fact, as clients rather enjoy signing wills, the practice of solicitors is to have them sign, not only on every sheet, but on every page. These additional signatures are needed only for attested wills (and indeed only for wills): if the testator neglects to sign on each sheet, the will is still valid, as a subscribed will, provided it is signed at the end.

The witness must be at least sixteen and of full mental capacity.¹⁷⁴ There is no requirement of good character.¹⁷⁵ A bar on female witnesses was removed in 1868.¹⁷⁶ The question of

¹⁶⁸ 1995 Act s 5(4), (5).

¹⁶⁹ 1995 Act s 5(6).

¹⁷⁰ At III. (2)(c) above.

¹⁷¹ See eg *Inglis v Harper* (1831) 5 W & S 785; *Fraser's Exx v Fraser's CB* 1931 SC 536.

¹⁷² Compare *Waterson's Trs v St. Giles Boys' Club* 1943 SC 369 with *Baird v Jaap* (1856) 18 D 1246 and *Crosbie v Wilson* (1865) 3 M 870.

¹⁷³ Requirements of Writing (Scotland) Act 1995 s 3(2). The requirement is to sign rather than to subscribe.

¹⁷⁴ 1995 Act s 3(4)(c).

¹⁷⁵ Hume (n 14) vol VI, 18 had doubted whether 'an infamous person' could be a witness.

whether a beneficiary can be a witness remained controversial for several centuries and was only finally settled, in the affirmative, by a seven-judge decision in 1883, in which Roman law was invoked on behalf of the winning side.¹⁷⁷

Either the witness must see the testator sign or the testator must acknowledge the signature to the witness.¹⁷⁸ Acknowledgement can be by gesture but is almost always by words.¹⁷⁹ The witness then signs – in practice at the end of the deed although this is no longer a formal requirement¹⁸⁰ – and must do so at once or after only a short interval of time, to avoid the risk of substitution of documents.¹⁸¹ There is no reason why the witness should know the nature or content of the document,¹⁸² but the witness must know the testator at least in the limited sense, as the Act puts it, of having ‘credible information’ as to identity.¹⁸³ It seems implicit that the witness signs with the consent of the testator although this is not spelled out in the statute. Attestation is not complete until a note of the witness’s name and address has been added to the will, normally in a special clause (the ‘testing clause’) which comes at the end.¹⁸⁴

(b) *Conferral of probativity*

Yet the formalities just described scarcely matter. Suppose that they are not complied with – suppose that the witness is a six-year old child who has never met the testator far less seen him sign the will, or that the witness’s signature is forged, or even that the witness is a figment of the testator’s imagination. As long as the testator has subscribed, the will is perfectly valid. More than that, as long as the will *appears* to have been subscribed and attested, the will is also probative and hence self-proving. No supplementary evidence, written or oral, is needed.¹⁸⁵ At first sight, this easy conferral of probativity may seem surprising. Yet it is perfectly logical. To be of practical use, probativity must be capable of being determined by visual inspection. As the Scottish Law Commission put it, ‘It is self-contradictory to say “This document proves itself if certain extrinsic facts are proved”’.¹⁸⁶ Extrinsic facts are relevant, if at all, not to the establishment of probativity but to its rebuttal.

If a will is probative, it is presumed to have been subscribed by the testator and hence – since only subscription is needed for formal validity – to be valid in respect of formality.¹⁸⁷ That presumption can of course be overcome by contrary evidence but the onus of proof, it has

¹⁷⁶ Titles to Land Consolidation (Scotland) Act 1868 s 139. Hume (n 14) vol VI, 17-18 had thought women disqualified ‘on account of their ignorance of business’.

¹⁷⁷ *Simsons v Simsons* (1883) 10 R 1247, 1250: ‘By the Roman law the heir or any other interested party could be a witness, and Cicero stated in his oration *Pro Milone* that he himself had taken an interest under a will which he had signed as a witness’. The authorities cited were Gai II, 108; J Inst II, 10, 10; and Marcianus D. 34, 5, 14.

¹⁷⁸ 1995 Act s 3(4)(e), (7).

¹⁷⁹ For gestural acknowledgement, see *Lindsay v Milne* 1995 SLT 487.

¹⁸⁰ A purely informal signature is not allowed: see 1995 Act s 7(5).

¹⁸¹ The 1995 Act s 3(4)(e) requires that the witness’s signature is ‘one continuous process’ with the testator’s signature or acknowledgement. For a case where a delay of 45 minutes was allowed, see *Thomson v Clarkson’s Trs* (1892) 20 R 59.

¹⁸² Hume (n 14) vol VI, 17; *Ferguson* 1959 SC 56, 61 (Lord Mackintosh).

¹⁸³ 1995 Act s 7(5).

¹⁸⁴ 1995 Act s 3(1)(b). This can be done later: see s 3(3).

¹⁸⁵ Compare the position under the Uniform Probate Code (USA) § 2-504 which requires additional affidavits, whether prepared at the time of execution or later.

¹⁸⁶ Scottish Law Commission, Report on *Requirements of Writing* (n 51) para 5.4.

¹⁸⁷ 1995 Act s 3(1).

repeatedly been said, is heavy.¹⁸⁸ There are two separate routes to rebuttal. One is to prove that the testator did not subscribe; the other is to prove that the witnessing was defective.¹⁸⁹ The consequences of success are not the same in each case: in the first the will is cast down as a forgery, in the second the will survives, at least for the time being, but ceases to be probative so that the onus of proof passes to those who would propose its validity.¹⁹⁰

4. Internal formalities

For as long as heritable property was transmitted by *de praesenti* conveyance and not by testament, the use of words of transfer – normally the word ‘dispone’ – was a prerequisite of validity.¹⁹¹ But once the law changed, in 1868, to allow testaments for heritage, the need for special words disappeared.¹⁹² Neither particular words nor particular content had ever been required for moveable property, and although it was normal for testaments to appoint an executor, even this was not a condition of validity.¹⁹³ Already by the time of Bankton the rule for wills was that ‘any words capable to shew the deceased’s mind are sufficient’,¹⁹⁴ and it has since been made clear that such words need not include ‘a verb expressing conveyance or transfer or bequest’.¹⁹⁵ The main concern of case law has been to distinguish completed expressions of testamentary intention from a person’s provisional thoughts and jottings, and in making that distinction the use of particular words has rarely been important.¹⁹⁶

5. Practicalities

(a) Making a will

Most wills are prepared by solicitors.¹⁹⁷ What typically happens is that the testator meets with the lawyer and, prompted by questions and explanations, gives instructions as to what is wanted; the solicitor then drafts the will and sends it to the testator with an explanatory letter; the testator signs, if satisfied, or has further discussions with the lawyer if not. The signing takes place either in the solicitor’s office or, without professional supervision, at the testator’s home. Attestation is invariable. The solicitor retains the will or at least a copy of it. The cost is often quite modest, for solicitors hope that, by making the will, they may ultimately receive the legal work associated with winding up the estate. Some effort is made to encourage will-making and so to reduce the incidence of intestacy. For example, there are periodic ‘Wills Weeks’ or ‘Free Wills Months’ during which participating solicitors offer to make a will at a

¹⁸⁸ *Cleland v Cleland* (1838) 1 D 254; *Baird’s Trs v Murray* (1883) 11 R 153; *Sutherland v W M Low & Co Ltd.* (1901) 8 SLT 395. And see II. 3 above.

¹⁸⁹ The list of possible defects is set out in s 3(4) of the 1995 Act.

¹⁹⁰ 1995 Act s 3(4) (‘then for the purposes of those proceedings, there shall be no presumption that the document has been subscribed by that granter’).

¹⁹¹ See I. 2 above.

¹⁹² Titles to Land Consolidation (Scotland) Act 1860 s 20. Admittedly, s 20 makes its own internal requirement, only allowing wills of heritage if they purport to ‘convey or bequeath lands’ at least in the sense of using words which would be sufficient to legate moveables. But the requirement is so easily satisfied – see John McLaren, *The Law of Wills and Succession as Administered in Scotland* (3rd edn, Edinburgh, 1894) vol 1, ch 17 – that it is rarely referred to in the modern law.

¹⁹³ See I. 3 above.

¹⁹⁴ Bankton (n 4) III, 8, 2. See also McLaren (n 192) vol 1, para 508.

¹⁹⁵ *Colvin v Hutchison* (1885) 12 R 947, 955 (LP Inglis).

¹⁹⁶ For a review of the main cases, see Macdonald (n 9) paras 8.36-8.39.

¹⁹⁷ For a solicitor’s perspective on the process, see Barr et al (n 67) ch 9.

discount or in exchange for a legacy to a charity or even free of charge. And a person consulting a solicitor for some other reason – house purchase, for example, or divorce – may be treated to a homily on the importance of providing for one’s family and the value of tax planning.

While solicitors dominate the market, anyone can offer a will-making service. Readily discoverable on the internet, such services usually undercut the charges made by solicitors. Under new legislation, will writers are to be regulated by approved professional bodies which must make provision for training, a code of practice, and for professional indemnity.¹⁹⁸

For those who decide to make a will on their own – and few do – there are instruction manuals and online programmes.¹⁹⁹ Apart from a wish to save money, a person might use a home-made will as a modest supplement to a professionally-prepared document or in an emergency where there is no time to consult a professional.

(b) Finding a will

Although wills are registered after death, in the court records,²⁰⁰ they are not registered before. There is no register of wills in Scotland and no immediate prospect of one being introduced. At least so far, the United Kingdom has not ratified the Basle Convention on Registration of Wills (1972) although framework legislation has been in place since 1982.²⁰¹ Moreover, as registration would not – indeed could not – be compulsory, not even the introduction of a register would eliminate the risk that a will is overlooked. In most cases that risk is probably slight, because wills are typically made and retained by solicitors. Even this, however, is not an infallible safeguard, for wills are often made many years before death, clients lose touch with their lawyers, and legal firms come and go. Advertisements inquiring as to the whereabouts of a deceased’s will are a familiar feature of the legal press.

(c) Confirmation of executors

Following death, the testator’s estate is administered by an executor who must give effect to the terms of the will. Typically, the executor is nominated in the will but, even so, the appointment must be confirmed by the court. Such confirmation is the executor’s title to administer the estate and the rough equivalent of probate in England.²⁰² As part of the application for confirmation the executor must prepare a full inventory of the deceased’s property. In addition, where the will is unwitnessed and improbate, its authenticity must be specially demonstrated.²⁰³ The procedure, however, is undemanding: all that is needed is a sworn affidavit from a single person to the effect that the person is ‘well acquainted with the

¹⁹⁸ Legal Services (Scotland) Act 2010 Pt 3 ch 2.

¹⁹⁹ For example, Scotwills (<<http://www.scotwills.co.uk>>) offers the opportunity to make one’s own will ‘using our interactive, expert system, designed by a Solicitor’. The advertisement continues: ‘The fee is fixed at £45 – there are no hidden extras. Compare that with the cost of a Solicitor-made Will which usually costs between £90 and £150 and can cost much more!’

²⁰⁰ This is part of the Confirmation process discussed in the next section.

²⁰¹ Administration of Justice Act 1982 ss 23-26 (not in force). For a brief discussion, see Michael Brandon, ‘UK Accession to the Convention on the Establishment of a Scheme of Registration of Wills and of the Convention providing a Uniform Law on the Form of an International Will’ (1983) 32 *ICLQ* 742.

²⁰² See generally: Currie (n 161); Macdonald (n 9) paras 13.29 ff.

²⁰³ Succession (Scotland) Act 1964 s 21A. Confirmation is the equivalent of probate in England.

signature' of the deceased, has 'seen and examined the signature on the will', and confirms that it is the deceased's signature.²⁰⁴ If the signature is an informal one (such as 'Mum'), the witness must also confirm that it was the deceased's normal way of signing a writing of the type in question (such as a letter).²⁰⁵ As it is highly unusual for affidavits to be questioned by the court or for further inquiry to be made, an improbativ will is scarcely more troublesome in practice than one which has been fastidiously witnessed.

IV. FORM AND FORMALISM

What formalities, then, should be required for wills? In Scotland, as in most other countries, two at least have usually been regarded as indispensable. In the first place, the will should be in writing.²⁰⁶ And in the second place it should be signed by the testator or, if he is unable to write, by some responsible person acting on the testator's behalf. The justifications are well-known and hardly controversial. Writing explains what is to happen to the testator's property when he is no longer there to give directions for himself. And a signature serves both to connect the testator to the writing – to adopt its contents as his final wishes – and also to demonstrate the authenticity of the juridical act. Although these justifications can be characterised in different ways, their primary purpose is evidential: the deceased's estate can safely be distributed according to the written instructions precisely because there is a reasonable assurance that that is what the deceased intended.²⁰⁷

The difficult question is whether more than writing and subscription are needed. There are at least two reasons why this might be so: to protect the testator against himself, and to protect him against others. Both were perfectly familiar to the jurists of eighteenth-century Scotland. The first, said Erskine, is so that parties are not 'caught by rash expressions' which they might later regret, while the second, according to Bankton, is 'for the greater security of men's rights against falsehood'.²⁰⁸ But of course the choice is not a neutral one, for the more a testator is protected by increased requirements of form, the greater the danger that his testamentary intentions are defeated by ignorance or technical error in attempting compliance. To protect testators may also be to injure them: that is the eternal dilemma of form.

In Scotland the avoidance of injury has seemed the paramount virtue. What is to be avoided, wrote Robert Bell in 1795, is 'a superfluity of form, which renders the execution of it dangerous, uneasy, and often almost impossible'.²⁰⁹ And certainly there has been little interest in the protection of testators from themselves. Indeed in a country where intestacy rates approach 50%, the problem has not been too many 'rash expressions' but too few.

²⁰⁴ Requirements of Writing (Scotland) Act 1995 s 4(1), (3); Act of Sederunt (Requirements of Writing) 1996, SI 1996/1534 para 4, sch, form 1.

²⁰⁵ 1995 Act s 7(2)(c). See further Currie (n 161) para 4.103. For informal signatures, see III.2(b) above.

²⁰⁶ With the trivial exception, now abolished, of wills of up to £100 Scots. It can, of course, be argued that an insistence on writing is increasingly old-fashioned in view of the prevalence and reliability of other media. See James Lindgren, 'The Fall of Formalism' (1991-2) *Albany LR* 1009, 1020-24, advocating video-wills in particular.

²⁰⁷ In the influential terminology used by Gulliver and Tilson (1941) 51 *Yale LJ* 6-9, this is known as the 'evidentiary' function.

²⁰⁸ Erskine (n 5) III, 2, 2; Bankton (n 4) I, 11, 27. In the terminology of Gulliver and Tilson (1941) 51 *Yale LJ* 5-13, these functions are known respectively as the 'ritual' (or sometimes 'cautionary') and as the 'protective'.

²⁰⁹ Bell (n 70) 27.

Protection against others is a different matter. The introduction of attestation in 1681 was designed, among other things, to discourage ‘unfair attempts on the weak or ignorant’.²¹⁰ Today there is a tendency to dismiss this sort of approach as a ‘historical anachronism’.²¹¹ Whatever the position may once have been, we are told, ‘the makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or unearned, they are likely to be among the more capable and dominant members of our society’.²¹² But even if this is true, it is hardly the whole story. Today, as in the seventeenth century, wills continue to be made by the old, the sick and the enfeebled, who are or may be vulnerable to the pressure, or even the fraud, of relatives, friends and carers. Increasing longevity seems likely to add to the problem.²¹³ And while it may be the case, as has been argued, that most wills are executed by people in the prime of their lives and with appropriate legal and financial advice,²¹⁴ the fact remains that no will is final until death and that an earlier and considered will can be displaced by a last-minute change of mind. Yet if the problem of fraud and undue influence remains, it seems doubtful that attestation provides much in the way of a solution.²¹⁵ In Scotland, at least, the role of a witness is a modest one. He need not see the actual signature or the circumstances leading up to it; he need not know that the document is a will; and he can be a beneficiary – perhaps indeed the very person who is most likely to put pressure on the testator.²¹⁶ Only a more demanding signing regime, such as signature before a notary, would be likely to make much difference. But given Scotland’s long history of informality, it seems doubtful if even an optional notarial procedure would command support.²¹⁷

But if formalities can do little to protect against fraud, then they should at least facilitate the making of wills. Testamentary intention should not be defeated by innocuous technical error. Formalities, in short, should avoid the trap of formalism. In recent years a standard approach to this problem has been the introduction of some kind of dispensing power allowing technical blemishes to be overlooked where the court is satisfied that the document was truly intended as a will. Beginning with Israel in 1965,²¹⁸ dispensing powers have since been introduced in many parts of the English-speaking world including the United States, Canada, Australia, New Zealand and South Africa.²¹⁹ The possibility has also been canvassed in both

²¹⁰ Hume (n 14) vol VI, 25.

²¹¹ John H Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88 *Harvard LR* 489, 496.

²¹² Gulliver and Tilson (1941) 51 *Yale LJ* 9.

²¹³ See eg J C Sonnekus, ‘Freedom of Testation and the Ageing Testator’, in Reid, De Waal and Zimmermann (n 1) 78.

²¹⁴ Gulliver and Tilson (1941) 51 *Yale LJ* 10.

²¹⁵ See Scottish Law Commission, Report on *Requirements of Writing* (n 51) para 4.13: ‘Someone who needs protection against foolishly signing also needs protection against foolishly signing in front of witnesses’.

²¹⁶ For a discussion of the issues in the context of English law, see: Roger Kerridge, ‘Wills Made in Suspicious Circumstances: the Problem of the Vulnerable Testator’ (2000) 59 *CLJ* 310; Roger Kerridge, ‘Draftsmen and Suspicious Wills’, in Martin Dixon (ed), *Modern Studies in Property Law* vol 5 (2009) 159.

²¹⁷ The Scottish Law Commission referred to notarial execution as an ‘extreme requirement’ where ‘the cost and inconvenience would be disproportionate to the advantages gained’: see Report on *Requirements of Writing* (n 51) para 4.13. For arguments in favour of an optional notarial system, see Lloyd Bonfield, ‘Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past’ (1995-6) 70 *Tulane LR* 1893, 1918-20. In the USA an optional notarial system was introduced to the Uniform Probate Code by amendment in 2008: see § 2-503(a)(3)(B).

²¹⁸ For a discussion, see Celia Wasserstein Fassberg, ‘Form and Formalism: A Case Study’ (1983) *AJCL* 627.

²¹⁹ See chs 14-16 and 18. The most influential voice has been John Langbein’s: see Langbein 88 *Harvard LR* 489 and also John H Langbein, ‘Excusing Harmless Errors in the Execution of Wills: a Report on Australia’s Tranquil Revolution in Probate Law’ (1987) *Columbia LR* 1.

Scotland and England.²²⁰ But there is also another way. Instead of excusing a failure in attestation or in the preparation of a holograph will, the requirement that a will be attested or holograph could itself be dropped. A discretion, in other words, could be replaced by a fixed rule. Perhaps characteristically, this is the solution which has been adopted in Scotland.²²¹ Since 1995 a will has been valid in respect of formalities provided it is in writing and subscribed.²²² The solution to formalism is, more or less, the abandonment of form.

²²⁰ Scottish Law Commission, Report on *Succession* (Scot Law Com No 124, 1990) paras 4.1-4.20; Law Reform Committee, *Twenty-second Report: The Making and Revocation of Wills* (Cmnd 7902, 1980) paras 2.4-2.6.

²²¹ For enthusiastic advocacy of this approach, see James Lindgren, 'Abolishing the Attestation Requirement for Wills' (1989-90) 68 *North Carolina LR* 541; Lindgren (1991-2) *Albany LR* 1024-30. Lindgren was presumably unaware that this had already been recommended by the Scottish Law Commission in 1988: see Report on *Requirements of Writing* (n 51) part IV.

²²² Requirements of Writing (Scotland) Act 1995 s 2(1), discussed at III.1 and III.2 above. A dispensing power would still be needed if the law was prepared to countenance a will which had not been signed. At one time that was the position favoured by the Scottish Law Commission (see Report on *Succession* (n 220) paras 4.15-4.16) but the Commission's current view is opposed to the use of a dispensing power for unsigned wills: see Report on *Succession* (n 10) paras 6.37-6.40.