Scottish Law Commission

(SCOT LAW COM No 112)

Report on Requirements of Writing

Edinburgh

Her Majesty's Stationery Office

SCOTTISH LAW COMMISSION
(Scot Law Com No 112)

Report on Requirements of Writing

Laid before Parliament by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons *to be printed*
12th July 1988

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Maxwell, *Chairman*,
Dr E M Clive,
Professor P N Love, CBE
Sheriff C G B Nicholson, QC.

The Secretary of the Commission is Mr K F Barclay. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

ISBN 0 10 255188 X

Scottish Law Commission

Items 1 and 2 of the First Programme

REQUIREMENTS OF WRITING

To: The Right Honourable the Lord Cameron of Lochbroom, QC,
Her Majesty's Advocate

We have the honour to submit our Report on Requirements of Writing.

(*Signed*) PETER MAXWELL, *Chairman*
E M CLIVE
PHILIP N LOVE
GORDON NICHOLSON

KENNETH F BARCLAY, *Secretary*
29 April 1988

Contents

Page	*Paragraph*	
		PART I INTRODUCTION
1	1.1	Background to report
1	1.2	Summary of report
2	1.5	Acknowledgements
		PART II SUBSTANTIVE REQUIREMENTS
3	2.1	Introduction
3	2.2	Obligations: present law
5	2.8	Criticisms of the present law
6	2.11	Abolition of certain common law rules
6	2.12	Repeal of section 6 of the Mercantile Law Amendment Act Scotland 1856
7	2.13	A new statutory provision
7	2.13	General considerations
7	2.14	Contracts relating to land
10	2.21	Gratuitous obligations
12	2.27	Cautionary obligations
12	2.28	Contracts of service
12	2.29	Submissions to arbitration
13	2.30	Contracts of insurance
13	2.31	Writing required by parties
14	2.32	Bonds
14	2.33	Trusts
16	2.38	Role of actings
16	2.39	Obligations relating to land
18	2.44	Gratuitous obligations
19	2.45	Declarations of trust
19	2.46	Recommendation
19	2.47	Variation or cancellation
19	2.48	Type of writing required
20	2.49	Other common law writing requirements
20	2.49	Wills and other testamentary dispositions
20	2.50	Transfer, etc. of interest in land
21	2.51	Transfer of incorporeal moveable property
		PART III EVIDENTIAL REQUIREMENTS
22	3.1	Present law
22	3.1	General
22	3.2	Loans
22	3.3	Obligations of relief
22	3.4	Declarators of trust
22	3.5	Innominate and unusual contracts
22	3.6	Gratuitous obligations
22	3.7	Performance or discharge
23	3.8	Payment of money under an antecedent obligation
23	3.9	Gratuitous renunciation of rights
23	3.10	Variation of written obligation
24	3.13	*Rei interventus* and homologation
25	3.14	Criticisms of the present law
25	3.15	Results of consultation
26	3.17	Assessment and recommendation

Page	*Paragraph*	
		PART IV FORMAL VALIDITY OF WRITINGS
28	4.1	Introduction
28	4.2	Present law
31	4.12	Recommendation on the authentication statutes
32	4.13	Functions of formal requirements
32	4.14	Assessment of various formal requirements
35	4.20	Options for reform
36	4.23	Consideration of different cases
36	4.23	Certain contracts and obligations relating to land
37	4.27	Certain gratuitous obligations
37	4.28	Certain trusts
38	4.29	Dispositions and other conveyancing deeds
39	4.32	Wills and other testamentary writings
40	4.36	Bonds and other deeds
41	4.38	Invalid writing as evidence
41	4.39	Privileged writings
41	4.39	Writs *in re mercatoria*
42	4.40	Holograph writings
42	4.41	Effect of other enactments
42	4.42	Effect of stipulations by parties
42	4.43	Recommendations
43	4.44	Alterations
		PART V PROBATIVITY OF WRITINGS
45	5.1	Introduction
45	5.2	Probativity by attestation
45	5.2	General
46	5.4	Acquisition of probativity
46	5.5	Subscription by granter
48	5.8	Date and place of subscription by granter
48	5.9	How many witnesses?
48	5.10	Name and address of witness
49	5.12	Qualifications of witness
49	5.14	Process of attestation
50	5.17	Recommendations
50	5.18	One witness to several subscriptions
51	5.19	Form of testing clause
52	5.22	Alterations
53	5.25	Effect of probativity
55	5.28	Sanctions
55	5.30	Probativity by court docquet
55	5.30	Introduction
56	5.31	Setting up date and place
57	5.32	Evidence and procedure
57	5.34	Effect of probativity by court docquet
58	5.35	Setting up alterations
59	5.36	Effect of probativity on prescription
61	5.45	Presumptions where more than one granter
61	5.46	Requirements for registration
64	5.56	Requirements for confirmation of executors
		PART VI EXECUTION OF WRITINGS
66	6.1	Introduction
66	6.2	Subscription on extra pages
67	6.5	Meaning of subscription
73	6.22	Subscription of inventories, schedules, etc.
75	6.24	Person subscribing in several capacities

Page	*Paragraph*	
75	6.25	Notarial execution
79	6.38	Execution of writings by partnerships
81	6.41	Execution of writings by companies
87	6.57	Execution of writings by building societies
88	6.59	Execution of writings by other bodies corporate (apart from local authorities)
90	6.63	Execution of writings by local authorities
93	6.71	Execution of writings by government ministers
96	6.79	Crown writs
97		**PART VII CONSEQUENTIAL AMENDMENTS AND REPEALS**
102		**PART VIII SUMMARY OF RECOMMENDATIONS**
111		**APPENDIX A**
111		Draft Requirements of Writing (Scotland) Bill
192		**APPENDIX B**
192		Model forms of testing clause
197		**APPENDIX C**
197		List of those submitting comments

Part I Introduction

Background to Report

1.1 It has been the view of the Scottish Law Commission for many years that there is a need for substantial reform and modernisation of the old laws requiring writing, and often writing of a particular type, for certain legal purposes. Many of the rules of the present law date from the 16th century and are not suited to the needs of today. The Commission consulted on major aspects of this question in 1977.[1] Taking the results of this consultation into account we published a second consultative memorandum in 1985 ("the memorandum") in which we sought views on detailed proposals for reform.[2] The response has confirmed us in our view that substantial reform is necessary but has caused us to modify some of our provisional proposals.

Summary of Report

1.2 This Report deals with several questions.[3] The first is "When should writing be required for the validity of such matters as contracts, conveyances and wills?" This involves, among other things, an examination of the so-called *obligationes literis* of the common law. Our recommendation will be that the common law on *obligationes literis* should be replaced by statutory rules requiring writing for the constitution of a contract, voluntary obligation or trust in only a few cases. We also recommend statutory writing requirements for conveyances relating to land, and wills. The second question is "When should writing be required for proof?" This involves an examination of various rules on proof by writ or oath, some of which have been criticised by judges since the last century. Our recommendations will be that there should be no legal requirements of proof by writ or oath and that the procedure for referring a matter to the oath of a party should be abolished. The third question is "Where writing is legally required what should be the requirements for formal validity?" Our recommendation will be that, in general, the sole requirement should be subscription by the granter. The fourth question is "When should a writing prove itself?" This involves a consideration of the rules on probativity, in the correct sense of that word. We make recommendations as to what must appear on the face of a writing if it is to be self-proving. The fifth, and last, question follows on from our conclusions on formal validity and probativity. It is "What should count as subscription in the case of individuals, partnerships, companies, local authorities, other bodies corporate and government ministers?" This involves, among other things, a consideration of the rules on notarial execution and the execution of writings by companies registered under the Companies Acts.

1.3 We do not cover in this Report the law on the communication of offer and acceptance in order to constitute a contract. We intend, however, to consult separately

1. Consultative Memorandum No 39, *Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof* (1977).
2. Consultative Memorandum No 66, *Constitution and Proof of Voluntary Obligations and the Authentication of Writings* (1985)
3. Some of these questions come under our programme subject of *Obligations* (Item 2 of our First Programme of Law Reform) and some under our programme subject of *Evidence* (Item 1 of our First Programme of Law Reform). The disentangling of the present law on probativity requires separate treatment of the rules on the formal validity of writings and the rules on when writings are self-proving.

on the questions whether the so-called "postal rule" (that posting of an acceptance may complete the contract) should be replaced by a rule requiring an acceptance to be communicated to the offeror before the contract is complete. In that connection we shall also discuss the implications of modern methods of communication for the law on the constitution of contracts.

1.4 We also do not cover in this Report the law on the communication of unilateral promises or the law on the delivery of writings, or the equivalents to delivery. When we recommend later that writing should be required for certain purposes, we are not to be taken as meaning that writing by itself, regardless of communication or delivery or some recognised equivalent, is to be sufficient for those purposes.

Acknowledgements

1.5 We gratefully acknowledge the help of many people in the preparation of this Report. Much of the groundwork was done by our predecessor, and former members of staff of the Commission, in the preparation of Consultative Memorandum No 39 on the *Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof* (1977). The comments submitted by consultees in response to that memorandum were of great value in suggesting the direction which further work should take. In the preparation of the memorandum which preceded this Report[1] we were greatly assisted by Mr Kenneth G C Reid of the Department of Scots Law at Edinburgh University. Mr Reid has also provided valuable advice and assistance as a consultant in the later stages of this exercise. We are grateful to him and also to all those who submitted comments on the memorandum.[2] As will be obvious from the terms of this Report the comments of consultees have been of great value to us and have caused us to modify our provisional views on a number of points. We have no doubt whatsoever that the recommendations in this Report have been strengthened as a result of the consultation process. As work on the Report and draft Bill proceeded we consulted a number of people for advice. This was always gladly given and we are grateful to all who assisted us in this way. Our special thanks are due to Mr A A Snowdon of the Department of the Registers of Scotland, to Mr Duncan White, Commissary Clerk at Edinburgh, to Mr John Doig, Regional Sheriff Clerk at Inverness, and to members of the Law Reform and Conveyancing committees of the Law Society of Scotland, all of whom gave us the benefits of their experience and expertise in the later stages of this project.

1. Consultative Memorandum No 66, *Constitution and Proof of Voluntary Obligations and the Authentication of Writings* (1985).
2. A list of those who submitted comments is contained in Appendix C. Valuable comments were also made at a seminar on the memorandum held at the Faculty of Law, Edinburgh University on 6 November, 1985.

Part II Substantive requirements

Introduction

2.1 We are concerned in this part with those cases where writing is required for validity rather than proof. We deal first with contracts and other voluntary obligations. Under the present law most contracts and obligations can be entered into without any formality. The parties may choose to set out an agreement in writing-particularly if it is complicated or important-but that is generally a matter of prudence rather than necessity. There are, however, some cases where writing is required for the constitution of a contract or obligation. Some of these cases arise under statutory provisions which require writing as a matter of consumer protection or for some similar policy reason. In some such cases the form and contents of the writing may be regulated in considerable detail and the sanction may not necessarily be invalidity. Under the Consumer Credit Act 1974, for example, most consumer credit agreements must be embodied in documents of prescribed form and contents and must be executed in a prescribed manner: a document which does not comply with these rules is enforceable against the debtor or hirer only on an order of the court.[1] There are many other statutory provisions which require writing for particular purposes. With the exception of section 6 of the Mercantile Law Amendment Act Scotland 1856 (which we consider below) and a few other cases where we suggest minor or consequential amendments we are not here concerned with statutory provisions of this type. We are primarily concerned with the cases where writing is required by the common law for the constitution of an obligation-the so-called *obligationes literis* of the common law. We also deal, at the end of this part, with other common law requirements of writing-for example, for dispositions of land or wills.[2]

Obligations: present law

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

(a) Obligations relating to heritage, including leases for more than one year.[3]

(b) Contracts of service for more than one year and contracts of apprenticeship.[4]

(c) Submissions to arbitration relating to heritage and, possibly, submissions relating to moveables over a hundred pounds Scots in value.[5]

In addition, there is some doubt as to whether contracts of insurance require writing for their constitution by the common law.[6] There is also doubt about the position of cautionary obligations at common law.[7] The general rule in relation to the common law *obligationes literis* is that the writing must be attested, holograph or adopted as holograph.[8] The right to resile from a contract which has not been completed by the

1. Consumer Credit Act 1974 ss 60-65; Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553).
2. See paras 2.49-2.52 below.
3. Walker & Walker, *Evidence* 87-89.
4. *Ibid* 89.
5. *Ibid* 97-98. But see *Millar & Son* v *Oliver & Boyd* (1906) 8F 390 at 401.
6. *Ibid* 110-111. Contrast *McElroy* v *London Assurance Corp* (1897) 24R 287 (esp per Lord McLaren at 290) with *Christie* v *North British Insurance Co* (1825) 3S 519 at 522 and *Parker & Co (Sandbank) Ltd* v *Western Assurance Co* 1925 SLT 131. Contracts of marine insurance are inadmissible in evidence unless embodied in a written marine policy: Marine Insurance Act 1906 ss 22-24.
7. Walker & Walker, *Evidence* 109; *BOCM Silcock Ltd* v *Hunter* 1976 SLT 217. The main difficulties regarding cautionary obligations turn, however, on s 6 of the Mercantile Law Amendment Act Scotland 1856. See para 2.12 below.
8. Walker & Walker, *Evidence* 85. Writs *in re mercatoria* are discussed at para 2.6 below.

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).[1] 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*[2] it was held that it could also be proved by parole evidence of actings establishing that agreement had been reached.[3]

2.3 Where an *obligatio literis* is varied by agreement the same formalities are required for the variation as for the original constitution of the obligation.[4]

2.4 The parties to a transaction may stipulate that they will not be bound until their obligations are set out in writing. Sometimes obligations of this kind are regarded as *obligationes literis* which, unless there is *rei interventus* or homologation, require to be constituted in writing which is attested, holograph or adopted as holograph.[5] It is arguable, however, that as a matter of basic principle, the parties can stipulate for any form of writing they wish and for any number of witnesses.

2.5 There is confusion in the present law as to whether a unilateral obligation such as a bond to repay money lent is an *obligatio literis*.[6] It is clear that the actual *obligation* to repay money lent is not one which requires to be constituted in writing: it arises from the loan transaction.[7] To say that the bond itself is an *obligatio literis* is confusing and productive of doubt and inconvenience. Is the law saying that a writing requires to be constituted in writing? Is it saying that if the creditor loses the bond, or if it is improperly executed, he cannot fall back on the underlying obligation? If he can fall back on the underlying obligation, can he use an improperly executed bond as evidence of it?[8]

2.6 The law on *obligationes literis* is further complicated by the privileges afforded to writs *in re mercatoria*. The idea here 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, for example, 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[9] nor to contracts of service for more than a year.[10] 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),[11] (*c*) contracts of insurance (if they are *obligationes literis*, which is doubtful)[12] and (*d*) obligations which do not require to be in writing but which the parties agree must be in writing before they are bound (so far as the normal authentication rules apply

1. Consultative Memorandum No 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 SC 171; *Law* v *Thomson* 1978 SC 343.
2. 1966 SC 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 3.17 to 3.19). This would fortify and extend the decision in *Errol* v *Walker* and remove any doubts about the law on this point.
3. In *Law* v *Thompson* 1978 SC 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.
4. *Carron Co* v *Henderson's Trs* (1896) 23R 1042; *Perdikou* v *Pattison* 1958 SLT 153.
5. Walker & Walker, *Evidence* 91.
6. *Ibid* 94-95.
7. Loan requires to be proved by writ or oath, but that is a different matter. See *Paterson* v *Paterson* (1897) 25R 144.
8. There is doubt on this point. See *Paterson* v *Paterson supra* at 174, 181, 187.
9. Walker & Walker, *Evidence* 100. Cf *Danish Dairy Co* v *Gillespie* 1922 SC 656 (where it was not argued that a lease was *in re mercatoria*).
10. *Stewart* v *McCall* (1869) 7M 544.
11. See *Johnston* v *Grant* (1844) 6D 875; *National Bank of Scotland Ltd* v *Campbell* (1892) 19R 885; *BOCM Silcock* v *Hunter* 1976 SLT 217.
12. See para 2.2 above.

to such cases, which may depend on what the parties stipulate).[1] It seems clear that "whatever may have been the original importance of writings *in re mercatoria* their practical importance is now very limited".[2] This is just as well because the accepted definition of matters *in re mercatoria* is somewhat vague: it includes "all the variety of engagements, or mandates, or acknowledgements, which the infinite occasions of trade may require".[3]

2.7 We have noted already that it is doubtful whether cautionary obligations are *obligationes literis* at common law.[4] There is also doubt about their position under section 6 of the Mercantile Law Amendment Act Scotland 1856. This provides as follows

> "All guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect."

Although this 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 that writing is required only for proof.[5] 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.[6]

Criticisms of the present law

2.8 The first criticism of the present law on the so-called *obligationes literis* is that it is unacceptably vague and uncertain. The leading Scottish textbook on the law of evidence states that

> "The law which requires writing for the constitution and proof of certain obligations is so uncertain and unsatisfactory that it is almost impossible to state a principle which is of general application."[7]

We agree with this assessment. Not only is there doubt as to whether some contracts, such as insurance contracts, cautionary obligations and submissions to arbitration involving moveables are *obligationes literis*, but there is also doubt about the scope of the rules on contracts relating to heritage and contracts of service for more than a year. In several cases contracts relating only incidentally to heritage have been held not to be *obligationes literis*.[8] No clear principle emerges, however, as to when the heritable element is to be regarded as incidental.[9] In relation to contracts of service, it has been held that an engagement for a period of years at an annual salary and a commission on goods sold was not an *obligatio literis*.[10] No reasons were given for the decision but it seems clear that the court was reluctant to apply the rule requiring writing any more widely than was absolutely necessary. There have been conflicting

1. Walker & Walker, *Evidence* 91 and see para 2.4 above.
2. Walker & Walker, *Evidence* 100.
3. Bell, *Commentaries* I, 342.
4. Para 2.2 above.
5. *Walker's Trs* v *McKinlay* (1880) 7R (HL) 85 at 88 and 89; *Wallace* v *Gibson* (1895) 22R (HL) 56 at 59.
6. *National Bank of Scotland Ltd* v *Campbell* (1892) 19R 885 at 892 per Lord McLaren; *Snaddon* v *London, etc Assurance Co* (1902) 5F 182. In *BOCM Silcock* v *Hunter* 1976 SLT 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 2.6 above.
7. Walker & Walker, *Evidence* 84.
8. See *ibid* 88-89.
9. In *Allan* v *Millar* 1932 SC 620 the contract was held not to be an *obligatio literis* where the heritable element was roughly one fourth of the total value of subjects which the court said formed a *universitas*, the legal nature of which was predominantly moveable.
10. *Pickin* v *Hawkes* (1878) 5R 676.

decisions as to whether a compromise of an action is an *obligatio literis* in so far as it relates to heritage or to a contract of service for more than a year.[1] The uncertainty and confusion over bonds and cases where the parties stipulate for writing have already been mentioned.

2.9 A second criticism of the present law on the *obligationes literis* is that the list of such obligations includes some obligations which should not require writing for their constitution and, arguably, does not include others which should. This question is best discussed later, however, when we consider what should be the contents of a statutory list of obligations requiring writing for their constitution.[2]

2.10 A third criticism relates to the type of writing required to constitute an *obligatio literis*. While a simple requirement of writing or, say, subscribed writing may be a useful safeguard, a requirement of writing executed in some special way may be a trap. People may reasonably think they have a concluded bargain only to find that the other party is wriggling out of it on a technicality.[3] Again, however, this question is best discussed when we consider what type of writing should be required for the obligations in our proposed new statutory list.

Abolition of certain common law rules

2.11 The only way, in our view, of dealing satisfactorily with the uncertainty of the present law on *obligationes literis* is to sweep away the common law rules on this subject and to replace them with a short statutory list of those obligations which require writing for their constitution. This is what we provisionally proposed in the memorandum.[4] Only one body expressed outright opposition, on the general ground that they did not favour codification. The general reaction of consultees was strong support for the proposal. The codification point is, in our view, not material. Whatever may be the arguments for and against codification of, say, the entire law of contract, it seems to us that it can only be advantageous to replace the vague rules of the common law on the *obligationes literis* with statutory provisions setting out as clearly as possible when writing is required for the constitution of an obligation, and what type of writing is required. We therefore **recommend** that:

1. **Any rule of the common law which requires writing for the constitution or variation of any agreement or obligation should cease to have effect.**
(Paragraph 2.11; clause 22)

Repeal of section 6 of the Mercantile Law Amendment Act Scotland 1856

2.12 In the memorandum we proposed the repeal of this section (set out and criticised in paragraph 2.7 above) insofar as it deals with "guarantees, securities or cautionary obligations". There was considerable support for this on consultation. One consultee urged us to go further and repeal "the entirety of this unhappy section" including the provision requiring representations and assurances as to the character, conduct, credit, ability, trade or dealings of any person to be in writing if they are to have any effect. Although we had previously taken the view that this part of the provision was beyond the scope of the present exercise, it is so obviously in need of repeal that we think it would be unjustifiable to leave it standing when the rest of section 6 is repealed. The mischief caused by the section is illustrated by the most recent case in which it has been considered.[5]

1. See *Anderson* v *Dick* (1901) 4 F68; *Torbat* v *Torbat's Trs* 1906 14 SLT 830; *Cook* v *Grubb* 1963 SLT 78.
2. See paras 2.13 to 2.47 below.
3. Cf *Allan* v *Millar* 1932 SC 620 where a letter thought to be holograph of the other party to the transaction turned out to have been written out by his wife.
4. Para 4.13.
5. *Andrew Oliver & Son Ltd* v *Douglas* 1982 SLT 222.

The pursuers had given an extension of credit to a company on the basis of representations as to its profitability in the previous year. They incurred a loss as a result and sued directors of the company and chartered accountants for not taking reasonable care to see that the representations were accurate. There was no suggestion of fraud: the pursuer's case was based on negligence only. One of the defenders founded on section 6 of the 1856 Act. The court held, however, largely on the basis of English authority on the corresponding English statute, that section 6 applied only to fraudulent representations. Accordingly it did not apply in a case based only on negligence.

The paradoxical result of section 6 as interpreted by the courts is that it protects those making fraudulent representations as to credit but not those making negligent representations. This seems to us to be absurd. We can see no good reason for affording a special protection to those who make, or who are alleged to have made, fraudulent representations as to credit. We agree that this part of section 6 should also be repealed.[1] Accordingly we **recommend** that:

2. **Section 6 of the Mercantile Law Amendment Act Scotland 1856 should be repealed.**

(Paragraph 2.12; clause 25 and Schedule 8)

A new statutory provision

General considerations

2.13 In our view exceptions to the general rule that obligations may be constituted by agreement without any special formality should be kept to the minimum. This is not to deny the value of writing. In many cases it will be prudent for parties to reduce their contracts to writing. Nothing in our recommendations will make it more difficult, or less prudent, for them to do so. What we question, as a matter of general policy, is not the value of writing in the field of obligations but the value of compulsory requirements of writing. The disadvantages of *requiring* writing are, first, that it adds to expense, delay and inconvenience and second, that it enables the unscrupulous to escape from their obligations by pleading that there is no writing. We proceed to consider the various categories of obligation which might be included in a statutory replacement of the common law list of *obligationes literis*.

Contracts relating to land

2.14 There are arguments for not requiring writing for the constitution of a contract relating to land. The original reason for requiring writing was the importance of such contracts,[2] but it cannot now be argued that contracts relating to land are necessarily more important than other contracts. The importance of the transaction could not by itself justify requiring writing for an agreement to sell a patch of land for a few hundred pounds while not requiring 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."[3]

A counter-argument is that transactions relating to land and houses are *generally* still important. For most people the purchase of their house is the largest, and most important, transaction they make in their lifetimes. There is still a strong case for a rule which gives parties to such a transaction time for consideration or reconsideration and which discourages them from concluding informal doorstep contracts without the benefit of legal advice.

1. Since reaching this conclusion we have been interested to note that the Ontario Law Reform Commission has recommended the repeal of the corresponding provision in the Statute of Frauds. Report on *Amendment of the Law of Contract* (1987) 116.
2. *Park* v *Mackenzie* (1764) 5 Br Supp 639.
3. *McGinn* v *Shearer* 1947 SC 334 at 344-345

2.15 In the memorandum we provisionally concluded that there should continue to be a requirement of writing for 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. We invited views as to whether writing should be required for any other contracts relating to heritage.[1] Most consultees thought that there should continue to be a requirement of writing for an agreement to buy or sell heritable property or to lease, or take on lease, such property for more than a year. Only two would have preferred no requirement of writing in such cases. There was considerable support for requiring writing in the case of other contracts relating to heritage. One argument in support of a wider requirement was that there is no significant difference in this respect between contracts of sale and contracts of exchange (excambion) of heritage. Another was that, as writing is necessary to obtain a real right in land, the prior agreement should also be in writing to avoid unnecessary dispute as to its precise terms.

2.16 We are not entirely persuaded by the arguments put to us that there is an overwhelming case for requiring writing for a wide range of contracts relating to heritage.[2] The consumer protection argument is not very strong in areas other than the purchase and sale of dwelling-houses. For most other contracts relating to heritage there is much less risk of "doorstep" transactions without legal advice. The argument about the *desirability* of writing at the agreement stage as a basis for the subsequent conveyance is irrefutable but does not necessarily lead to the conclusion that writing should be compulsory. There are many cases where a person would rather have a non-written agreement than none at all. We are also concerned that a requirement of writing for *all* contracts relating to heritage would be unacceptably wide. It could cover, for example, contracts for gardening services and house maintenance which relate to heritage but only incidentally. Nonetheless we have been impressed by the weight of support from a wide range of consultees for a fairly general requirement of writing in this area and we have considered how this could be achieved in a way which would meet the concerns of consultees while avoiding the vagueness of the common law.[3]

2.17 As a starting point we consider that the terms "heritable property" or "heritage" should not be used in formulating a new rule. These terms are inherently meaningless nowadays when all property can be inherited in the same way. The policy is that certain agreements relating to land should require writing for their constitution and we think that any new rule should be expressed in terms of land rather than heritage. "Land" should include the buildings on land (other than moveable structures)[4] the air space above it and the minerals under it but not growing crops.[5]

2.18 The general rule should, we suggest, be that writing should be required for the constitution of any contract or voluntary obligation for the grant, transfer, variation or extinction of an interest in land. We say "for" rather than "relating to" the grant,

---

1. Paras 4.3 and 4.13; provisional proposal no 3.
2. It is of interest to note that the Ontario Law Reform Commission has recently recommended that

   "The existing writing requirements for contracts relating to land should be repealed subject to a requirement that a contract concerning land is not enforceable on the evidence of the party alleging the contract unless such evidence is corroborated by some other material evidence."

   The Commission noted, however, that most other law reform bodies which had reviewed the writing requirements in the Statute of Frauds had favoured retaining writing requirements relating to land contracts: Report on *Amendment of the Law of Contract* (1987) 102, 116. We ourselves would not favour an evidential solution to this problem, for reasons similar to those given in para 2.21 below.
3. The Law Commission for England and Wales have recently recommended a requirement of signed writing for contracts for the sale or other disposition of an interest in land. See their Report on *Transfer of Land: Formalities for Contract for Sale Etc of Land* (Law Com No 164, 1987). They found that there was "absolutely no support" for the option of having no writing requirement at all for this type of contract.
4. Under the Interpretation Act 1978 s 5 and Sch 1 "land" includes "buildings and other structures".
5. Industrial growing crops are within the definition of goods in the Sale of Goods Act 1979 s 61(1), having been inserted as a Scottish equivalent of emblements. The word "industrial" seems, however, to be confusing and unnecessary in this context and we prefer to omit it. S 61(1) also refers to "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale" but it would be inappropriate to except such things from the definition of land for present purposes. For one thing there may not be a contract of sale. For another, the exception would be too wide: it could cover the sale of slate for excavation or a castle for dismantling and re-erection elsewhere. There would be no great hardship in requiring subscribed writing for such purposes.

transfer, variation or extinction of an interest in land in order to keep the requirement of writing reasonably narrow and precise. We intend that an interest in land should include not only ownership but also a tenancy for more than a year[1] a right to use or occupy land for more than a year, a servitude, and any restriction on the use or occupation of land which will be operative for more than a year. It should exclude a tenancy for a year or less; any right to use or occupy land for a year or less; and any restriction on the use or occupation of land which will be operative for a year or less. A tenancy, or a right to use or occupy land, or a restriction on the use or occupation of land, for recurring periods which are such that the time from the beginning of the first period to the end of the last period will be more than a year should be treated as being for more than a year. The effect of a rule on these lines would be to require writing for agreements to buy, sell or exchange land, to grant a liferent of land, to lease land for more than a year, to grant a licence to use land for more than a year, and to grant servitudes and similar rights or obligations. This would be in line with the views of consultees, some of whom pointed out that licences were often, in practical terms, indistinguishable from leases, and most of whom wished to include agreements for the exchange of land and agreements to grant servitudes. A rule on the above lines would also include agreements for the use of land for a few weeks each year for a number of years. This could cover, for example, certain agreements relating to time-sharing or fishing or sporting rights. The rule would, on the other hand, clearly exclude gardening, maintenance and building contracts which may relate to land but certainly are not for the grant, transfer, variation or extinction of an interest in land. The rule would not affect the law on prescription and would therefore not prevent rights (e.g. servitude rights) being acquired or lost in that way.

2.19 It will be noted that we have proposed retaining an exception for leases for one year or less. Most consultees were content with this but a few thought that there should be a requirement of writing in relation to all leases, however short. We have given this view careful consideration but have concluded that the case for changing the present law has not been made out. Many short lets (for example, of holiday cottages) are arranged quite informally. The parties do not expect to have to engage a lawyer. They would often be surprised and annoyed if told that their arrangement was of no legal value because not in writing. The same considerations apply to licences for short periods. Again these are often arranged informally (for example, a licence to have a stall at a craft sale) and a requirement of writing would be more of a burden and a trap than a needed protection.

2.20 We therefore **recommend** that:

3(a) Writing should be required for the constitution of a contract or voluntary obligation for the creation, transfer, variation, or extinction of an interest in land.

(b) "Land" for this purpose should include the buildings on land (other than moveable structures), the air space above it and the minerals under it but should not include growing crops.

(c) An "interest" for this purpose should include not only ownership but also a tenancy for more than a year, a right to use or occupy land for more than a year, a servitude, and any restriction on the use or occupation of land which will be operative for more than a year. An "interest" should, however, not include a tenancy for a year or less, or a right to use or occupy land for a year or less, or a restriction on the use or occupation of land which will be operative for a year or less.

(d) For the purposes of paragraph (c) recurring periods which are such that the time from the beginning of the first period to the end of the last period will

1. By this we mean a tenancy which is granted for more than a year. It would continue to be possible for an oral lease to be granted for a year (or even less) and to be renewed from year to year by tacit relocation. Cf Agricultural Holdings (Scotland) Act 1949 ss 2 and 3.

be for more than a year should be treated as being for more than one year, whatever their cumulative length.

(e) Nothing in this recommendation is intended to affect the law on positive or negative prescription.

(Paragraphs 2.17 to 2.19; clauses 1 and 3)

Gratuitous obligations

2.21 Under the present law a gratuitous obligation can be proved only by writ or oath but writing is not required for its constitution. There is, we think, a good case for requiring writing in relation to at least some gratuitous obligations. Such a requirement is common in other legal systems.[1] As one group of commentators on our earlier memorandum[2] pointed out, there might otherwise be a danger of rash or frivolous promises being made the subject of litigation. Gratuitous undertakings are often made in the context of friendship, or family relationship, and it can be particularly difficult in such circumstances to determine whether there was an intention to undertake a legal, as opposed to a moral, obligation. In one special context, promises to make a will, it would be odd to require writing for the will but to allow a legally binding promise to make a will to be constituted and proved without writing.[3] If writing is required, we think that there would be advantages in requiring it for constitution rather than proof. There is something unsatisfactory in the notion of a legal 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 but before any actings have taken place in reliance on the promise,[4] 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, without his co-operation, be proved in a court of law. The rationale of a requirement of writing is that people should be able honestly to say that they are not legally bound, not that they should be able to tell lies under the protection of a technical rule of evidence. In the context of onerous mutual contracts the danger of using a requirement of writing as a protection is that the person it is designed to protect may actually want to go ahead with the contract and may be deprived of the benefit of his bargain if the other party founds on the lack of writing. There is no such danger in the case of a gratuitous obligation and a requirement of writing is therefore more easily justified in that case.

2.22 In the memorandum we provisionally proposed that writing should be required for the constitution of a gratuitous obligation.[5] Of those consultees who expressly commented on this proposal a majority supported it. One body took the view that a requirement of writing was unnecessary because beneficiaries of gratuitous obligations would only rarely take their benefactors to court. We think, however, that it would be rash to assume that such cases would not occur from time to time and, in any event, quite apart from court proceedings, there has to be a clear basis in law for advising people as to whether or not they are bound by their promises. Another consultee pointed out that gratuitous obligations were many and varied: he did not consider that a case had been made out for formalising the whole field. However, an element of formality already exists in the requirement of proof by writ or oath: what would be changed would be the role of writing not the advisability of having it: and, of course, nothing would prevent the whole range of gratuitous obligations from being made and acted on without any formality, as thousands already are, so long as no question of enforcement arose. One commentator suggested that a distinction should be drawn between solicited and unsolicited obligations, there being more justification for a requirement of writing in the former case. It seems to us, however, that an unsolicited generous impulse is as worthy of protection as a solicited undertaking.

1. See Zweigert and Kötz, *An Introduction to Comparative Law* Vol II 72-73 (2nd edn transl by Tony Weir, 1987).
2. Consultative Memorandum No 39, *Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof* (1977).
3. See *Smith* v *Oliver* 1911 SC 103 at 111.
4. For the effect of actings see paras 2.38 to 2.47 below.
5. Paras 4.8 and 4.13; provisional proposal no 3.

2.23 In a valuable article in the Scots Law Times, Dr MacQueen pointed out that gratuitous obligations frequently arise in various commercial contexts.[1] He gave the following examples:[2]

1. an agreement whereby a person undertakes to pay an agent a commission if he brings about a certain result (e.g. the sale of the principal's property)
2. an undertaking to pay a reward, made for promotional or advertising reasons
3. a grant of an option for the purchase of property
4. a promise to hold an offer open for a stated period
5. a letter of credit by a banker, undertaking to pay the seller (in an international sale of goods) on presentation of certain documents
6. an undertaking to accept the highest offer
7. an undertaking to accept the lowest tender
8. an undertaking to pay for work done in reliance on a "letter of intent" to award a construction contract
9. a "requirement contract" where A agrees to supply B with goods as and when he requires them.

Dr MacQueen pointed out that in Scots law such cases could be readily and usefully accommodated by the law on binding unilateral promises. He argued that it would be undesirable to make the law more restrictive and suggested that one way of dealing with the matter would be to have an exception for commercial transactions "and to permit unilateral obligations of this type to be constituted and proved in any way".[3]

2.24 We are persuaded by Dr MacQueen's argument. There are many "free offers", undertakings to give discounts and other gratuitous obligations in the commercial world which are made for commercial reasons and which are very far from being rash or impulsive gestures. There is no need for the protection of writing in such cases. Indeed a requirement of writing could defeat the natural and reasonable expectations of the parties. We therefore **recommend** that:

4. **Writing should be required for the constitution of a gratuitous obligation, other than one undertaken by a person in the course of a business.**
(Paragraphs 2.22 to 2.24; clause 1)

2.25 The binding unilateral promise is useful in Scots law in relation to promises to keep offers open for a certain time,[4] and it is necessary to consider the effect our recommendation would have in this area. First our recommendation would have a liberalising effect in the case of promises made in the course of a business.[5] At present proof of the promise must be by writ or oath: under our recommendation the promise could be made and proved in any way.[6] Secondly, our recommendation would probably have little effect in non-commercial cases. At present writing is (in effect)

1. 1986 SLT 1.
2. The list is not exhaustive. Another example would be a gratuitous obligation by a purchaser to pay a higher price than the one agreed. Cf the Canadian case of *Gilbert Steel Ltd* v *University Construction Ltd* (1976) 67 DLR (3d) 606.
3. 1986 SLT at 5.
4. See our Consultative Memorandum No 35 *Constitution and Proof of Voluntary Obligations: Unilateral Promises* (1977)
5. We have been interested to note that the Ontario Law Reform Commission has recently recommended that firm offers made in the course of a business should not be revocable for lack of consideration. In non-business cases a witnessed signed writing would be required. See their Report on *Amendment of the Law of Contract* (1987) 20-25.
6. Unless it was regarded, when taken along with the offer, as a promise to grant, transfer, vary or extinguish an interest in land. See Consultative Memorandum No 35, paras 15 to 20. We do not think it necessary or desirable to lay down a general rule as to when a promise should be construed as a self-standing promise accompanying a separate offer and when the two should be construed together as eg a promise to convey if the offer is accepted within the stated time. See Consultative Memorandum No 35 paras 18 and 19. The former is clearly the more natural and reasonable construction (see *Malcolm* v *Campbell* (1891) 19R 278 on the courts' reluctance to construe something as a unilateral promise to convey) but everthing would depend on the facts of the particular case. The importance of the issue would in any event be diminished if the requirement of writing was only for subscribed writing and not for attested or holograph (or adopted as holograph) writing. (See Part IV below.)

required for proof of the promise: in future writing would be required for constitution. The law would be more rational but we do not think there would be much difference in practical effect.

2.26 We do not think that our recommendation on gratuitous obligations would cause any difficulty in relation to the law on third parties' rights under a contract (*jus quaesitum tertio*).[1] In all of the reported cases on *jus quaesitum tertio* the contracts have in fact been in writing. In any event an obligation in favour of a third party which is undertaken, as part of the bargain, in an onerous transaction would probably not be regarded as a gratuitous obligation:

> "...a promise or undertaking is not in the eye of the law gratuitous-that is to say is not a mere *nudum pactum* - if it be part of a transaction which includes *hinc inde* onerous elements...."[2]

Cautionary obligations

2.27 By a cautionary obligation we mean an obligation granted by a person by way of security for the fulfilment or performance by another person of the latter's obligations. Cautionary obligations include guarantees by one person that another person will make the payments required under a contract. They also include those cases where one person becomes cautioner for someone else's due performance of an office (such as that of executor): in this type of case the usual arrangement is for a bond of caution to be obtained, for a premium, from an insurance company. The justification for requiring writing for the constitution of cautionary obligations is that they may be gratuitous and entered into out of friendship.[3] In such cases there should be an opportunity for reconsideration and a brake on hasty undertakings. We suggested in the memorandum that there should continue to be a requirement of writing for the constitution of a cautionary obligation.[4] This was generally supported on consultation, although one body disagreed on the ground that a requirement of writing would not be of assistance to commerce. We have, however, already recommended that gratuitous obligations (except those entered into in the course of a business) should require writing for their constitution. This makes it unnecessary to have a separate rule for gratuitous cautionary obligations. There is no reason for requiring writing in the case of a cautionary obligation undertaken in the course of a business, particularly as we do not recommend a requirement of writing for insurance contracts.[5] Nor can we see any reason for requiring writing in the case of a non-gratuitous cautionary obligation undertaken otherwise than in the course of a business: such cases would be very unusual.

Contracts of service

2.28 In the memorandum we suggested that there was no good reason for preserving the common law requirement of writing in relation to contracts of service for more than a year. This may have been a useful protection for employees in the days when certain employments were akin to serfdom and when there was no employment protection legislation or collective bargaining. Nowadays it is more likely to work against the interests of employees.[6] There was almost unanimous support, on consultation, for our proposal that writing should not be required for the constitution of a contract of service for more than a year. We therefore make no recommendation for the inclusion of such contracts in the new statutory list. This would not, of course, affect any other statutory provisions, or any agreements between the parties, whereby writing might be required.

Submissions to arbitration

2.29 There is a good deal of doubt and uncertainty in the present law as to whether an agreement to submit a matter to arbitration requires to be constituted in writing.[7]

---

1. See our Consultative Memorandum No 38, *Constitution and Proof of Voluntary Obligations: Stipulations in favour of Third Parties* (1977).
2. *Hawick Heritable Investment Bank Ltd* v *Huggan* (1902) 5F 75, per Lord Kyllachy at 78.
3. See eg Bell, *Principles* (10th edn 1899) para 246 "A cautionary obligation is commonly an engagement of friendship and gratuitous."
4. Paras 4.6 and 4.13; provisional proposal no 3.
5. See para 2.30 below.
6. See eg *Pickin* v *Hawkes* (1878) 5R 676 and *Cook* v *Grubb* 1963 SLT 78, in both of which the employee wished to found on an informal agreement.
7. Walker & Walker, *Evidence* 95-98.

There are many conflicting decisions on this subject. As a matter of policy it seems to us that there is much to be said for Lord Dunedin's view that

> "the only foundation of submission must always be the consent of the parties, the submitters ... wherever you have got something that will really show a consent between the two parties to a submission, that is enough."[1]

It is hard to see any good reason for distinguishing between arbitrations relating to moveables and those relating to heritage. In relation to moveables a requirement of writing could often be inconvenient and could frustrate the intentions of the parties. In many commercial situations arbitration agreements form part of the standard conditions applying to particular transactions. In some cases they may be part of the custom of a particular trade. Frequently arbitrations in the commercial field are, and have to be, concluded quickly on the basis of an oral submission. In the memorandum we reached the provisional conclusion that submissions to arbitration should not feature in the new list of agreements requiring writing for their constitution. There was wide support for this proposal, but also dissent. One consultee referred to the Civil Jurisdiction and Judgments Act 1982 which provides that an agreement to prorogate the jurisdiction of a particular court

> "shall be either in writing or evidenced in writing or, in trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware."[2]

He suggested that no less should be required for a submission to arbitration, the effect of which would be to oust the jurisdiction of all courts. Other consultees argued that agreements to submit to arbitration should be subject to a requirement of writing because (*a*) the object of such agreements is to oust the jurisdiction of the courts and (*b*) there is a need for precision as to the actual dispute being referred to arbitration (particularly as the arbiter's award can be reduced if it goes beyond, or does not decide, the issue submitted to him). We fully accept that a written submission will often be desirable and, in complex matters, practically necessary. We expect that submissions would, as a matter of practice, generally be in writing, at least in important cases. We are not persuaded, however, that a simple agreement to refer a simple matter to arbitration should be devoid of legal effect if not in writing. In many small arbitrations the main object is probably not to oust the jurisdiction of the courts, but rather to end quickly a dispute which would otherwise drag on unresolved. In our view the use of writing in this field can as a general rule (subject to any specific statutory exceptions)[3] be left to the good sense of the parties. We do not therefore recommend the inclusion of submissions to arbitration in the new list of contracts requiring writing for their constitution.

Contracts of insurance

2.30 In the memorandum we suggested that insurance contracts should not be included in the list of contracts requiring writing for their constitution. This was generally supported on consultation and, in particular, received the wholehearted support of the Association of British Insurers. In practice arrangements for insurance cover are frequently made by telephone. There is no requirement of writing in English law and it would clearly be undesirable to introduce a requirement for Scots law alone. We therefore do not recommend the inclusion of insurance contracts in the new statutory list.

Writing required by parties

2.31 We recommend later in this Report the repeal of the old authentication statutes.[4] The abolition of the common law category of *obligationes literis* and the repeal of the authentication statutes will remove all basis for arguing that where the parties to an agreement stipulate that they will not be bound until their agreement is reduced to writing, the writing must be attested, holograph or adopted as holograph. The general principle will apply that the parties can stipulate for any type of writing they wish. We think it would be wrong to include in the new statutory list cases where the parties stipulate for writing. In such cases the requirement comes from the parties'

1. *Miller & Son* v *Oliver & Boyd* (1906) 8F 390 at 401.
2. Sched 8, para 5(2).
3. See eg the Agricultural Holdings (Scotland) Act 1949 ss 75, 76 and 99 and SI 1960/1337.
4. The Subscription of Deeds Acts 1540 and 1579; the Subscription of Deeds Act 1681 and the Deeds Act 1696.

stipulations and there is no need for a statutory requirement. The parties in such matters are their own legislators. A superimposed statutory requirement would merely confuse matters.

Bonds 2.32 We think it would be not only confusing but also wrong to require an obligation to repay money to be constituted in writing. Accordingly we do not recommend the inclusion of such obligations in the new statutory list.

Trusts 2.33 Under the present law writing is not required for the constitution of a trust but some trusts can be proved only by writ or oath. 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 alleadged to be the trustee and against whom or his heirs or assigneyes the Declarator shall be intented or unless the same be referred to the oath of party simpliciter ..."

This Act has given rise to great difficulties of interpretation.[1] It does not, in general, apply unless there is a document of title.[2] 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,[3] or that the pursuer's consent to his acting as he did was obtained by fraud or misrepresentation.[4] 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.[5] This view is not, however, universally held.[6] 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,[7] but again there is authority for the contrary view.[8] It has also been held that "the Act does not apply to questions with third parties, but only as between truster and trustee".[9] It does not apply where the same person is both truster and trustee.[10] The Act applies even though the trustee is alleged to be fraudulently denying the existence of the trust: indeed its main purpose was to discourage latent trusts by exposing trusters to precisely this risk.[11] In one case, however, it was held that the Act did not apply where a lease was taken in the trustee's name on the understanding that he would subsequently declare that he held the lease in trust for a company but where he later denied the trust.[12] The distinction between this case and the ordinary case where the trustee fraudulently denies the trust is hard to see.

2.34 The effects of the 1696 Act are undoubtedly arbitrary. This is most clearly seen in the requirement that there must be a "deed of trust". This has been held to cover

1. See Walker & Walker, *Evidence* 119-23; Wilson & Duncan, *Trusts, Trustees and Executors* 50-61.
2. *Cairns* v *Davidson* 1913 SC 1054; *Newton* v *Newton* 1923 SC 15; *Kennedy* v *Macrae* 1946 SC 118; *Weissenbruch* v *Weissenbruch* 1961 SC 340. See, however, *Dunn* v *Pratt* (1898) 25R 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 SC 391.
3. *Horne* v *Morrison* (1877) 4R 977; *Dunn* v *Pratt* (1898) 25R 461; *McConnachie* v *Geddes* 1918 SC 391.
4. *Marshall* v *Lyell* (1859) 21D 514 at 521; *Wink* v *Speirs* (1867) 6M 77; *Galloway* v *Galloway* 1929 SC 160.
5. *Dunn* v *Pratt* (1898) 25R 461 esp at 468; *Beveridge* v *Beveridge* 1925 SLT 234.
6. *Cairns* v *Davidson* 1913 SC 1054; *McConnachie* v *Geddes* 1918 SC 391; in both cases per Lord Salvesen. See also Wilson & Duncan, *Trusts, Trustees and Executors* 56-57.
7. *Baptist Churches* v *Taylor* (1841) 3D 1030; *Forrester* v *Robson's Trs* (1875) 2R 755.
8. *Laird & Co* v *Laird & Rutherfurd* (1884) 12R 294 esp per Lord President Inglis at 297. In *Munro* v *Stein* 1961 SC 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.
9. *University of Aberdeen* v *Magistrates of Aberdeen* (1876) 3R 1087 per Lord Deas at 1102; (1877) 4R (HL) 48. See also Wilson & Duncan, *op cit* at 52.
10. *Ibid.*
11. *Marshall* v *Lyell* (1859) 21D 514 per LJC Inglis at 521.
12. *Pant Mawr Quarry Co* v *Fleming* (1883) 10R 457. Cf also *Tennent* v *Tennent's Trs* (1868) 6M 840.

shares,[1] but not War Loan,[2] or bearer bonds;[3] and to cover missives[4] but not deposit receipts.[5] There is clearly no "deed of trust" if cash or corporeal moveables are transferred by simple delivery and in such a case a trust can be proved by any competent means. The result of all this 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 available evidence, the choice of mode of proof depending on technical considerations, such as whether there was a "deed of trust", and not on any justifiable policy considerations. Where the Act does apply it may protect the fraudulent trustee who denies that he holds the trust property in trust.[6]

2.35 In the memorandum we concluded that the present law on proof of trusts was open to serious criticism and that some reform was desirable. After considering various alternatives we concluded that the simplest and best solution was to repeal the provision on proof of trusts in the 1696 Act and not replace it.[7] The result would be to remove any restriction on proof of trust. We pointed out that under the existing law there were many situations where the 1696 Act did not apply (e.g. actions by persons other than the truster and trusts of moveables where there is no deed of trust) and that this did not appear to have given rise to any problems of unfounded allegations of trust. Most consultees supported this proposal, as part of a wider proposal to abolish requirements of proof by writ or oath, but a working party of Court of Session judges did not consider that a good case had been made out for abolishing the rule that proof of trust requires writing. They thought that there could be a danger of abuses if the relevant part of the 1696 Act were to be repealed. They pointed out that the obligation of a trustee to make over trust property to a beneficiary did not prescribe[8] and that a defender in an action for declarator of trust could, after many years, find himself in a weak position because of the deaths of witnesses.

2.36 We have given this question renewed and careful consideration. We deal with it here, in the context of constitution rather than proof, because our conclusion is that there is a case for a limited requirement of writing for the *constitution* of certain trusts. We remain of the view that the present limited requirement of writing for the proof of certain trusts is unprincipled and arbitrary and ought to be repealed.[9] The reason for it was to discourage latent trusts by deliberately exposing the truster to the risk of the trustee's fraud.[10] We do not regard this as a desirable technique: the law ought not to encourage fraud. Nor do we think that the technique is even likely to be effective. It is easy enough for the truster to obtain a back letter at the time of creating the trust and, if he does so, there is an effective and provable trust which may yet be completely latent so far as third parties are concerned. The Act, in short, placed trusters at risk without protecting third parties.[11] The danger that a person will be exposed, years after acquiring property, to an unfounded allegation that it is really held in trust for someone else is, we believe, not a real one. The onus of proving a trust is clearly on the person seeking to establish it and the passage of time would not make it any easier to discharge. The danger of unfounded allegations of trust exists, in theory, under the present law in the case of property not held under a "deed of trust" and in the case of a claim by someone other than the alleged truster, but it never seems to have materialised in fact. We note that there has never been any requirement of writing for proof of a trust of moveables in English law and that

1. See *Weissenbruch* v *Weissenbruch* 1961 SC 340.
2. *Beveridge* v *Beveridge* 1925 SLT 234
3. *Newton* v *Newton* 1925 SC 15 at 25.
4. *Dunn* v *Pratt* (1898) 25R 461.
5. *Cairns* v *Davidson* 1913 SC 1054.
6. It is interesting to note that in England the Statute of Frauds 1677 (which required trusts of land to be proved by writing) was held *not* to apply where the trustee fraudulently denied the trust and claimed the land himself. *Rochefoucauld* v *Boustead* [1897] 1 Ch 196. This amounted more or less to judicial repeal of this provision of the Statute but seems to have caused no harm. See the Law Reform Commission of British Columbia, *Report on The Statute of Frauds* (1977) 33-36, 61.
7. Para 5.5.
8. See Prescription and Limitation (Scotland) Act 1973 Sched 3.
9. There is nothing in the Recognition of Trusts Act 1987 to cause us to change this view.
10. *Marshall* v *Lyell* (1859) 21D 514 at 520, 524.
11. See eg *Pickard* v *Pickard* 1963 SC 604.

the requirement in the case of land was, in effect, judicially repealed in 1897 by the decision in *Rochefoucauld* v *Boustead*,[1] where Lindley L.J. held that

> "it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."

Changes in the law on proof of trust would not affect the integrity of the Register of Sasines or the Land Register, or the extent to which reliance could be placed on the registers: the only difference would be that a trust which could at present be proved by writ or oath could in future be proved by any competent means.

2.37 Although we remain of the view that there should be no requirement of writing for the proof of trusts, we have considered whether there is a case for any requirement of writing for the constitution of certain trusts. The main argument for a requirement of this kind is that it provides an opportunity for second thought and a protection against impulsive gestures. That is why we have recommended a requirement of writing in relation to agreements to purchase houses (and certain other obligations relating to land) and gratuitous obligations. In the context of trusts we think that a similar danger of impulsive gestures, and a similar justification for a protective requirement of writing, exists in the case where a person creates a trust by declaring that he holds his own property in trust for someone else. This type of case has featured in the law reports with increasing frequency in recent years.[2] In addition to the declaration of trust there must be delivery or some equivalent to delivery. However, it has been accepted that intimation of the trust to a beneficiary is the equivalent of delivery. It is this which gives rise to the danger and which, in our view, justifies the imposition of a requirement of writing. There is not the same danger where property is actually conveyed or transferred by the truster to a separate trustee to be held in trust. In such a case the conveyance or transfer is a decisive act, and in the case of land or incorporeal property an act requiring an appropriate written conveyance, and the danger of an impulsive gesture is much reduced. We therefore **recommend** that:

5. Writing should be required for the constitution of a trust by a declaration by the truster that he holds his property in trust.

(Paragraph 2.37; clause 1)

The use of the word "holds" in the above recommendation is not intended to prevent its application to the case where the truster owns the property in question but does not have actual possession of it, or to the case where the truster declares a trust over property to be acquired by him. The recommendation is intended to apply, however, only to the case where the truster becomes the sole trustee. If there is another trustee, and hence the necessity for a transfer of the property to the trustees, the rationale for the requirement of writing disappears.

Role of actings

2.38 The purpose of the requirements of writing which we have recommended is to provide an opportunity for withdrawal from an informal obligation at an early stage. It must therefore be considered whether that opportunity should continue after the informal obligation has been acted upon. The considerations may be different in relation to obligations relating to land, gratuitous obligations and declarations of trust and we therefore consider these three cases separately.

Obligations relating to land

2.39 In the case of obligations relating to land the present law is, as we have seen, that the opportunity to withdraw from an obligation not constituted in writing may

1. [1897] 1 Ch 196 at 206.
2. See *Allan's Trs* v *Lord Advocate* 1971 SC (HL) 45; *Clark's Trs* v *Inland Revenue* 1972 SC 177; *Kerr's Trs* v *Inland Revenue* 1974 SLT 193; *Clark Taylor & Co* v *Quality Site Development (Edinburgh) Ltd* 1981 SC 111; *Tay Valley Joinery Ltd* v *C F Financial Services Ltd* 1987 SLT 207.

be lost by personal bar in the form of *rei interventus* or homologation-i.e. where the party seeking to withdraw has either sat back and allowed the other party to act on the faith of the agreement as if it were complete (*rei interventus*) or has himself acted on the faith of the agreement in such a way as to indicate that he regards himself as bound by it (homologation).[1] In English law it has likewise long been recognised that part performance or estoppel may preclude reliance on the requirement of writing in relation to interests in land.[2] In the memorandum we expressed the view that the continued operation of personal bar in this context could be essential to avoid injustice and we proposed that personal bar should remain unaffected by our proposals on the constitution of obligations.[3] This was supported by all except one of those who commented on it. The one dissenter considered that it was pointless to have a requirement of writing if actings could both prove the agreement and deny the right to resile. However, the whole point of the requirement of writing is precisely to permit a right to resile where there have been no actings. The requirement is intended for obligations which have not yet been acted upon, not for those which have been completely performed or followed by sufficient actings.

2.40 Our initial intention was simply to retain, in this context, the existing law on *rei interventus* and homologation. On further consideration, however, we concluded that this would be unsatisfactory for three reasons. First, the existing law is far from clear: it would not be desirable to require the users of a new statute to refer to a host of old cases in order to make sense of it. Secondly, it is uncertain how the common law of personal bar, even if there was an express saving clause for it, would be held to operate in relation to a new statutory requirement of writing. Thirdly, it is by no means certain that there is a role for homologation, as opposed to *rei interventus*, in the scheme which we are now recommending. We have therefore decided that it would be better to set out the role of actings expressly in the new statutory provisions and to make it clear that the new statutory rules on actings replace, in this sphere, the common law on *rei interventus* and homologation.

2.41 We considered whether we should recommend a rule that it would be too late to withdraw from a contract or obligation on the ground of lack of writing once the contract or obligation had been fully performed but concluded that there was no good reason for distinguishing between cases of full performance and cases of almost complete performance. If an equivalent of *rei interventus* were preserved, then those cases where withdrawal ought to be precluded by performance, whether complete or partial, would be covered in any event.

2.42 It seems clear that there is a need to preserve an equivalent of *rei interventus*. It would be unconscionable to allow a party to an unwritten agreement to sit back and allow the other party to incur expense in reliance on the agreement and then to withdraw from the agreement on the ground that it was not in writing. The classic definition of *rei interventus* is that of Bell,[4] who said that *rei interventus* was

> "inferred from any proceedings not unimportant on the part of the obligee, known to, and permitted by, the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable."

This sonorous language would not be entirely suitable for a modern statute and embodies a test which is slightly too strict in some respects and not strict enough in others. As the effect of actings is only to hold a person to his agreement and to prevent him from relying on a technicality to escape from it, we would favour dispensing with

1. See para 2.2 above.
2. See *Steadman* v *Steadman* [1974] 2 All ER 977. In their Report on *Transfer of Land: Formalities for Contracts for Sale Etc. of Land* (Law Com No 164) the Law Commission for England and Wales do not recommend statutory provisions on part performance, taking the view that estoppel could be used to achieve very similar results (para 4.13).
3. Para 4.10. We proposed in para 5.12 of the memorandum that any limitation to writ or oath of the *proof* of the underlying obligation should cease to have effect.
4. *Principles*, s 26 (4th edn 1839). See *Mitchell* v *Stornoway Trustees* 1936 SC (HL) 56 at 63.

the requirements that the actings be "not unimportant" and that they be "unequivocally referable" to the agreement. The test, we suggest, should simply be whether the person seeking to uphold the contract has in fact acted, or refrained from acting, in reliance on it. If, for example, the purchaser of a house under an informal contract, sells his own house in reliance on the informal contract that should be sufficient even though, in the abstract, his actings may not be unequivocally referable to that contract, but might be the result merely of a desire to sell his house for unrelated reasons. On the other hand the last part of Bell's definition-"alteration of circumstances, loss, or inconvenience, though not irretrievable"-appears to let in *any* alteration of circumstances, however unimportant. It seems to us that it would be better to adopt a formula like that in section 9 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 which, among other things, requires the person's position to have been affected to a material extent. Subject to these modifications, we think that the substance of *rei interventus* should be preserved. We recommend later the abolition of all restrictions on proof of obligations to writ or oath.[1] The result of that abolition would be that the underlying informal agreement could be proved by any competent means.[2]

2.43 It is by no means clear that homologation ought to bar withdrawal from an informal agreement. Bell's description of homologation is

> "an act approbatory of a preceding engagement, which in itself is defective or informal, either confirming, or adopting it, as binding. It may be express, or inferred from circumstances. It must be absolute, and not compulsory, nor proceeding on error or fraud, and unequivocally referable to the engagement; and must imply assent to it, with full knowledge of its extent, and of all the relevant interests of the homologator."[3]

Why, however, should a person be prevented from withdrawing from an agreement on the ground of lack of writing because *he* has acted on it or expressly confirmed it, if the other party has not changed his position or suffered any prejudice? Pushed to its logical conclusion this doctrine would mean that a person who says "I confirm the oral agreement we reached half an hour ago" would be barred from exercising his right to withdraw from it, even though neither party had changed his circumstances in the slightest. Actings by the party seeking to escape from an agreement may be relevant to the question whether there was an agreement at all. That, however, is a quite different question. Where an agreement is admitted or proved and the sole question is whether a party is barred from founding on a protective requirement of writing, we cannot see that his *own* actings should amount to personal bar so long as the other party's position is unchanged.

Gratuitous obligations

2.44 The same principles ought, in our view, to apply to gratuitous obligations.[4] If the beneficiary of the obligation has acted in reliance on it, with the knowledge and acquiescence of the other party, and has changed his circumstances in such a way or to such an extent that he would be seriously prejudiced if the other party were to found on the lack of writing, then it should not be possible to found on the lack of writing. In the case of a gratuitous cautionary obligation the admission of an equivalent to *rei interventus* would not amount to a significant change in the law: it is already the case that *rei interventus* can be pleaded to prevent a person relying on the informality of a cautionary obligation.[5] For the reasons advanced above, we do not think that homologation should have a role to play in barring withdrawal from a gratuitous obligation. If (*A*) has promised orally to buy a specific item of property and to give it to (*B*), the fact that (*A*) has acted on his promise by, for example, buying the property in question should not, in our view, prevent him from withdrawing his promise so long as (*B*) has not changed his position in any way in reliance on it.

---

1. See Part III below.
2. This would resolve a long-standing controversy. See *Mitchell* v *Stornoway Trustees* 1936 SC (HL) 56; *Errol* v *Walker* 1966 SC 93. Stewart, article in 1966 Journal of the Law Society of Scotland at 263.
3. *Principles*, s 27 (4th edn 1839).
4. We were interested to note after reaching this conclusion that the Ontario Law Reform Commission recommended the introduction of a reliance rule to prevent withdrawal from a gratuitous promise. See their Report on *Amendment of the Law of Contract* (1987) 25-32.
5. See *National Bank of Scotland Ltd* v *Campbell* (1892) 19R 885; *Snaddon* v *London Edinburgh and Glasgow Assurance Co Ltd* (1902) 5F 182; *BOCM Silcock Ltd* v *Hunter* 1976 SLT 217.

Declarations of trust

2.45 Again we suggest that the same principles should apply. If a beneficiary has acted to his prejudice in reliance on the trust, with the knowledge and acquiescence of the truster, then the truster should no longer be able to deny the existence of the trust by founding on a lack of writing.

Recommendation

2.46 Our recommendation is therefore as follows:

6. **The requirements of writing in the three preceding recommendations should not apply if (a) the obligee or a trust beneficiary (as the case may be) has acted, or refrained from acting, in reliance on the contract, obligation or trust with the knowledge and acquiescence of the obligor or truster with the result that his position has been affected to a material extent and (b) the interests of the obligee or trust beneficiary would be adversely affected to a material extent if the other party were allowed to withdraw on the ground of lack of writing.**

(Paragraphs 2.42, 2.44 and 2.45; clause 1)

Variation or cancellation

2.47. We suggested in the memorandum that the same rules should apply to variation or cancellation of an agreement or obligation as applied to its constitution. So, if writing was required for constitution, writing would also be required for variation or cancellation. There was no dissent on consultation. On reconsideration, however, we have come to the conclusion that it is not necessary or desirable to deal with cancellation. There are many different ways in which an agreement or obligation may come to an end and in relation to many of them (such as discharge by performance) a requirement of writing would be inappropriate. Even in relation to cancellation by agreement, which is what we had in mind when we talked of "cancellation", the arguments for a requirement of writing are not compelling. The reason for a requirement of writing is to protect people from rashly taking on certain obligations. There is not the same reason to protect them from getting out of obligations. Variation is different. A party could, by agreeing to a variation, substantially increase his obligations. The same protection ought, we think, to be available in relation to a variation as is available in relation to the original obligation. Similarly the protection should fly off after *rei interventus*. Similar considerations apply to trusts. We therefore **recommend** that:

7(a) **Where writing is required in relation to the constitution of a contract, obligation or trust, writing should also be required for its variation.**

(b) **The requirement of writing for a variation should not apply if (a) a party has acted, or refrained from acting, in reliance on the variation, with the knowledge and acquiescence of the other party, with the result that his position has been affected to a material extent and (b) the interests of that party would be adversely affected to a material extent if the other party were allowed to regard the variation as invalid because of a lack of writing.**

(Paragraph 2.47; clause 1)

Type of writing required

2.48 We deal with this question later when we discuss the requirements for the formal validity of various forms of writing. Here we note only that the Interpretation Act 1978 defines "writing" as including "typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form" and provides that expressions relating to writing are to be construed accordingly.[1]

1. S 5 and Sched 1.

Wills and other testamentary dispositions

2.49 Under the present law writing is generally required for a will or testamentary disposition. There is, however, an exception for a bequest of moveables of a value not exceeding a hundred pounds Scots (generally taken to be £8.33p. in today's currency).[1] There is probably no exception for soldiers' wills.[2] In the memorandum we made the provisional proposals that writing should continue to be required for testamentary dispositions and that there should be no exceptions to this rule. We expressed the view that the present exception for moveables under £8.33 in value was plainly indefensible and that to increase the limit to (say) £500 might merely give rise to disputes and litigation.[3] Our provisional proposals were supported almost unanimously on consultation. We think that it would be desirable to set out the requirement of writing in statute, rather than leave it to depend on the common law. On reflection, however, we think that the expression "testamentary disposition" is too wide. There is a danger that it might be regarded as covering certain special destinations.[4] What we want to cover are wills and codicils and testamentary trust dispositions and settlements. We therefore **recommend** that:

8(a) There should be a statutory requirement of writing for a valid will or codicil or testamentary trust, disposition and settlement.

(b) There should be no exceptions to this requirement.

(Paragraph 2.49; clause 2)

Transfer etc of interest in land

2.50 Under the present law there is a general common law requirement of writing for the creation of feudal rights and for the transfer of heritable property.[5] We did not suggest any change in this rule but invited comments as to whether any clarification or alteration of the law was required. Although we did not receive any comments specifically on this point we did receive several general comments in favour of gathering together as many writing requirements as possible in the one statute. We can see considerable advantages in doing this. It would leave an obvious gap in the legislation if the requirement of writing for contracts and obligations relating to interests in land were regulated by statute but nothing was said about dispositions and other conveyancing deeds. We think that the definition of interest in land recommended earlier in the context of contracts and obligations could conveniently be used here also: leases for a year or less would accordingly be excluded. We therefore **recommend** that:

9. There should be a general statutory requirement of writing for the voluntary creation, transfer, variation or extinction of an interest in land (within the meaning of recommendation 3 above).

(Paragraph 2.50, clause 2)

The use of the word "voluntary" in this recommendation is intended to make it clear that the acquisition or loss of interests in land by virtue of any enactment or court decree or by operation of law (e.g. by prescription, accretion, adjudication or intestate succession) is not to be affected. We do not think that there should be any provision for actings in relation to the matters covered by Recommendation 9. There is a distinction in this respect between the underlying contract or obligation for, say, the creation or transfer of an interest in land and the actual creation or transfer of it. The distinction is clearest in the case of missives for the sale of land and the disposition of the land, but exists in other cases too, although it becomes very blurred in the case

1. Stair, III 8.34 and 36; Erskine III 9.7; Walker and Walker, *Evidence* 98 and 99.
2. *Stuart* v *Stuart* 1942 SC 510. The court did not find it necessary to express a concluded opinion but seemed unpersuaded that the Roman law doctrine of the *testamentum militare* was part of the law of Scotland.
3. Para 4.14.
4. A bond or disposition or other document of title containing a special destination is not a testamentary writing (*Murray's Exrs* v *Geekie* 1929 SLT 524; *Barclays Bank Ltd* v *McGreish* 1983 SLT 344) but nonetheless a special destination "may be regarded as testamentary in effect" (*Brown's Tr* v *Brown* 1943 SC 488 at 492).
5. Stair, II 3 11,13,14.

of leases. It is reasonable to say that a person cannot back out of an obligation if the requisite actings have followed on it. It also seems reasonable to say that an actual conveyance is either valid or invalid whether or not actings have followed on it. If a person receives, say, an invalid disposition or lease when he was entitled to a valid one, then he can insist on implementation of the underlying agreement or damages for its non-implementation. The underlying agreement could be completed by actings under our recommendations. In any event the whole question of *rei interventus* in this area will become much less important if the sole requirement for formal validity is subscription. A major role of *rei interventus* has been to cure formal defects in genuine subscribed writings. There would be no need for that in future.

Transfer of incorporeal moveable property

2.51 Writing is not generally required for the transfer *inter vivos* of moveable property. There are, however, some statutory exceptions relating to such matters as shares,[1] patents[2] and copyright.[3] We are not concerned here with these statutory requirements although we discuss consequential amendments to some of them in Part VII. There is also, at common law, a *possible* exception for assignations of incorporeal moveable property.[4] The law on this point is, however, a matter of some doubt. Many of the cases which might be thought to have a bearing on it turn out to be concerned with proof by writ or oath.[5] There are indications in *Jeffreys* v *Kyle*[6] that there was no common law requirement of writing for an assignation of copyright, although the actual decision was based partly on a point of pleading and partly on the interpretation of old copyright statutes, now repealed. It may be implicit in *Clark* v *Callander*[7] that a transfer of rights under a contract relating to moveables need not be in writing in order to be valid, the decision in that case being merely that proof by writ or oath was required. On the other hand there is an *obiter dictum* by Lord McLaren in *McMurrich's Trs* v *McMurrich's Trs*[8] to the effect that a right of succession created by writing, whether the writing is a private deed or an Act of Parliament, can only be transferred by writing.

2.52 It is unsatisfactory that the law on whether or not a transfer of incorporeal moveable property requires to be effected by writing should not be clearly settled and we think that this opportunity should be taken to resolve the doubts one way or the other. On balance we favour making it clear that writing is *not* required in any case not covered by an existing statutory provision. This would make little or no difference in conveyancing practice, since written assignations would continue to be used, for reasons of prudence and convenience, in circumstances where they are used at present. It would be consistent with our general policy of reducing writing requirements to a minimum. It would lead to more coherence in the law: it seems anomalous that a right which does not require writing for its constitution should require writing for its transfer. And it would avoid the dangers inherent in the width of the concept of incorporeal moveable property, which could be regarded as covering a whole range of contractual and other rights. We therefore **recommend** that:

10. It should be made clear that writing is not required, in the absence of express statutory provision, for the transfer of incorporeal moveable property.
(Paragraph 2.52; clause 22)

1. Companies Act 1985 s 183; Stock Transfer Act 1963 s 1.
2. Patents Act 1977 s 31.
3. Copyright Act 1956 s 36(3).
4. See Walker and Walker, *Evidence* 111; McBryde, *The Law of Contract in Scotland* 385.
5. See eg *Clark* v *Callander* 8 March 1819 FC; *McMurrich's Trs* v *McMurrich's Trs* (1903) 6F 121; *McFadzean's Exr* v *McAlpine* 1907 SC 1269.
6. (1856) 18D 906, aff'd. (1859) 3 Macq 611.
7. 8 March 1819 FC.
8. (1903) 6F 121 at 126.

Part III Evidential Requirements

Present law

General

3.1 Certain obligations, although they may be constituted in any way, may be proved only by the writ of the party alleged to be bound or by his admission on the reference of the matter to his oath.[1] For this purpose the writ of the party need not be attested, holograph or adopted as holograph.[2] 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.

Loans

3.2 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,[3] to the writ or oath of the borrower.[4] The restriction on proof does not apply to a loan of corporeal moveables,[5] 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*.[6]

Obligations of relief

3.3 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.[7] According to Dickson[8] "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.[9]

Declarators of trust

3.4 We have considered in Part II the rule restricting proof of certain trusts to writ or oath.[10]

Innominate and unusual contracts

3.5 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.[11]

Gratuitous obligations

3.6 A gratuitous obligation may be proved only by the writ of the person bound by the obligation or by reference to his oath.[12] 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.[13]

Performance or discharge

3.7 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

1. Consultative Memorandum No 39 paras 34-52. Walker & Walker, *Evidence* 113-134.
2. *Paterson* v *Paterson* (1897) 25R 144. In some cases (eg entries in business books or holograph jottings in books or approved minutes) the writ need not even be signed. See Walker & Walker, *Evidence* 332.
3. But not necessarily in eg an action for reconveyance of security subjects. See *Smith's Tr* v *Smith* 1911 SC 653, as explained by Lord President Cooper in *McKie* v *Wilson* 1951 SC 15 at 20.
4. Walker & Walker, *Evidence* 114-119. For a recent example see *Greer* v *Plains Community Welfare and Social Club* (Sh Ct) 1987 GWD 684.
5. *Scot* v *Fletcher* (1665) Mor 11616; *Geddes* v *Geddes* (1678) Mor 12730.
6. *Robb* v *Robb's Trs* (1884) 11R 881; *Boyd* v *Millar* 1933 SN 106, 1934 SN 7.
7. Walker & Walker, *Evidence* 123-124.
8. *Evidence* 3rd edn para 606.
9. *Devlin* v *McKelvie* 1915 SC 180.
10. See paras 2.33 to 2.37 above.
11. See Walker & Walker, *Evidence* 132-134 where examples are given of the application of this peculiarly vague rule.
12. See Walker & Walker, *Evidence* 134; *Smith* v *Oliver* 1911 SC 103.
13. *Hawick Heritable Investment Bank Ltd* v *Huggan* (1902) 5F 75 per Lord Kyllachy at 78-9; Gloag, *Contract* 2nd edn 52.

oath.[1] The restriction in relation to obligations other than the payment of money[2] is subject to important exceptions[3] and examples of its operation are very rare.

Payment of money under an antecedent obligation

3.8 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.[4] The restriction on proof applies only where the payment has been made under a pre-existing obligation: payment in a ready money transaction (eg 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[5]) may be proved by oral testimony.[6] 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,[7] as must the repayment of money lent.[8]

Gratuitous renunciation of rights

3.9 The gratuitous renunciation of rights constituted in writing may be proved only by the writ or oath of the creditor.[9] 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.[10] There is a conflict of opinion on the renunciation of rights not constituted in writing. Erskine[11] and Gloag[12] take the view that in these circumstances renunciation may be proved by oral testimony, and this is probably the better view.[13] Dickson[14] and Sheriffs A.G. and N.M.L. Walker,[15] however, are of the 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.[16]

Variation of written obligation

3.10 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.[17] 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.[18]

3.11 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;[19] 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;[20] and in yet other cases oral agreement followed

1. See Walker & Walker, *Evidence* 124-128. *Keanie* v *Keanie* 1940 SC 549.
2. On which see next paragraph.
3. 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 Consultative Memorandum No 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 SC 215.
4. Walker & Walker, *Evidence* 128-130.
5. *Stewart* v *Gordon* (1831) 9S 466; *Shaw* v *Wright* (1877) 5R 245 at 247.
6. Dickson, *Evidence* 3rd edn para 616; *Burt* v *Laing* 1925 SC 181 at 184.
7. *Tod* v *Flockhart* 1799 Hume's Dec, 498; *Young* v *Thomson* 1909 SC 529,
8. *Thiem's Trs* v *Collie* (1899) 1F 764; *Jackson* v *Ogilvie's Exr* 1935 SC 154 at 160. For other examples of cases where the restriction did or did not apply, see Walker & Walker, *Evidence* 128-130.
9. Walker & Walker, *Evidence* 130-31; *Lord Craigmiller* v *Chalmers* (1639) Mor 12308; *Scot* v *Cairns* (1830) 9S 246; *Reid* v *Gow* (1903) 10 SLT 606; *Keanie* v *Keanie* 1940 SC 549.
10. *Anderson's Trs* v *Webster* (1883) 11R 35; *Lavan* v *Gavin Aird & Co* 1919 SC 345 at 348.
11. III 4.8.
12. *Contract* (2nd edn) 722.
13. In *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 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 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."
14. *Evidence* 3rd edn para 629.
15. *Evidence* 131.
16. See *Kilpatrick* v *Dunlop* 1909 2 SLT 307.
17. Walker & Walker, *Evidence* 303-308.
18. See Walker & Walker, *Evidence* 303; *Law* v *Gibsone* (1835) 13S 396; *Dumbarton Glass Co* v *Coatsworth* (1847) 9D 732; *Skinner* v *Lord Saltoun* (1886) 13R 823; *Burrell* v *Russell* (1900) 2F (HL) 80.
19. Eg *Stevenson* v *Manson* (1840) 2D 1204.
20. Eg *Carron Co.* v *Henderson's Trs* (1896) 23R 1042 at 1048 and 1054; *Perdikou* v *Pattison* 1958 SLT 153.

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.[1]

3.12 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* 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 the original contract.[2]

(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.[3]

(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".[4] 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.[5] 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.[6] 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.[7] 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.[8]

Rei interventus and homologation

3.13 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. In *Errol* v. *Walker*,[9] 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 the completion of 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 words spoken. It has also, on one view, created the anomalous situation that the completion of an agreement may be proved by actings if there is an offer in proper

1. Eg *Baillie* v *Fraser* (1853) 15D 747; *Bargaddie Coal Co* v. *Wark* (1859) 3 Macq 467; *Kirkpatrick* v *Allanshaw Coal Co* (1880) 8R 327 at 337; *Lavan* v *Gavin Aird & Co* 1919 SC 345.
2. See *Carron Co* v *Henderson's Trs* (1896) 23R 1042 ; *Perdikou* v *Pattison* 1958 SLT 153.
3. See eg *Stevenson* v *Manson*; *cit sup*.
4. *Carron Co* v *Henderson's Trs* (1896) 23R 1042 at 1049 per Lord Kyllachy.
5. See eg *Bargaddie Coal Co* v. *Wark* (1859) 3 Macq 467; *Kirkpatrick* v *Allanshaw Coal Co* (1880) 8R 327; *Lavan* v *Gavin Aird & Co* 1919 SC 345.
6. *Sutherland* v *Montrose Shipbuilding Co* (1860) 22D 665 at 673.
7. *Kirkpatrick* v *Allanshaw Coal Co* (1880) 8R 327.
8. *Lavan* v *Gavin Aird & Co* 1919 SC 345.
9. 1966 SC 93.

written form, (however rudimentary and in need of qualification the offer may have been) but not if the offer was made orally (however complete and acceptable and clearly established the offer may have been).[1]

Criticisms of the present law

3.14 The main criticism of these rules on proof by writ or oath is that by restricting the evidence available they may cause unjust results to be reached. In the memorandum we observed that:

> "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."[2]

We remain of this view. Here are some examples of the type of case where injustice could be caused by the restriction of proof to writ or oath.

1. A builder is sued by a firm of plasterers for payment of sums allegedly still due under a contract to do plasterwork. He says the sums have been paid and produces parole evidence to this effect. He cannot, however, produce any writ of the pursuer. So the decision goes against him. The judge says that he would probably have decided the other way had it been open to him to proceed upon the parole evidence.[3]
2. A man lends his brother £750. The man then dies and his executor claims repayment of the loan. The executor can prove, by an endorsed cheque, that the money was paid and offers to prove by witnesses the circumstances in which it was paid. The evidence of witnesses is held to be incompetent. In the absence of any writ by the brother proving a loan the action for repayment fails.[4]
3. A man borrows £225 from a friend and gives him an I.O.U. for that amount. He repays the loan in five instalments and, on payment of the last instalment, the friend promises to destroy the I.O.U. He fails to do so and, on his death, his executor claims payment of £225. There is no written evidence of repayment. So the borrower must pay twice.[5]
4. A wife is about to divorce her husband. They agree that he will transfer the matrimonial home to her for no consideration and that, in return, she will not claim any financial provision from him in the divorce action. This agreement is oral but it is clear, complete and unequivocal and made in the presence of several reliable witnesses. In reliance on it the wife does not claim financial provision in the divorce action. The divorce is granted but the husband refuses to transfer the house. If the agreement could be competently proved the wife could rely on *rei interventus* to prevent the husband founding on the lack of a written contract. She is, however, restricted to proof by writ or oath. There is no writ and on the matter being referred to the husband's oath he denies that there was any agreement. The wife has no remedy.[6]

Results of consultation

3.15 In the memorandum we assessed each of the rules requiring proof by writ or oath and concluded in each case that the rule was unnecessary and undesirable. We

1. See *Mulhern* v *Mulhern* 1987 SLT (Sh Ct) 62.
2. Para 5.1.
3. Cf *Hope Brothers* v *Morrison* 1960 SC 1.
4. Cf *Haldane* v *Spiers* (1872) 10M 537.
5. Cf *Thiem's Trs* v *Collie* (1899) 1 F 764.
6. This is a hypothetical example suggested by the report of *Mulhern* v *Mulhern* 1987 SLT (Sh Ct) 62 where, however, the facts were quite different.

therefore suggested that all of these rules should cease to have effect. This was supported by almost all of those who commented. The working party of Court of Session judges, however, did not think a good case had been made out for abolishing the rule that proof of trust requires writing. We have dealt with this above.[1] They did not object to abolition of the other rules restricting proof to writ or oath. One other Court of Session judge disagreed with our proposal although he thought reference to oath should be abolished. The majority of a committee of the Faculty of Advocates also disagreed with our proposal, although they too thought reference to oath should be abolished. Their main argument was that the restriction on the mode of proof not only was a valuable protection to the party who had to assert, for example, that money received as a gift or as payment for services rendered was *not* a loan but also conferred a measure of certainty on contractual arrangements and minimised litigation because each party knew exactly where he stood from the outset: a lender who failed to obtain an I.O.U. or other written acknowledgement had only himself to blame if he was subsequently unable to prove the true nature of the contract. The convener of the Faculty committee dissented on this issue, firstly upon the basis of instances within his own professional experience where the restriction was applied with unjust results and secondly on the ground that the restriction was not in accord with modern public expectations as to what the legal process should achieve. In his view modern expectations were that the court would be entitled to examine the whole circumstances of a transaction and reach a conclusion in the light of all the evidence presented to it, whether written or oral. He considered that any slight encouragement of fraudulent conduct which might result from abolishing the restrictions of proof to writ or oath would be a modest price to pay for the avoidance of the evident difficulties which the present law created.

3.16 We also suggested in the memorandum that the procedure of reference to oath should be abolished. This is an anachronism which originated at a time when the parties to an action were not competent witnesses. Although still resorted to by desperate litigants on rare occasions, with little apparent success, it is widely regarded as absurd and archaic. Our suggestion that it should be abolished was supported by almost all of those who commented, although one or two consultees thought that the procedure should simply be allowed to wither away.

Assessment and recommendation

3.17 We are not persuaded by the majority of the committee of the Faculty of Advocates. Any protection for donees and recipients of payments for services must be weighed against the danger of injustice to a person who has made a loan or paid a debt. People do not always insist on written receipts, particularly if there are witnesses present, and it seems harsh to penalise them for not doing so. We agree with the convener of the committee that on balance justice is likely to be better served by enabling the court to look at all the evidence available. It is also relevant to ask what the present rules protect a person from. *At worst* the recipient of a gift who is faced with a claim for repayment, on the ground that the payment was a loan, will have to give back what he received. He will be no worse off than he was before the gift. The injustice to him is much less than the injustice to a lender who cannot recover the amount lent because of a technicality of the law of evidence. Similarly a person who has received payment for work done, and who is then faced with a successful claim that the payment was a loan, will still be able to claim payment for his work if payment was legally due. He is no worse off. (If the payment was a gratuitous reward then we are back in the position of the donee.) In short we are not satisfied that the rules restricting proof to writ or oath do serve a valuable protective function. We agree with the view expressed over 90 years ago that these rules are to be regretted

> "as unsuitable to the present state of the law of evidence, and tending more to defeat justice than to promote it."[2]

1. Paras 2.33 to 2.37.
2. *Paterson* v *Paterson* (1897) 25R 144 per Lord Kincairney at 179. See also *McKie* v *Wilson* 1951 SC 15 where Lord President Cooper said, at 20, "This branch of the law exhales the odour of antiquity, but it is too deeply rooted to be disturbed.".

On the narrower issue of reference to oath the only question raised by consultation is whether this should be abolished or allowed to wither away. Most consultees, including the judges, the Faculty of Advocates and the Law Society of Scotland, favour abolition and so do we. There is no point in preserving an archaic procedure, the practical effect of which, in the words of one practising solicitor,

"seems to be, sadly, to prolong hope in situations which are in fact hopeless."

3.18 Various prescriptions in Scots law had at one time the effect, not of extinguishing the obligation, but of restricting proof to writ or oath. However, all prescriptions of this sort were swept away by the Prescription and Limitation (Scotland) Act 1973.[1] One other matter which requires proof by writ or oath is a promise to marry where that is founded on as the basis of a marriage by promise *subsequente copula*.[2] This form of marriage was abolished by the Marriage (Scotland) Act 1939 as from 1 July 1940. It is unlikely that many, if any, cases involving pre-1940 marriages by promise *subsequente copula* will now come before the court. It was always an artificial and unrealistic concept and after the lapse of 48 years it would be very difficult, even without the restriction on the proof of the promise, to establish the essentials for this type of marriage.[3] If, in any action, the requirements for this type of marriage *could* be established by parole evidence then we can see no reason why the action should not be allowed to succeed. To make the existence or non-existence of a marriage depend on the accident of whether a letter or other writ had survived for 48 years or more seems to us to be unjustifiable. The arguments against restricting proof to writ or oath apply generally and we think that the abolition of this type of restriction should be general in scope.

3.19 We therefore **recommend** that:

11(a) Any enactment or rule of law that restricts proof of any matter to writ or oath should cease to have effect.

(b) The procedure of reference to the oath of a party should be abolished.

(Paragraphs 3.17 and 3.18; clause 21)

We have recommended earlier[4] that writing should be required for the *constitution* and variation of certain obligations relating to land, certain gratuitous obligations and certain declarations of trust. Recommendation 11 is without prejudice to these earlier recommendations.

1. Implementing the Commission's Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15, 1970).
2. Clive, *Husband and Wife* (2nd edn 1981) 57.
3. It would have to be established, for example, that the intercourse was on the faith of the promise, although that would normally be presumed if the intercourse was proved to have taken place for the first time after the promise. *Campbell* v *Honyman* (1831) 5 W & S 92: Clive, *op cit*, 56.
4. See Part II, paras 2.20, 2.24 and 2.37.

Part IV Formal Validity of Writings

Introduction

4.1 In this part of the Report we consider what type of writing (e.g. subscribed, holograph, attested), if any, should be required for the formal validity of

(a) those contracts and obligations relating to land which will need to be constituted in writing

(b) those gratuitous obligations which will need to be constituted in writing

(c) those trusts which will need to be constituted in writing

(d) dispositions and other conveyancing writs relating to interests in land,

(e) wills and other testamentary writings,

(f) bonds and other deeds (not falling within any of the above categories) intended to be operative by their own force and not merely to be evidence of an underlying obligation.

We are concerned in this part only with writings by individuals who are able to subscribe. We deal later with writings by partnerships, companies, local authorities, other corporate bodies and government Ministers and with the question of notarial execution for those who are blind or unable to write. We are concerned in this part with formal validity-and not with probativity.[1] If a writing in any of the above cases is admittedly genuine, or is proved to be 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.

Present law

4.2 The law on the requirements for authenticating certain writings is contained largely in a series of old Scottish statutes which we shall refer to collectively as the "authentication statutes".[2] The earliest is the Subscription of Deeds Act 1540. Before this date writings were executed by seal. The Act narrates that seals may be lost or misused and provides:—

> "That therefor na faith be gevin in tyme cuming to ony obligatioune band or vther writting ynder ane sele without subscriptioune of him that aw the samin and witnesse Or ellis gif the party can nocht write with the subscriptioune of ane notar thairto."

Although the Act does not say that seals are unnecessary, the requirement of sealing writings by individuals must be taken as having fallen into desuetude.[3] The 1540 Act is still in force although its effect nowadays must be at best doubtful and at worst pernicious. If, for example, a person has a subscribed writing embodying a contract relating to moveables or the provision of services and chooses to add a seal, it is

1. We use the term "probative" in its proper sense of self-proving. We consider in Part V what requirements a writing should have to comply with if it is to be probative in this sense.
2. For a much fuller discussion of the present law, see the memorandum paras 2.25 to 2.60.
3. The requirement was made unnecessary for writings containing a clause of consent to registration for preservation in books of court by the Act of 1584 c 11 which was repealed by the Statute Law Revision (Scotland) Act 1964.

arguable that "no faith" is to be given to the writing (whatever that may mean) because it is a writing under a seal which is not subscribed by witnesses.

4.3 The next statute in the series is the Subscription of Deeds Act 1579. This requires attested writing for writs importing heritable title and all bonds and obligations of great importance. It provides:—

> "That all contractis obligationes reuersiones assignationes and discharges of reuersiones or eikis thairto And generalie all writtis importing heritable title or vtheris bandis and obligationes of greit importance to be maid in tyme cuming salbe subscriuit ... be the principall pairtijs gif they can subscriue vtherwayis be ... notaris befoir ... witnesses denominat be thair speciall duelling places or sum vther euident takens That the witnesses be knawin be present at that tyme Otherwyse the saidis writtis to mak na fayth."

This Act too is still in force. It has given rise to great difficulty.[1] Clearly it cannot be read and applied literally as a modern statute would be. If it were, then all written contracts would require to be attested-at least if their value was more than £8.33p.[2]

4.4 The Writs Act of 1672 relates only to charters or writs passing the great and privy seals.[3] It allows such charters and writs to be written bookwise instead of

> "in one broad parchement of soe great lenth and largeness that they can hardly be read"

and it regulates the way in which the seal is to be appended. Our initial view was that this Act had served its function and could usefully be repealed.[4] However, on consulting those responsible for the use of the great seal, we were informed that their preference was to retain the Act as statutory authority for the present procedures relating to the great seal. In these circumstances we do not recommend repeal of the 1672 Act.

4.5. 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 Writer and witnesses are not designed shall be null And are not supplyable by condescending vpon the Writer or the designation of the writer and 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 saw or heard him give Warrand to a Nottar or Nottars to subscribe for him And in evidence thereof touch the Notars pen 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... And that in all the saids caices The witnesses be designed in the body of the write Instrument or Execution respective Otherways the same shall be null and void And make no faith in Judgment nor outwith".

This Act is still in force. It seems to require *all* legally effective writs to be attested on pain of nullity. Fortunately, it is not given such a wide application. It is not applied, for example, to writs written by the granter himself,[5] or to writs *in re mercatoria*.[6]

4.6 The Deeds Act 1696 allowed writs to be in separate pages ("bookwise") instead of in one long parchment which had to be folded or rolled up. It provides:—

> "that it shall be free hereafter for any person who hath any Contract Decreit Disposition or other Security above mentioned to write to choose whither he will

1. See *Paterson* v *Paterson* (1897) 25R 144; Gow "The Constitution and Proof of Voluntary Obligations" 1961 Jur Rev 1, 119 and 234.
2. See Erskine III 2,10—"by obligations of great importance in this Act are understood obligations granted for a sum or subject exceeding in value £100 Scots". £100 Scots is now taken to be £8.33p.
3. There has been no privy seal in use in Scotland since the reign of Queen Victoria and there is now no keeper. The Secretary of State for Scotland is the Keeper of the great seal used in Scotland.
4. Repeal would not, of course, have revived the earlier law. Interpretation Act 1978 s 16.
5. See *Macdonald* v *Cuthbertson* (1890) 18R 101 at 107; *McBeath's Trs* v *McBeath* 1935 SC 471 at 483.
6. Bell, *Commentaries* (5th edn 1826) Vol I 324.

have the same written in Sheets battered togither as formerly or to have them written by way of book in Leafs of Paper either in folio or quarto Provideing that if they be written bookways every page be marked by the number first second &c. and Signed as the margines were before and that the end of the last page make mention how many pages are therin contained in which page only witnesses are to signe in writts and Securities where witnesses are required by Law And which writts and securities being written bookwayes marked and signed as said is His Majestie with consent forsaid declares to be als valid and formall as if they were written on severall Sheets battered togither and signed on the margine according to the present custome."

The requirement that each page be numbered was very generally neglected in practice and was eventually removed by an Act of 1856.[1] The requirement for signing on every page was interpreted as requiring subscription on only one side of a two-page sheet.[2]

4.7 The requirements of the old authentication statutes were further relaxed by sections 38 and 39 of the Conveyancing (Scotland) Act 1874 which provide as follows:—

"38. It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves.

39. 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, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such grantor or maker and witnesses."

4.8 Finally section 44 of the Conveyancing and Feudal Reform (Scotland) Act 1970 removed, for non-testamentary writings, the requirement that an attested writing be subscribed on every other page. Curiously, although the original requirement of subscription on every page (in the 1696 Act) was expressed in terms of formal validity, section 44 says that the lack of such subscription "shall be no objection to its probative character".

4.9 There is nothing in any of the above statutes about writs *in re mercatoria*, holograph writings, writings adopted as holograph, *rei interventus* or homologation. All of these have, however, been recognised by the courts in order to reduce the excessive requirements of the authentication statutes. In addition, in the important case of *Paterson* v. *Paterson*,[3] the Court of Session held that the authentication statutes did not apply to those cases where writing was required for proof rather than constitution of an obligation.

4.10 The authentication statutes have acquired, over the centuries, a considerable encrustation of case law on such matters as

1. An Act to abolish certain unnecessary Forms in the framing of Deeds in Scotland 1856 (19 & 20 Vict c 89). This Act was repealed by the Statute Law Revision Act 1892.
2. *Peter* v *Ross* (1795) Mor 16, 957; *Baird's Trs* v *Baird* 1955 SC 286; *Ferguson* 1959 SC 56.
3. (1897) 25R 144.

(a) who can act as a witness (only someone other than the granter, who is 14 years of age or over, and who is not mentally incapable)

(b) how witnesses are designed (normally by address)

(c) how well a witness must know the granter (a "simple introduction" or "credible information" being sufficient)[1]

(d) when witnesses must sign (not after the granter's death, or after the granter had withdrawn authority-and preferably immediately, or at least soon enough for the subscribing and witnessing to be one continuous transaction)[2]

(e) erasures, alterations and other vitiations (which must normally, if they are to form part of an attested writing, be declared in the testing clause),[3] and

(f) what counts as an "informality of execution" (not improper witnessing,[4] but practically anything else[5]).

There has also been a good deal of case law on writings which are holograph or adopted as holograph. It was held in one case that a will typed and signed by the testator was valid as a holograph writing, where the will contained a statement that it was typed by the testator himself.[6] Normally for a writing to be holograph, either the whole writing must be written by the granter in his own hand or at least enough of it for the essentials to be found in the handwritten part. Printed will forms, where the blanks are filled in by the testator, have usually failed this test.[7] The recognition by the courts that the privileges of a holograph writing would be gained if the granter added the words "adopted as holograph" (or similar words) above or below his signature in his own writing was a bold response to the strictness of the authentication statutes.[8] A writing which is holograph or adopted as holograph is formally valid, notwithstanding non-compliance with the authentication statutes. In practice this is most useful in relation to wills and missives for the purchase of houses.

4.11 The strictness of the authentication statutes has also been mitigated by a fairly generous approach by the courts to the adoption of informal writings by formal writings. Even an unsubscribed writing can be specially adopted as part of a writing which is itself attested, holograph or adopted as holograph.[9] And the courts have recognised that an informal writing may be impliedly adopted by a formal writing.[10] A formal writing can contain a general adoption of any subsequent informal writing falling within a particular description-for example, any writing under my hand.[11]

Recommendation on the authentication statutes

4.12 The state of the present law is most unsatisfactory. The law is contained in a whole series of statutes going back to 1540. These are not easy to read and understand and cannot, in any event, be accepted at face value. They must be read as being subject to extensive qualifications and relaxations. A complete picture of the law can be gained only by reading the many cases on the subject. It has been said that "There is scarcely any branch of the law in which there has been greater uncertainty and

1. *Brock* v *Brock* 1908 SC 964 at 966 and 967.
2. *Thomson* v *Clarkson's Trs* (1892) 20R 59; *Walker* v *Whitwell* 1916 SC (HL) 75.
3. See the memorandum paras 2.40 to 2.44.
4. Eg by a witness who does not see the granter sign or hear him acknowledge his signature, or who signs after the granter's death or after too long an interval. See *Walker* v *Whitwell*, *supra*.
5. Eg failure to design witnesses, to spell their names correctly in the testing clause, to sign a will on every sheet. *Thomson's Trs* v *Easson* (1878) 6R 141; *Richardson's Trs* (1891) 18R 1131; *Inglis' Trs* v *Inglis* (1901) 4F 365.
6. *McBeath's Trs* v *McBeath* 1935 SC 471. Contrast *Chisholm* v *Chisholm* 1949 SC 434, where the will contained no statement that it was typed by the testator and was held to be invalid.
7. *Maitland's Trs* v *Maitland* (1871) 10M 79; *Macdonald* v *Cuthbertson* (1890) 18R 101; *Carmichael's Exrs* v *Carmichael* 1909 SC 1387; *Bridgeford's Exr* v *Bridgeford* 1948 SC 416; *Tucker* v *Canch's Tr* 1953 SC 270; *Gillies* v *Glasgow Royal Infirmary* 1960 SLT (N) 71.
8. In Lord McLaren's view it "came dangerously near to legislation". *Harvey* v *Smith* (1904) 6F 511 at 521.
9. *Stenhouse* v *Stenhouse* 1922 SC 370.
10. *Callander* v *Callander's Trs* (1863) 2M 291; *Cross' Trs* v *Cross* 1921 1 SLT 244; *McGinn* v *Shearer* 1947 SC 334.
11. See eg *Ronalds' Trs* v *Lyle* 1929 SC 104; *Waterson's Trs* v *St Giles Boys' Club* 1943 SC 369.

fluctuation of judicial opinion than the application and scope of the Scots statutes which regulate the authentication of writings.".[1] We think the time has come to repeal the authentication statutes and start afresh. We therefore **recommend** that:

12. **The authentication statutes (i.e. the Subscription of Deeds Acts 1540, 1579 and 1681 and the Deeds Act 1696) and the related provisions in sections 38 and 39 of the Conveyancing (Scotland) Act 1874 and section 44 of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be repealed and replaced by a coherent set of rules in modern form.**

(Paragraphs 4.2 to 4.8; clause 25 and Schedule 8)

Functions of formal requirements

4.13 In the memorandum we suggested that 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).
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).

So far as the evidential function is concerned the main requirement is for a written record, rather than writing executed in any particular manner. As for "concluded intention" the normal method of indicating concluded intention is by subscription and no further formality appears to be required for that purpose. The "marking out" function is of most relevance in relation to missives for the purchase of heritage. More by the chance historical development of the law than by design, the actual contract documents in a file are marked out by having the words "adopted as holograph" on them-unless, of course, they are actually holograph, or the sender has not marked these words on his copy of an outgoing letter, or someone has foolishly or inadvertently added the words "adopted as holograph" to non-contract documents in the file. This is clearly not an essential function. There is no requirement that contract documents relating to moveables or services should be adopted as holograph, holograph or attested, although some transactions relating to moveables or services are extremely complex. If contract documents relating to land were valid by virtue of mere subscription they could in practice be marked out by other means, such as being prominently headed "Offer", "Qualified Acceptance" or "Acceptance" as the case may be. We return to this question later. There are arguments both ways on the "protective" function. Clearly, certain extreme requirements-such as requiring certain writings to be executed in the presence of a notary-could provide some protection for the weak-minded or vulnerable against unwisely entering into a contract or granting a disposition or making a will. But the cost and inconvenience would be disproportionate to the advantages gained. It is not clear that anything less than the presence of a notary would provide effective protection. Someone who needs protection against foolishly signing also needs protection against foolishly signing in front of witnesses and against being persuaded to write "adopted as holograph". For most people a requirement of subscription is a sufficient protection: it is sufficient, for example, in relation to cheques, promissory notes and share transfers. The protection of a few must be weighed against the inconvenience to many, and the risk of transactions being needlessly, and perhaps unjustly, invalidated on formal grounds.

Assessment of various formal requirements

4.14 For some purposes a writing must be sworn before a notary public. A written renunciation of occupancy rights under the Matrimonial Homes (Family Protection)(Scotland) Act 1981, for example, has effect only if the renouncing spouse at

1. *Paterson* v *Paterson* (1897) 25R 144 per Lord Moncrieff at 167.

the time of making the renunciation has sworn or affirmed before a notary public (or the equivalent in other countries) that it was made freely and without coercion of any kind.[1] This type of protection is justified, in our view, only in exceptional cases. It would be unnecessary and far too cumbersome and expensive for missives, gratuitous obligations, wills, dispositions and the other cases with which we are here concerned.

4.15 Attestation by a witness or witnesses is a natural way of providing for a deed to be probative (in the sense of self-proving). We recommend later that attestation should always be available as an option for this purpose. As a requirement for formal validity, however, the merits of attestation are less obvious. It is too heavy a requirement if all that is needed is a simple written record of a transaction. It is also more than is needed as an indication of concluded intention. It would be highly inconvenient if missives for the purchase of land or buildings had to be attested: so attestation would be too heavy for this purpose too. It is not a good protective requirement either. Anyone who can be duped into signing something can be duped into doing so before witnesses, and the actual attestation and completion of the testing clause can be done outwith the granter's presence. The history of the Scottish authentication statutes shows, moreover, that, when used as a requirement for formal validity, attestation is more complicated than it seems at first sight. It may be necessary to regulate such matters as the qualifications of the witnesses, the knowledge which they must have of the granter, what they must witness, and the time-span within which they must sign. Some of these matters, as we showed in the memorandum, have given rise to considerable difficulty: even after several centuries the law is still not entirely clear on the time-span within which the formalities for attestation must be completed.[2] There is a dilemma here. If the required qualifications of witnesses and the requirements for a valid attestation are regulated in some detail there is a danger that writings which are undoubtedly authentic will fail to receive effect because something went wrong with the attestation process. If, to guard against this danger, there are virtually no rules on who can act as a witness and what counts as a valid attestation there is a danger that attestation will be, and will be seen to be, an empty and meaningless formality.

4.16 A requirement that a writing be holograph if it is to be regarded as formally valid would, if it stood alone, be plainly absurd. It is many years since typewriters were invented. To require, say, missives and dispositions to be written by the granter would be out of the question, even if the granter were a single individual, and inconceivable if the granter were, say, a company or a body of trustees. A requirement that a writing be holograph makes sense only if it is an alternative to some other formality such as attestation. Even then it is curious. The fact that a writing is entirely or mainly in the granter's handwriting may certainly make it easier to prove its authenticity but that is not the question at issue. We are concerned here with the question whether a writing, admitted or proved to be the authentic writ of the granter, must be denied effect because it is not formal enough. 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. A holograph writing is no better as a record of a transaction or as an indication of concluded intention than a subscribed typed writing. One holograph writing is not "marked out" from others on a file. A requirement that a writing be holograph provides some protection against signing something the contents of which are unknown but not much protection against hasty or ill-considered offers or undertakings. In short, it is difficult to justify conferring any special privilege on holograph writings. If holograph writings are recognised as formally valid, there is no good reason for not recognising any subscribed writing as formally valid. Indeed if a writing typed by the granter, and bearing to be so typed, and subscribed by him is held to be holograph (as was held in the seven-judge case of *McBeath's Trustees* v. *McBeath*[3]) then the formal validity of a typed writing comes to depend on who typed it, which seems a pointless distinction. To regard holograph writings as formally valid was a

1. 1981 Act s 1(5) and (6).
2. See the memorandum paras 2.36 to 2.39.
3. 1935 SC 471.

sensible reaction to the strictness of the authentication statutes (which could be interpreted as applying only to writs written by a writer other than the granter)[1] and was as far as the courts could go, given the terms of the old statutes. Once these statutes are repealed there is no barrier to extending the same rule to all subscribed writings.

4.17 The "adopted as holograph" formula is of little or no value in relation to the evidential function or the concluded intention function. It is also of little value in relation to the protective function. A gullible person may easily be induced to write the words "adopted as holograph" above his signature. In *Harvey* v *Smith*,[2] 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. It so happens that, as an accidental side effect, the "adopted as holograph" formula performs a marking out function in relation to missives for the purchase or sale of heritage.[3] This depends on the good sense of solicitors in not using the formula indiscriminately and it is by no means clear that other, equally convenient and effective, marking out techniques could not be developed. A criticism of the "adopted as holograph" formula is that it is "mumbo jumbo" to the average person. What does it mean in a letter from a firm of solicitors? Surely it cannot mean "We wish this letter to be treated as if it had been handwritten by us"? The layman might well ask why a firm of solicitors should wish its immaculately processed letter to be regarded as handwritten. He might well ask how a letter could be handwritten by a firm with several partners. The "adopted as holograph" formula has great merit as an ingenious escape from the strictness of the authentication statutes but it has no intrinsic merit as a formality in its own right. The points made in the preceding paragraph apply equally here. If it is admitted that writing which is adopted as holograph is formally valid, there is no good reason, once the authentication statutes are repealed, for not regarding any subscribed writing as formally valid. If, however, it were to be thought that some formula should be retained for certain cases then consideration would need to be given to whether "adopted as holograph" was the most suitable. We do not believe there is any rational ground for conferring a special privilege on holograph writings and our recommendations on formal validity do not do so. If holograph writings are to enjoy no special privilege it would clearly be nonsensical to retain the "adopted as holograph" formula as such. In the memorandum we suggested for consideration that, if a formula were to be retained, it might be something like "intended to be legally binding".[4]

4.18 Sealing was formerly required for writings, even by private individuals, and is still used in writings by companies. As a formal requirement it fulfils the marking out function very well but this is its only merit. We would certainly not suggest reviving this meaningless formality for writings by individuals in Scots law.[5]

4.19 Simple subscription is the only formality required under the present law for cheques, other bills of exchange, promissory notes and share transfers.[6] Vast sums may change hands by virtue of simple subscription. Complicated contracts involving moveables may simply be subscribed. Subscription is commonly accepted as the mark of concluded intention. A requirement of subscription is regarded as a sufficient protection in many situations. People realise their signature may commit them. There are many advantages of subscription as the sole requirement for formal validity in the cases under consideration-including missives for the purchase of land, certain

1. *Macdonald* v *Cuthbertson* (1890) 18R 101 per Lord McLaren at 107.
2. (1904) 6 F511. The court managed to relieve the offeror of his 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.
3. It will not, of course, mark out all the contract documents on a file unless copies of outgoing offers and acceptances are marked too. This is not always done.
4. We do not favour the use of any such formula. See para 4.25 below.
5. The Law Commission for England and Wales has recently recommended that the requirement of a seal for the valid execution of a deed by an individual should be abolished. Report on *Deeds and Escrows* (Law Com No 163, 1987).
6. Bills of Exchange Act 1882 ss 3(1), 83(1); Companies Act 1985 s 183; Stock Transfer Act 1963 s 1. The Stock Transfer Act 1982 enables certain securities to be transferred through a computerised system "without the need for an instrument in writing".

gratuitous obligations, certain trusts, dispositions and other conveyancing deeds. It is simple, efficient and easily understood. There is less to go wrong. There is less danger of admittedly genuine writings being held to be invalid because of some purely technical defect. There would be no need for special rules on privileged writings-whether holograph, adopted as holograph or *in re mercatoria*. There would be less need to rely on *rei interventus* or homologation to prevent a party to an informal writing from escaping from his obligations. There would be no need for clauses in wills or other writings providing for later subscribed writings to be valid. It would still, of course, be possible for parties to have an attested writing as an optional extra and we make recommendations later on the probativity of such writings. It would still be possible for the law to insist on probative writings for certain purposes.[1] But a bungled attempt to gain the advantages of probativity would not result in the loss of formal validity, provided that the writing was subscribed.[2] In short, a requirement of simple subscription seems to offer many advantages. In a system which already recognises the formal validity of writings which are holograph or adopted as holograph, and which already recognises that writs *in re mercatoria* (a very wide category) are valid if subscribed, it is unlikely that a recognition of subscribed writings would give rise to new disadvantages. We return, however, to this question later when we consider separately the various cases for which writing is required.

Options for reform

4.20 In the memorandum we expressed a marginal preference for a requirement of only subscribed writing for all the cases under consideration (i.e. including missives, dispositions and wills) but invited views on the following options.

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

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 formula such as "Intended to be legally binding".

Option 3. The requirements for formal validity (as opposed to probativity) should vary from case to case. In some cases (e.g. gratuitous obligations where writing was required and wills) it might be simple subscription: in others (e.g. missives) it might be the addition of a formula: in others (e.g. dispositions) it might be attestation.

4.21 Consultation produced a mixed response. The majority of those who commented on this question favoured option 1 (simple subscription). Two consultees supported option 2 as presented, and one supported a modified version of it which would have retained a role for holograph writings. One body preferred the present law, including the "adopted as holograph" formula. A minority of consultees (including the Council of the Law Society of Scotland and the Council of the Society of Writers to H.M. Signet, by a majority) favoured option 3. One firm of solicitors, while expressing no preference for any option, made a plea for a dispensing power so that a defectively executed writing could be validated by, say, a judge of the Court of Session-"a safety valve for the odd things which happen from day to day". Another consultee, while not expressing any preference, thought that "it should be possible for an ordinary person to feel confident of completing formal execution without the presence of a solicitor advising every signatory" and that people should not be deprived of rights because of technical defects. The Keeper of the Registers of Scotland also submitted valuable comments which we consider later in the context of conveyancing writs.

4.22 On the basis of the consultation it seems to us that the choice is between option 1 (simple subscription) and option 3 (different rules for different cases). We proceed therefore to consider separately the different cases where writing is required.

1. See paras 5.46 to 5.56 (registration of documents) and 5.57 to 5.58 (confirmation of executors).
2. This would simply carry the principle of s 39 of the Conveyancing (Scotland) Act 1874 one stage further. Witnessing would no longer be part of the essential formalities.

Certain contracts and obligations relating to land

4.23 The typical example of a contract in this category is the contract for the purchase or sale of a house. Under the present law such a contract is commonly concluded by missives-that is, an offer in the form of a letter, met by an acceptance in the form of a letter. If the acceptance is qualified it must be met by an acceptance of the qualifications and so on. Each letter in the series is commonly prepared by the client's solicitors, and adopted as holograph and signed by them as the client's agents. In the case of new houses, however, the offer is very often signed and adopted as holograph by the prospective purchaser. We shall take the case of missives for the purchase or sale of a house as representing all of the contracts and obligations relating to land with which we are here concerned.[1]

4.24 The requirement that missives be attested, holograph or adopted as holograph can lead to unfortunate results, as the following cases show.

1. In the early case of *Park* v. *McKenzie & Lawson*[2] there was an offer written by McKenzie and subscribed by both McKenzie and Lawson to purchase a tenement from Park. This was met by a signed and attested acceptance by Park. Some time later Park, "being tempted by a better offer," sold the tenement to someone else. McKenzie and Lawson sued for implement, and Park pleaded that the contract was formally invalid "being defective in the solemnities required by the Act 1681". The court upheld this plea. A reclaiming petition was strenuously argued but the court adhered to the first decision "upon a ground", as the reporter put it, "that, in my opinion, has no support from reason, analogy, or decisions namely, that a deed defective in the solemnities of the Act 1681 is null and void, and no better than blank paper; and therefore that there must be *locus poenitentiae* as if the bargain had been entirely verbal."

2. In *Goldston* v *Young*[3] Young wrote out a letter for Goldston to sign, offering to purchase Young's shop at 90 Nicolson Street, Edinburgh for £790. Goldston signed the letter. On the same day Young wrote out and signed an acceptance and delivered it to Goldston. Accordingly there was a subscribed offer met by a holograph and subscribed acceptance. Before any actings followed Young changed his mind. Goldston sued for implement of the bargain, or alternatively for damages. The court dismissed the action on the ground that the offer was not holograph or attested.

3. In *Sinclair* v *Weddell*[4] the parties reached an agreement that Weddell would lease a public house in Bathgate to the pursuer on stated terms. At Sinclair's request Weddell wrote out, signed and gave to him a statement setting out the terms of the agreement. Later Weddell withdrew from the bargain and Sinclair raised an action for damages. After the action was raised Sinclair added his signature to the document. The court dismissed the action on the ground that the document was holograph of only one of the parties. The decision, it seems clear, would have been the same if both parties had signed the agreement as soon as it was written out.

4. In *Allan* v *Millar*[5] the pursuer had advertised certain subjects for sale. He received what looked like a holograph offer. His solicitor accepted by a letter which was adopted as holograph. The defender tried to get out of the bargain by pleading that the offer had in fact been written by his wife. The court held that the subjects (the stock of a small-holding, including growing raspberry bushes and a shed) were predominantly moveable and that accordingly the requirement for formal writing did not apply. Had the subjects been predominantly heritable the defender would have been able to escape from his bargain,

1. For the complete list see para 2.20 above.
2. (1764) M 8449.
3. (1868) 7M 188.
4. (1868) 41 Scot Jurist 121.
5. 1932 SC 620.

even if he had signed the offer, on the ground that it had been written by his wife and not by himself.

We do not think that it reflects any credit on the law if bargains such as these are denied effect because of the absence of the "adopted as holograph" formula. It is very hard to see why there should be one rule for ships, aeroplanes, oil rigs and other moveables and another for land. We are not persuaded that subscription is insufficient "to concentrate the mind of the granter to the necessary degree and to impress upon him the importance of his act and its consequences", as one professional body put it. We prefer the view of another professional body that "most people regard formal documents to which they are required to put their name as legally binding". In any event it is normally by or on the advice of solicitors that the adopted as holograph formula is added, and solicitors know well the importance and consequences of an offer or acceptance. The only possible justification for requiring the words "adopted as holograph" to be added to missives is that they serve to mark out the contract documents on a file. Again, however, we find it hard to see why this is necessary in the case of land but not in the case of contracts relating to moveables, and necessary in Scotland but not in England and Wales and other countries. If the requirement were removed it would still be possible for solicitors to mark out the contract documents by, for example, appropriate headings.

4.25 It would be highly inconvenient if missives had to be attested. The choice, as we see it, is between simple subscription and subscription plus a formula. To use "adopted as holograph", if holograph writings had no special privileges, would divorce the law from reality. To use a formula like "Intended to be legally binding" would prompt the question why only some contract documents needed to be fortified by these words when all were equally intended to be legally binding. Some commentators, moreover, were adamant that, for practical reasons, any alternative formula should be shorter than "Adopted as holograph". "Intended to be legally binding" would be longer and would probably be seen as an unnecessary and burdensome addition by those who had to write it time after time.

4.26 We regret that, on this issue, we are differing from the views of some consultees for whose opinions we have the highest regard. These consultees were, however, in a small minority on this issue. There was strong support for the option of simple subscription, and strong opposition to any requirement of a formula like "adopted as holograph" or "intended to be legally binding". Our conclusion is that there is no sufficiently weighty argument for requiring anything other than subscribed writing for those contracts and obligations relating to land where writing will be required.

Certain gratuitous obligations

4.27 Under the present law writing is not required for the constitution of a gratuitous obligation, but is required only for proof. No special formality is required. Our proposal that writing should be required for the constitution of a gratuitous obligation, other than one undertaken in the course of a business, would change the role of writing rather than the need for it. We can see no good reason for requiring anything more than subscribed writing. It would, of course, continue to be the law in Scotland that for a promise to be legally binding it would have to be intended to create a legal obligation. A casual promise to invite someone to dinner would not normally create a legal obligation, even if it was in writing. This has nothing to do with *formal* validity but we mention it because an objection sometimes made, in systems based on English law, to a simple requirement of signed writing for gratuitous obligations is that it would catch many promises not intended to be legally binding.[1] This would not be so in Scotland.

Certain trusts

4.28 The same applies to trusts. Under the present law certain trusts need to be proved by writ or oath. The writ need not be attested, holograph or adopted as holograph. Under our proposals writing would be required for the constitution of a trust by a declaration by the truster that he holds his own property in trust. Again we can see no good reason for requiring anything more than subscribed writing.

1. See eg the Report of the Ontario Law Reform Commission on *Amendment of the Law of Contract* (1987) 44.

Dispositions and other conveyancing deeds

4.29 We are concerned here with those voluntary grants, transfers, variations or extinctions of interests in land which will have to be in writing under our recommendations.[1] They include dispositions of heritable property, feudal writs of all kinds, assignations of registered leases, and heritable securities. We shall take the disposition of a house as the typical example. At present dispositions are invariably attested. A disposition which is holograph or adopted as holograph is probably valid but, in practice, it is unlikely to be acceptable to the purchaser. We have referred earlier in this Report[2] to section 39 of the Conveyancing (Scotland) Act 1874 which provides that deeds, instruments or writings which are subscribed by the granter and bear to be attested by two subscribing witnesses are to be formally valid even if, because of some informality of execution, they are improbative. The burden of proof of their authenticity lies on the person using or upholding them and the proof may be led either in a special application to the court or in the course of other proceedings in which the writing is founded on or objected to. It is clear that, even under the present law, there may be dispositions and other conveyancing deeds which are formally valid and yet not probative.

4.30 In the memorandum we expressed a provisional preference for requiring only subscription for the formal validity of dispositions and other conveyancing deeds. The advantage of this can be appreciated only when it is considered along with our recommendations on probativity. We recommend later that a writing may acquire probativity not only by virtue of attestation but also by virtue of a court docquet added to the writing by the clerk of court and certifying that the granter's subscription had been found by the court to be authentic.[3] A system of formal validity by virtue of subscription coupled with the possibility of "setting up" a valid writing as probative would merely carry the scheme of section 39 of the 1874 Act one stage further. The only essential for formal validity would be subscription (instead of subscription plus attestation): "setting up" in court could result not only in a finding of authenticity but also in a docquet which would confer probativity for the future. If the only requirement for the formal validity of a disposition were to be subscription the practical effect, in the normal case, would be minimal. Dispositions would continue to be attested so that they would gain the advantages of probativity.[4] Just as dispositions are not simply adopted as holograph under the present law, so they would not simply be subscribed under the new law. This was also the view of the Keeper of the Registers of Scotland who, in commenting on the memorandum, said—

> "it is anticipated that the present practice of providing probative conveyancing writs will continue unabated, whatever minimum requirements for formal validity are adopted. Every purchaser and lender, it is suspected, would continue to insist upon attested and probative writs.".

The practical effects of the change would become apparent if something went wrong with the attestation. There would be a much wider and stronger safety net than is currently provided by section 39 of the 1874 Act. Provided the writing had been subscribed it would be valid and could be "set up" and rendered probative. Defects of execution could be much more readily cured. This would be particularly useful in those cases (for example, where the granter dies soon after executing a deed) where it is not possible to have an improperly attested writing re-executed.

4.31 We discuss later the requirements for, and effect of, probativity. So far as formal validity is concerned we can see considerable merit in extending the safety net of section 39 of the Conveyancing (Scotland) Act 1874 to all cases where the writing has been genuinely subscribed by the granter. The simplest and most logical way of doing that is to provide that only subscription is necessary for formal validity. If anything at all went wrong with attestation that would be an informality of execution which might affect probativity but would not cause the writing to be invalid.

---

1. See para 2.51 above.
2. See para 4.7 above.
3. See Part V.
4. Including, in appropriate cases, the advantage of being recordable in the Register of Sasines. See paras 5.46 to 5.56 below. It is interesting to note that in England and Wales, where attestation is not required for the formal validity of deeds, deeds are, in fact, nearly always attested. Report of the Law Commission for England and Wales on *Deeds and Escrows* (Law Com No 163, 1987) para 2.12.

Wills and other testamentary writings

4.32 The authentication statutes apply to testamentary writings as well as to other writings. Accordingly, in Scots law a will is formally valid if duly attested, or if holograph or adopted as holograph. A writing which is subscribed only may, as we have seen, be valid as a testamentary writing if adopted by another writing which is itself attested, holograph or adopted as holograph. A will is also formally valid in Scotland, irrespective of the place where it is made and the domicile of the testator, if it is in the form of an international will as prescribed in the Convention on International Wills.[1] The rules on international wills are stricter, as might be expected, than the ordinary rules of Scots law and require not only attestation by two witnesses but also signature by "an authorised person" present at the execution of it.[2]

4.33 There are conflicting policy considerations in the case of testamentary writings (which we shall refer to as "wills" for short). On the one hand it is desirable to guard against the danger of forgery: on the other it is desirable not to deprive genuine wills of effect because of some technical defect. There are even perhaps conflicting considerations as to the desirability of making it easy for people to make their own wills without the help of a solicitor. On the one hand it can be argued that home-made wills can be a source of difficulty and litigation: on the other, that wills can be simple and that there is no reason to deprive people of the choice between making their own will and having one prepared by a solicitor. If they wish to run the risk of legal difficulties after their death that is their concern. There is also the consideration that a solicitor is not always available. Someone in danger of death in a car trapped in a snow drift should, it may be argued, be able to make a valid will there and then.

4.34 Scots law at present clearly makes it easy for people to make their own wills. Even a will typed by the testator himself, and bearing to be so typed, has been upheld as a holograph will.[3] And a will typed by someone else is formally valid if the words "adopted as holograph" are added by the testator. These three words would not, it may be supposed, present any more difficulty to a skilled forger than the testator's signature. Yet, so far as we are aware, forged wills have never been a problem in Scotland. There have, however, been a number of cases where even the limited formal requirements of the present law have given rise to difficulty and litigation. A typical case has been where the testator has filled up and signed a printed will form but has not added the words "adopted as holograph".[4] The courts have then had to engage in the rather sterile and formalistic exercise of deciding whether enough of the document has been written by the testator to allow it to qualify as holograph. In most, if not all, of these cases there has been no doubt as to the authenticity of the will: the only question has been whether it satisfied the formal requirements of the law.

4.35 We have not found this an easy question. Clearly there are arguments both ways. On balance, however, we consider that there is merit in the Scottish tradition of having the same requirements for all formal writings: in this way people are more likely to know where they stand: different requirements for different classes of writings are likely to confuse and lead to unnecessary errors. We also consider that there is merit in the Scottish tradition of providing a simple way for people to make their own wills. We would not be in favour of tightening the formalities to such an extent that a person could not make a simple will leaving everything to, say, his or her spouse or lifelong companion without legal assistance: we would not be in favour, for example, of making the requirements for an international will mandatory for all wills under Scots law. If we are right in this general approach—and we readily concede that different views could be taken—then simple subscription should be enough for the formal validity of a will or other testamentary writing. Again, we envisage that wills prepared by solicitors would continue to be attested in order to gain the benefit

1. Administration of Justice Act 1982 s 27 and Sched 2.
2. In the United Kingdom solicitors and notaries public are authorised persons: 1982 Act s 28.
3. *McBeath's Trs* v *McBeath* 1935 SC 471.
4. *Maitland's Trs* v *Maitland* (1871) 10M 79; *Macdonald* v *Cuthbertson* (1890) 18R 101; *Carmichael's Exrs* v *Carmichael* 1909 SC 1387; *Bridgeford's Exr* v *Bridgeford* 1948 SC 416; *Tucker* v *Canch's Tr* 1953 SC 270; *Gillies* v *Glasgow Royal Infirmary* 1960 SLT (N) 71.

of probativity.[1] If, however, something went wrong with the attestation, there would be a useful safety net. No longer would the will have to be held invalid if, for example, there was too great an interval between subscription by the testator and a witness,[2] or a witness had not seen the testator subscribe or heard him acknowledge his signature.[3] Provided it was subscribed by the testator, the will would still be formally valid.[4] This would manifestly be in the interests of the beneficiaries and also the testator's solicitors who might otherwise have been exposed to a claim for damages for professional negligence.[5] Whether allowing subscription to suffice for formal validity, even if not accompanied by the three words "adopted as holograph" or the signature of a witness, would result in more forged wills, or more fraudulently induced wills, must be a matter of speculation.[6] It must be remembered, however, that this kind of fraud is a high risk type of crime where the criminal (if he is the main beneficiary under the forged or fraudulently induced will) is identifying himself in a document which is likely to be scrutinised by lawyers and challenged by disappointed heirs if there are any suspicious circumstances. It must also be remembered that if a will is not probative the burden of establishing its validity will rest on anyone seeking to found on it, and a court is not likely to allow that burden to be easily discharged if there are suspicious circumstances. In relation to improbative wills the approach of the courts has been stated as follows—

> "Whenever there is room for suspicion or doubt as to what really was the deed or the sheets which the testator really intended to subscribe, the Court will refuse to sustain the deed. The Court will always, and rightly, exact the clearest proof upon this point, and this seems to be an ample and sufficient guarantee. It is really the only guarantee against fraud in this and in all cases."[7]

We have balanced the arguments for and against removing the "Adopted as holograph" requirement (which is what the proposed change amounts to) and have concluded that the advantages of removing it outweigh the possible disadvantages. If Parliament were to take a different view on this question it would be necessary to consider carefully what additional requirements there should be for formal validity. In particular, if attestation were to be required for the formal validity of a non-holograph will, it would be necessary to regulate what counted as a valid attestation for this purpose.[8]

Bonds and other deeds

4.36 One of the criticisms of the present law on *obligationes literis* is that if the parties choose to use writing, in a case where writing is not legally required and if the writing is of a type covered by the authentication statutes, then the writing must comply with those statutes. If it does not then it is invalid and, on one view of the law, it may not be permissible to use it as evidence of the underlying obligation. The typical example of this situation is the personal bond. We have given a great deal of thought to the question whether our draft Bill ought to contain a rule that, in order to be formally valid, a personal bond or other deed which actually creates, transfers, varies or extinguishes a right or obligation, should require to be subscribed by the granter or granters. The advantage of such a provision is that it provides an answer to the question "When is a bond (or other deed) formally valid?" That is a natural question to ask if the law recognises that the bond actually operates of its own force as a separate source of obligation, or liquid document of debt. Scots law clearly does recognise this at present. Indeed if registered for execution the bond can be directly enforced just like a court decree. The disadvantages of such a provision are that it may catch too much and it is likely to be confusing and difficult to understand. The reader is likely to ask why, if writing is not required to create the obligation, there

1. See further paras 5.57 and 5.58 below on requirements for confirmation of executors.
2. Cf *Walker* v *Whitwell* 1916 SC (HL) 75.
3. Cf *Smyth* v *Smyth* (1876) 3 R 573; *Forrest* v *Low's Trs* 1907 SC 1240
4. It could be "set up" by an application to the court under the procedure discussed below (paras 5.30-5.35) and once docquetted accordingly would have all the privileges of a probative will.
5. Cf *Ross* v *Caunters* [1980] Ch 297.
6. It should be noted that failure to sign a duly attested will on every sheet does not invalidate it under the present law. This is a matter of probativity not formal validity: the failure is merely an informality of execution which is covered by section 39 of the Conveyancing (Scotland) Act 1874. See Halliday, *Conveyancing Law and Practice* Vol I 98.
7. *McLaren* v *Menzies* (1876) 3R 1151 per Lord Gifford at 1170.
8. Cf the rules (re probativity only) in clause 5(4) of the draft Bill appended.

should be any rules at all about formal validity. He is likely to ask why in such a case, a bond or other deed should not simply be regarded as evidence, generally irrefutable, of the underlying obligation.

4.37 We have found this the most difficult issue in the whole exercise. We have tried different solutions, but all have led to difficulties. In the end we have concluded that the best course is to have no provision on the formal validity of bonds and other documents which are used to effect legal results in cases where there is no requirement of writing. This means that the answer to the question "When is a deed such as a bond formally valid?" is that that is the wrong question. The right question is "When is the obligation or transaction in question formally valid?" and the answer to that is that there is no requirement of writing at all if statute does not so provide. The theorectical effect of our approach is that a bond or other deed (in a case where writing is not required to effect the legal result in question) would no longer be a separate source of obligation or legal effect. It would just be evidence of any underlying obligation or legal act or transaction. If subscribed and probative, and if registered for execution, it would be sufficiently conclusive evidence to enable the obligation to be enforced by summary diligence. The practical effects of our approach would be minimal. Bonds and other legal deeds would continue to be subscribed (and indeed attested) for evidential or registration purposes.

Invalid writing as evidence

4.38 The doubt in the present law about whether a formally invalid writing can be used as evidence in relation to an underlying obligation is most material in relation to bonds. In this area it will not arise in future because bonds will have only an evidential function. The doubt could also arise, however, in relation to unsubscribed missives or conveyancing documents which might be useful as evidence relating to an underlying obligation which had been constituted by informal agreement followed by the requisite actings. We think that the doubt should be removed and that a formally invalid document should be available as evidence for what it is worth in any case.

Privileged writings

Writs in re mercatoria

4.39 The approach we are adopting makes any special privilege for writs *in re mercatoria* unnecessary. The only cases where writing would be required in future would be cases where the privilege of writs in *re mercatoria* does not apply (contracts or conveyances relating to heritage, testamentary writings) or could not appropriately apply (gratuitous obligation *not* undertaken in the course of a business) or should not apply (trusts created by declaration by a person that he holds his property in trust). In any event, even if there were any remaining scope for the privilege, the changes we are recommending would make the privilege meaningless. At present writs *in re mercatoria* are formally valid if subscribed.[1] In future all writings will be formally valid if subscribed, unless a statute provides otherwise or the parties stipulate otherwise. At present writs *in re mercatoria* may be subscribed by initials or by mark if that is the granter's accustomed mode of subscription.[2] We are recommending later a liberalising of the rules on what counts as subscription generally, the result of which would be that any writing would be validly subscribed if the granter appended his usual signature or mark.[3] At present the date of a mercantile writing does not have to be independently proved, but as this does not apply where the date is material (as it may be in bankruptcy proceedings[4]) it would seem to be more a statement of the practical effects of such writs than a rule of law. If this apparent privilege of mercantile writings were removed nothing would be lost. For ordinary mercantile

1. Halliday, *Conveyancing Law and Practice* Vol I 110.
2. *Ibid.*
3. Paras 6.5 to 6.21.
4. *Purvis* v *Dowie* (1869) 7M 764.

purposes the date would continue to be accepted at face value, but if any question of priority arose the date, if disputed, would have to be proved unless some special statutory presumption applies.[1] It is undesirable to have special rules for a category of writings as vague and undefinable as writs *in re mercatoria* and we consider that the opportunity should be taken to declare expressly that no special privilege attaches to a writ *in re mercatoria*.

Holograph writings

4.40 For the avoidance of any doubt it would also be useful to declare expressly that no special privilege attaches to a holograph writing.

Effect of other enactments

4.41 Our recommendations on formal validity would be without prejudice to the effect of other enactments making different provision for formal validity in the case of any particular type of writing. This is important because an enactment might permit something, which under our proposed rules would require subscribed writing, to be done by, say, writing authenticated by a printed or stamped or facsimile signature. An example is a gratuitous promissory note.[2] Conversely, an enactment might require more than mere subscription in certain cases: it might for example require notarial authentication where some special protection was thought to be required.[3] The type of provision which merely regulates the use or method of authentication of the seal of a body corporate cannot, in our view, be regarded as requiring sealing, or any particular method of authenticating a seal, for the formal validity of any of the writings with which we are here concerned.[4]

Effect of stipulations by parties

4.42 A party to a contract may stipulate that he will not be bound until the agreement is embodied in writing in a particular form. This is a matter of general contract law and will not be affected by our recommendations. A party who stipulates that he is not to be bound until the agreement is embodied in writing which is signed, sealed and witnessed is in effect stipulating that even a writing which complies with the statutory requirements for formal validity will not be sufficient to create an obligation in his particular case. Nothing in our draft Bill would prevent this or any other condition being made a prerequisite of the assumption of obligations in any case.

Recommendations

4.43 Our recommendations on the formal validity of writings are therefore as follows:

13(a) Subscription by the granter, or granters, should be the only requirement for formal validity in the case of

(i) a writing necessary for the constitution or variation of a contract, obligation or trust,

(ii) a writing which grants, transfers, varies or extinguishes an interest in land,

(iii) a will or other testamentary writing.

(b) In the case of a contract the above requirement should be held to be satisfied if the offer is subscribed by the offeror and the acceptance by the acceptor (and so on if there is a qualified acceptance).

(c) The above requirement should not prevent a writing which has not been subscribed by the granter or granters from being used as evidence of any right or obligation to which it relates.

1. There is a special statutory presumption in s 13(1) of the Bills of Exchange Act 1882. This of course would be unaffected by our proposals.
2. See eg Bills of Exchange Act 1882 ss3(1), 83 and 91. See also *Whyte* v *Watt* (1893) 21R 165 ("signed" in statute on registration of voters covered cyclostyled signature).
3. See eg the Matrimonial Homes (Family Protection)(Scotland) Act 1981 s 1(6).
4. See eg the Transport Act 1962 Sch 1 para 4 (as substituted by Transport Act 1968 s 52(4)-"The application of the seal of any Board shall be authenticated by the signature of the secretary of the Board or some other person authorised by the Board, either generally or specially, to act for that purpose". There are many similar statutory provisions. For the authentication of writings by bodies corporate see paras 6.59-6.62 below.

(d) These rules should be without prejudice to any other enactment making different provision for formal validity in the case of any type of writing.

(e) Holograph writings and writs in re mercatoria should no longer enjoy any special privileges.

(Paragraphs 4.23 to 4.41; clauses 4 and 22)

Alterations

4.44 We deal later with the evidential question of when an alteration may be presumed to have been made before subscription.[1] We also deal later with the effect of alterations on probativity.[2] Here we are concerned with the question of formal validity. There is no difficulty, from this point of view, about an alteration made before subscription.[3] It will form part of the document actually subscribed: no separate question of formal validity arises.

4.45 There is more difficulty about an alteration (by which we mean an interlineation, marginal addition, deletion, erasure or anything written on erasure) made after subscription. As a matter of strict logic it could be suggested that any such alteration is in effect a document of variation or codicil and that it ought therefore to be authenticated in the same way as such a document or codicil if it is to be formally valid. This would be stricter than the present law is in relation to certain types of document and, in our view, it would be too strict. Under the present law a post-subscription alteration to a will receives effect if it is signed or initialled by the testator.[4] Similarly a post-subscription alteration to a gratuitous promissory note is effective if it is initialled by the drawer. This seems to us to be sensible and convenient. There is often no room for a proper subscription of an alteration: initialling or sidescribing may be all that is practicable. We have no wish to force people to resort to separate minutes of variation or codicils or new documents in circumstances where the present law would permit a signed or initialled alteration. The rules of the present law relating to attested, non-testamentary, non-privileged writings are probably stricter than those relating to, for example, wills and promissory notes.[5] However, as we are recommending a uniform rule for the formal validity of all the documents under discussion in this part we think that there should also be one rule in relation to the formal validity of alterations made after subscription. In general we think that a post-subscription alteration ought to be authenticated by the granter or granters but that, in recognition of the impracticability of requiring full subscription, authentication by signature or initials should suffice.[6]

4.46 Under the present law a testator can revoke a testamentary provision by deleting it, deliberately and with revoking intention: there is no need to authenticate the deletion although this is, of course, advisable.[7] We have no wish to interfere with this rule and our recommendations on alterations make an express exception for it. We also make an exception for the provisions of the Erasures in Deeds (Scotland) Act 1836 and section 54 of the Conveyancing (Scotland) Act 1874 which prevent

1. See paras 5.22 and 5.35 below.
2. See para 5.22.
3. While there is no difficulty from the point of view of principle and law reform, there is confusion on this question in the present law. Contrast *Gibson's Trs* v *Lamb* 1931 SLT 22 and *Elliot's Exrs Petrs* 1939 SLT 69 with *Syme's Exrs* v *Cherrie* 1986 SLT 161 and see the criticisms of the last mentioned case in Reid, "Execution or Revocation" 1986 SLT (Articles) 129.
4. *Pattison's Trs* v *University of Edinburgh* (1888) 16R 73 per Lord McLaren at 76 and 77.
5. See Halliday, *Conveyancing Law and Practice* Vol I 88-89. There are however old cases (including two decisions by the House of Lords) where effect appears to have been given to marginal additions which were signed but not attested and not noted in the testing clause. See *Cuming* v *Presbytery of Aberdeen* (1721) 1 Robertson's App 364; *Spottiswood* v *Creditors of Prestongrange* (1741) M 16811; 5 Brown's Sup. 709; *Bruce* v *Bruce-Carstairs* (1770) M 10,805; aff'd (1772) 2 Paton's App 258. In two of these cases (*Cuming* and *Bruce*) the addition was alleged to be post-execution. It is not in any event clear why the decisions on testamentary writings should not apply to other writings. The authentication statutes apply equally and a non-testamentary writing can be varied after subscription and before delivery just as a testamentary writing can be varied after subscription and before death.
6. On the probativity of such alterations see para 5.23 below.
7. *Magistrates of Dundee* v *Morris* (1858) 3 Macq 134; *Pattison's Trs* v *University of Edinburgh* (1888) 16R 73 at 76-77; *Milne's Exr* v *Waugh* 1913 SC 203; *Allan's Exrx* v *Allan* 1920 SC 732.

challenges, on the grounds that something is written on erasure, to notarial instruments, instruments of sasine, notices of title and other writings recorded in the Register of Sasines unless it is proved that the erasure was made for the purpose of fraud or the record is not conformable to the writing as presented for recording.

4.47 Under the present law there is some doubt as to whether any special privilege attaches to holograph writings or alterations. In one case in 1844 there are *obiter dicta* to the effect that the normal rules on alterations do not apply to holograph alterations to holograph writings.[1] A few years later this was extended to holograph words written on erasure in a non-holograph attested writing.[2] It was also held, about the same time, that an unsigned uninitialled holograph marginal addition could receive effect.[3] The reasoning in these cases is not satisfactory. It appears to be based on the notion that the holograph addition is authenticated merely by being in the hand of the granter and that any other authentication is unnecessary. It was not, however, so clear then as it is now that subscription is essential for the formal validity of a holograph writing[4] and it seems doubtful whether these cases, or *dicta*, can still be regarded as sound.[5] In any event we recommend that no special privilege should attach to holograph alterations or holograph writings. We appreciate that there is a strong case for not invalidating, for technical reasons, a post-execution alteration to a testamentary writing where it can be shown to the satisfaction of a court that the alteration was made by the testator himself with deliberate testamentary intention. However, we think that the remedy for unauthenticated post-execution alterations to testamentary writings is not to have a special rule for holograph alterations or holograph writings but to allow the court a dispensing power so that, on being satisfied that the alteration was made by the testator, with the requisite intention, it could hold the alteration valid notwithstanding the absence of authentication. We have this under consideration in our work on succession law.[6] We therefore **recommend** that:

14(a) An alteration to a writing which requires subscription for formal validity should be regarded as forming part of the writing if, but only if, it was made before the writing was subscribed by the granter or, if there is more than one granter, by the granter first subscribing.

(b) An alteration to such a writing which is made after the document was subscribed by the granter, or if there is more than one granter, by the granter first subscribing, should be capable of taking effect as a variation of the terms of the writing if, but only if, it is signed or initialled by the granter or, if there is more than one granter, by all the granters. For the purposes of the other recommendations in this report such an alteration should be treated as a writing.

(c) "Alteration" in this recommendation means any interlineation, marginal addition, erasure or deletion and anything written on erasure.

(d) Nothing in this recommendation should affect the law on the revocation of testamentary provisions by deletion or erasure, or the operation of the Erasures in Deeds (Scotland) Act 1836 and section 54 of the Conveyancing (Scotland) Act 1874.

(Paragraphs 4.44 to 4.46; clauses 8 and 23)

1. *Robertson* v *Ogilvie's Trs* (1844) 7D 236 at 242. The case was decided on the ground that the alterations were not material. In any event the testator had "authenticated the alteration by a holograph marginal addition, which he subscribed". *Ibid* per Lord Ordinary Cuninghame at 240. In *Magistrates of Dundee* v *Morris supra* Lord Chelmsford accepted (*obiter* at 152) that holograph writings were privileged in this respect.
2. *Grant* v *Stoddart* (1849) 11D 860. Lord Jeffrey (at 870) had great doubts on this point.
3. *Horsbrugh* v *Horsbrugh* (1848) 10D 824.
4. In *Grant* v *Stoddart* (above) Lord Mackenzie observed (at 867) that subscription of a holograph deed was not always necessary. For the modern approach see *Taylor's Exrs* v *Thom* 1914 SC 79; *McLay* v *Farrell* 1950 SC 149. It is to be noted that in *Hogg's Exrs* v *Butcher* 1947 SN 141 and 190 the marginal additions were holograph and subscribed.
5. See however *Gray's Trs* v *Dow* (1900) 3F 79, where an unauthenticated holograph codicil squeezed in above the testator's original subscription was held valid. See also *Fraser's Exrx* v *Fraser's Curator Bonis* 1931 SC 536 where an unsubscribed, uninitialled holograph postscript to a holograph will was held to be valid. This case was distinguished in *McLay* v *Farrell* 1950 SC 149 and followed without enthusiasm in the Outer House case of *Reid's Exrs* v *Reid* 1953 SLT (Notes) 51.
6. See our Consultative Memorandum on *The Making and Revocation of Wills* (No 70, 1986) para 2.18.

Part V Probativity of Writings

Introduction

5.1 The term "probative writing" is used in different senses in Scots law. Sometimes it is used to mean a writing which is executed in accordance with the solemnities prescribed by the authentication statutes.[1] Sometimes it is used in the sense of a writing which affords proof of its own authenticity and which is therefore presumed to be authentic and formally valid until the contrary is established in court proceedings.[2] The two definitions focus on different stages. The first focusses, somewhat confusingly, on how the writing was executed. The second focusses, more understandably, on the effect which the writing has. A writing which has not in fact been properly executed in accordance with the authentication statutes, and which is not probative in the first sense, may nonetheless appear on its face to have been so executed and may therefore be probative in the second sense. In the memorandum we used the word "probative" in the second and wider sense of "self-proving". We use it in the same sense in this Report. Indeed, the repeal of the authentication statutes would make any other use inconceivable. We draw a careful distinction between formal validity and probativity.[3] A subscribed disposition, or testamentary writing or offer to purchase a house would be formally valid under the scheme we are proposing but it would not, without more, be probative. It would not bear on its face sufficient proof of its own authenticity. In this part of the Report we consider what the requirements for probativity should be.

Probativity by attestation

General

5.2 In the memorandum we asked whether Scots law should continue to make provision for writings which are probative by virtue of attestation. We pointed out that two alternatives might be considered. The first would be to make no provision at all for probative writings. The second would be to reserve the privilege of probativity for writings bearing to have been authenticated by a notary. Our provisional view was that the Scottish system of probativity by virtue of attestion had advantages over both these systems. It provides a method whereby the need to produce extrinsic evidence of a writing's authenticity can be avoided and whereby those asked to accept writings can have some assurance that they are genuine. It does so without the expense and inconvenience of notarial execution in all cases. Our provisional conclusion was that Scots law should continue to make provision for writings which are probative by virtue of attestation. This was supported, almost unanimously, on consultation, and we therefore **recommend** that:

15. Scots law should continue to make provision for writings to be probative (i.e. to prove their own authenticity) by virtue of attestation.
(Paragraph 5.2; clauses 5 and 14 to 19)

5.3 The result of providing for probativity by virtue of attestation in a system where subscription suffices for formal validity is to give people an option. If they want a writing which is not only valid but also self-proving then they can choose attestation. This will be a sensible choice in any case where a writing is liable to be produced

1. See eg Halliday, *Conveyancing Law and Practice* Vol I 76.
2. See eg Walker and Walker, *Evidence* 182.
3. This distinction exists, of course, under the present law. A holograph will is formally valid but not probative. An offer to buy heritage is formally valid if adopted as holograph, but is not probative.

and founded upon for a considerable period of time, particularly if its authenticity is likely to be challenged. Where, however, as in the case of missives between solicitors, a writing is intended to be shortly superseded and is unlikely to have its authenticity challenged, simple subscription would be quite sufficient. In some cases the parties' choice may be limited by the requirements for registration or recording. We recommend later that, as a rule, only a probative writing may be recorded in the Register of Sasines, or registered for preservation and execution in the Books of Council and Session or in sheriff court books.[1]

Acquisition of probativity

5.4 Under the present law a writing acquires probativity if certain things appear on the face of it. We consider that this should continue to be the case. It is illogical to make the acquisition of probativity depend on extrinsic facts. It is self-contradictory to say "This document proves itself if certain extrinsic facts are proved". In the memorandum we proposed that six things should appear on the face of a writing before it would be probative by virtue of attestation. These were (1) subscription by the granter, (2) subscription by a witness, (3) the date and place of subscription by the granter, (4) a statement that the witness saw the granter sign or heard or saw him acknowledge his signature, (5) a statement that the witness was over 16 years of age, and (6) the date when the witness signed.[2] Although many consultees agreed with this approach, others thought that it would result in too much appearing on the face of the writing and would be impracticable. The Law Society of Scotland, in particular, thought that some of the items in the above list (eg the statement of the witness's age) should not have to appear on the face of the writing but could be presumed to be complied with unless a challenger of the writing proved the contrary. Other consultees pointed out that it would be necessary to provide for loss of probativity if one of the statements in the writing (eg that the witness saw the granter sign or heard or saw him acknowledge his signature) was shown in the course of court proceedings to be false. We think there is force in these views and that a very much simpler and more practicable form of testing clause can be achieved by adopting a variant of the Law Society's suggestion. Only the bare minimum would be required to appear on the face of the writing for the acquisition of probativity but if the writing was challenged in any court proceedings the benefit of probativity would be lost, for the purpose of those proceedings, if certain requirements were shown not to have been complied with.[3]

Subscription by granter

5.5 It is clear that for a writing to be probative it would have to bear to be signed at the end by the granter. What is less clear is whether it should also bear to be subscribed by the granter on each page or sheet. This was formerly a requirement in all cases but the law was altered in relation to non-testamentary writings by section 44 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which provides that where a non-testamentary writing is subscribed, and (where appropriate) sealed, on the last page

> "it shall be no objection to its probative character that it is not subscribed or, as the case may be, subscribed and sealed on every other page."

This provision implemented a recommendation of the Halliday Committee on Conveyancing Legislation and Practice[4] which gave the following reasons for it.[5]

> "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

1. See paras 5.46 to 5.56 below.
2. Paras 7.2 to 7.17 and 7.27.
3. See para 5.25 below.
4. Cmnd 3118 (1966).
5. Para 17.

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."

The argument on inconvenience is compelling but the others less so. Not all of those who have the custody of writings will be beyond temptation and the danger period for substitution of pages is *before* registration. We invited comments as to whether the policy of section 44 was right and suggested that a possible alternative might be to require each page to be initialled. There was a division of opinion on this issue. Nine consultees favoured a requirement that each page or sheet be authenticated by the granter. Of these, three thought subscription should be required and the rest favoured initialling. The arguments in favour of authentication of each page were that probativity is a high privilege, that a writing cannot reasonably be regarded as proving its own authenticity if there is nothing on the face of the earlier sheets to indicate that they were not substituted after subscription and that cases of substitution (without fraudulent intent) are common in practice. Eight consultees were strongly opposed to any requirement of subscription or initialling in the case of non-testamentary writings. The arguments against the requirement were that the change in 1970 had been very welcome on grounds of convenience and that no serious problems had resulted from it. In particular there was no evidence of any increase in forgery. It was pointed out that some commercial documents extended to hundreds of pages and that it would be highly impracticable to require each page or sheet to be signed. In general it was felt by these consultees that it would be a retrograde step to revert to the pre-1970 law.

5.6 We have found this a difficult question. There are weighty arguments and weighty consultees on each side. In essence it is a case where logic points one way and expediency another. Logically a document should not be self-proving if there is nothing to indicate the authenticity of the pages other than the last. In these days of word processors it is all too easy to substitute one unsigned page for another without leaving any indication that this has been done. On the other hand the 1970 change has clearly been welcomed by many of those concerned with the execution of bulky documents and it obviously would be highly inconvenient to revert to the earlier position. A granter who is concerned about the risk of pages being substituted can, if he wishes, sign every page and declare in the testing clause that he has done so. If section 44 of the 1970 Act had never been enacted we doubt whether we would have been persuaded that it was right to confer the privilege of probativity on pages which were manifestly not self-proving in any way. However, it has been enacted, it has been welcomed, it has worked, and there is a substantial body of opinion opposed to reversion to the previous law. In these circumstances we conclude that expediency wins and we do not recommend any requirement of initialling or subscribing each page of a non-testamentary writing. We observe that, if this is accepted, the case for anything other than the simplest requirements for the last page becomes extremely weak. There is no point in requiring elaborate formalities for the last page if all the other pages are accepted at face value without any authenticating mark whatsoever.

5.7 Consultees were generally agreed that a requirement that each page or sheet be authenticated should continue to be a condition of probativity in the case of testamentary writings. This seems reasonable. Such writings are executed by individuals and therefore there is not the problem of multiple signatures. They are generally short and each individual generally executes only a limited number (at most) in a lifetime. So the arguments based on expediency do not apply. We agree therefore that there should continue to be a requirement that each page or sheet of a testamentary writing should be authenticated by the granter if the writing is to be self-proving. Logically, it is only each *sheet* of paper (which might make up two or four pages) which needs to be authenticated. Logically, too, there is no need for subscription as opposed to signature, except at the end of the last sheet. The important point is that the granter should have signed somewhere on each sheet other than the last. We make a composite recommendation on probativity by virtue of attestation later and we there recommend that in the case of testamentary writings, in addition to subscription and attestation at the end in the usual way, each sheet other than the

last should require to be signed by the granter.[1] We stress that this relates to probativity only. Subscription at the end would suffice for formal validity.

Date and place of subscription by granter

5.8 In the memorandum we proposed that the date and place of subscription by the granter should appear on a writing as a condition of probativity. Although most consultees agreed with this proposal, a few considered that a statement of the date and place should be optional. The Law Society of Scotland in particular considered that, while inclusion of the date and place of subscription by the granter would be desirable, it should not be essential for the purposes of probativity. In the light of the comments received we have given this question further consideration. We note that, while in practice the date of subscription by the granter would be mentioned in a carefully prepared deed, it is not essential under the present law. In many cases, the date of delivery is more important than the date of subscription. In an exercise designed to reduce unnecessary formalities we would be reluctant to introduce a new requirement for probativity, the absence of which could only be corrected by means of an application to a court. The same applies to place of execution, only with more force. Only rarely (for example, if there is a private international law question involved) will this be of crucial importance and it would seem hard, for example, to deny an attested will the benefit of probativity merely because the testator had omitted to mention where it was executed. We have therefore come to the view that a statement of date and place of subscription should not be essential for probativity. It would, however, be desirable and we have included a reference to date and place in the model testing clauses referred to later.[2]

How many witnesses?

5.9 The authentication statutes, curiously, do not state how many witnesses are required but it has generally been accepted that two are necessary and sufficient, in conformity with the general rule of evidence requiring corroboration. However, the Civil Evidence (Scotland) Bill, currently before Parliament, abolishes the requirement of corroboration in civil proceedings, in so far as it still applies.[3] There are practical arguments for reducing the required number of witnesses to one. It would make the execution of probative documents a simpler and quicker process and would cut down the opportunities for things to go wrong at the attestation stage. In the case of documents with multiple signatories the simplification could be quite significant. Our provisional conclusion in the memorandum was in favour of a requirement of only one witness. Opinion was divided fairly evenly on consultation, with a slight majority in favour of a reduction to one witness. The argument for two witnesses was that they provided a greater safeguard against fraud and forgery without adding greatly to the inconvenience of attestation. The argument for a reduction to one witness was that this would make for simpler attestation while providing adequate protection. To some extent this is a question of degree. Three witnesses would perhaps be a better protection than two. Two would perhaps be a better protection than one. The question, as we see it, is what is the safe and acceptable minimum number. On balance we agree with those consultees who consider that one witness would suffice.

Name and address of witness

5.10 It is desirable that the witness should be reasonably identifiable so that anyone challenging an attested writing can check the position. Under the present law the witness must be "designed" but this term is liable to be confusing to the layman. "Address" is a much more familiar concept. We suggest therefore that it should be a requirement for the acquisition of probativity by attestation that the writing contains a statement of the witness's name and address. We prefer not to lay down any rule as to what constitutes a "name" for this purpose. A person's name is, in this country, a matter of usage rather than law. The requirement of a separate statement of the witness's name, even where his signature is legible, is slightly more restrictive than the present law but we felt unable to recommend any rule based on legibility, which is a highly subjective criterion. We recommend below that anyone should be able to add the statement of the witness's name at any time before the document is founded on in legal proceedings or registered for preservation. So the failure by a witness to

1. Para 5.17 below.
2. See para 5.19 below.
3. This implements a recommendation in our Report on *Corroboration, Hearsay and Related Matters in Civil Proceedings*, Scot Law Com No 100 (1986) para 2.10.

add his own name would be easily rectifiable and should not cause difficulty. The witness's address could be either a home or business address. In practice the word "Witness" is usually added after a witness's signature. This is useful in order to make it clear which is the granter's signature and which the witness's, but we do not think it should be made a statutory requirement. Some modern forms of testing clause or docquet, including the modern forms in Appendix B, make it clear by other means which is the witness's signature.

5.11 At present, under section 38 of the Conveyancing (Scotland) Act 1874, the designations of the witnesses can be added at any time before the writing is registered in any register for preservation or is founded on in court[1] and need not be added by the witnesses themselves. We suggest only slight changes in this rule, namely the addition of name, as mentioned above, and replacement of the reference to "court" by "legal proceedings". This would be designed to cover arbitration proceedings and proceedings before tribunals. Just as it is undesirable to allow the onus of proving the authenticity of a document to be changed by alterations to the document in the middle of court proceedings so it is undesirable to allow this to be done in proceedings before a tribunal or arbiter.

Qualifications of witness

5.12 It is at present a requirement of Scots law that an instrumentary witness should be 14 years of age or over, should not be one of the granters of the writing, and should not be *incapax*. In the memorandum we suggested that the age for acting as a witness should be raised to 16. This was generally supported on consultation. We suggested that there was no reason why one granter should not act as a witness to another's signature, but this met with opposition on consultation. On further consideration we accept that there is increased protection if a granter (by which we mean a person who is named in the writing as a granter of it) is not allowed to act as a witness. It should continue to be the case that a person should not be able to act as a witness if he is mentally incapable of understanding what is involved in acting as a witness.

5.13 For the reasons given above[2] we now accept that it would be inappropriate to require a statement of the qualifications of the witness to appear on the writing. However, a writing should not be probative if it appears on its face that the witness was not qualified to act as such-for example, if it is obvious on the face of the writing that one granter's signature has been witnessed by another granter.

Process of attestation

5.14 Under the present law a witness must know the granter (although credible information on this point or a simple introduction by name is sufficient)[3] and must either see the granter subscribe or hear him acknowledge his signature. The witness must then sign more or less immediately—as part of one continuous transaction[4]—and must in any event sign before the granter dies.[5]

5.15 We propose no change in the rule that the witness must know the granter. On consultation some consultees suggested omitting the possibility of acknowledgement by the granter of his signature. They suggested that the witness should always be expected to see the granter sign and pointed out that with a reduction to one witness this should not pose practical problems. We accept this suggestion. We suggested in the memorandum that a witness should be permitted to sign at any time, on the view that he was merely adding an affidavit that he had in fact witnessed the granter's subscription. This suggestion met with a good deal of opposition on consultation and we now accept that there are advantages in requiring the witness to sign after the granter as part of one uninterrupted process. Only in that way is there any certainty that the document which the witness saw subscribed is the one to which he adds his

1. The view has been expressed *obiter* that producing a deed for the purposes of a petition under s 39 of the 1874 Act is not founding on it in a court in the sense of s 38. *McLaren* v *Menzies* (1876) 3R 1151 per Lord Deas at 1158.
2. Para 5.4.
3. *Brock* v *Brock* 1908 SC 964 at 966 and 967.
4. This at least is the rule when the witness has heard the granter acknowledge his signature. There is an argument that more latitude is allowed when the witness has seen the granter sign. See the memorandum para 2.38. In practice the witness is expected to sign right away in both cases.
5. *Walker* v *Whitwell* 1916 SC (HL) 75.

own signature as witness. Provided, however, that the witness is required to sign after the granter, as part of one continuous process, it does not seem necessary to prohibit signature after the granter's death.

5.16 For the reasons given earlier we do not think that a statement that the witness knew the granter, and saw him subscribe, and signed thereafter as part of one continuous process need appear on the writing. That would make the testing clause unduly long and impracticable. A writing should not, however, acquire probativity by virtue of attestation if there is anything on its face to indicate that any of these requirements is lacking—if, for example, the witness's signature bears a date several days after the granter's.

Recommendations

5.17 Our recommendations on the acquisition of probativity by virtue of attestation are therefore as follows:

16. A writing should acquire probativity by virtue of attestation if

(a) it appears on the face of the writing that

(i) it was subscribed by the granter, or by each granter if more than one,

(ii) the subscription of the granter, or of each granter if more than one, was attested by the signature of a witness, and

(iii) the name and address of each witness is stated, and

(b) there is nothing on the face of the writing to indicate

(i) that the writing was not subscribed by the granter or granters, or

(ii) that the writing was not properly attested.

(Paragraphs 5.4 to 5.16; clause 5(1)).

17. For the purposes of recommendation 16 a writing is not properly attested if the person named, and apparently signing, as the witness to the signature of a granter, or of any granter if more than one,

(i) did not in fact sign the writing, or

(ii) did not see the granter sign, or

(iii) did not, at the time of his subscription, know the granter, or have reliable information as to his identity, or

(iv) did not sign after the granter as part of one continuous process, or

(v) was himself a granter of the writing, or

(vi) was, at the time of his subscription under the age of 16 or mentally incapable of acting as a witness to a writing.

(Paragraphs 5.4 to 5.16; clause 5(1), (4) and (5))

18. A testamentary writing (but not any other writing) should also, as a condition of acquiring probativity by attestation, bear to be signed by the testator on each sheet other than the last.

(Paragraph 5.7; clause 5(2))

19. It should be permissible for anyone to add the name and address of a subscribing witness to a writing at any time before the writing is registered in any register for preservation or is founded on in any legal proceedings.

(Paragraph 5.4 to 5.16; clause 5(3))

One witness to several subscriptions

5.18 Under the present law the same person can act as witness to the subscriptions of two or more granters of a writing. Provided that it is clear (e.g. from the testing clause) that the witness has acted as such in relation to both or all of those granters he need sign only once. We see no reason to change this rule. There is, however, a difficulty with regard to the requirement that the witness should sign after the granter whose subscription he is witnessing as part of one continuous process. If the order of subscription is First Granter, then Second Granter, then Third Granter and then Witness it could be argued that the continuity of the process in relation to the first granter has been interrupted. This would be a very pedantic argument but it could be made and we think it should be met in advance. We therefore **recommend** that:

20(a) It should continue to be possible for one person to act as witness to the subscriptions of several granters of a writing and to subscribe only once in that capacity.

(b) In such a case, if those granters subscribe one after the other, as part of one continuous process, and the witness subscribes after the last of those granters as part of one continuous process, then the witness should be regarded, for the purposes of recommendation 17(iii) above, as subscribing after each of those granters as part of one continuous process.

(Paragraph 5.18; clauses 5(6) and 12(5))

Form of testing clause

5.19 We accept the criticism made by a number of consultees that the forms suggested in the memorandum were too long. The above recommendations enable new shorter forms to be devised. We have given careful consideration to the question whether these forms should be included in a schedule to the draft Bill, or in subordinate legislation, or merely as recommended forms appended to this Report. At a very helpful meeting between representatives of the Commission and representatives of the Law Society of Scotland it was made clear that the preference of the Law Society's representatives was for the forms to be simply appended to the Report as recommended forms. The fear was expressed that if the forms were embodied in legislation there might be a tendency for practitioners to adhere too strictly to them. We have given this suggestion sympathetic consideration. In favour of the suggestion, it was argued that the forms are optional in any event, that unnecessary legislation is to be avoided, and that it is not the function of legislation to give practical advice on the completion of forms. Two arguments were, however, made against the suggestion. The first was that the forms of testing clause were intended not just as recommended styles but as forms which, if followed, would be a legally sufficient way of giving the information necessary under the new law for the acquisition of probativity. They were intended to avoid questions as to what would be an adequate way of conveying this information. This could only be done if they were given some legal standing. The other argument related to the publicity to be given to the forms. If they were merely appended to our Report they would be, or would soon become, relatively inaccessible to practitioners. If, however, they were in a statute or statutory instrument they would be readily available and, in practice, would probably appear in such publications as the Parliament House Book. It was also pointed out that the risk of over-zealous adherence to the forms could be reduced by making it clear in the legislation that they were optional and without prejudice to the effectiveness of any other way of conveying the information required for probativity. In the end we were persuaded that, while we should meet the concerns of the Law Society of Scotland so far as possible by making it absolutely clear that the forms of testing clause were optional and without prejudice to the effectiveness of any other forms, we could only achieve the purpose of providing legally safe, readily accessible forms if the forms were included in legislation. As between inclusion in a schedule to the draft Bill and inclusion in a statutory instrument our preference is for the latter. We are aware that Scottish conveyancing statutes have frequently included large numbers of forms, along with notes on their completion. Nonetheless it seems to us that this type of material is more suitable for subordinate legislation. One advantage of subordinate legisation is, of course, that it can be more readily altered in the light of experience. We think therefore that the forms recommended in Appendix B to this Report should be included in subordinate legislation.

5.20 The forms in the Appendix could be used to declare alterations made before subscription and could be used, with the slight modification mentioned in the notes, where one person acts as witness to two or more signatures and signs only once in this capacity. The forms are essentially the same as the signing docquets used successfully under the present law by many large organisations.

5.21 Several consultees made the point that there was no reason to interfere with the traditional form of testing clause which worked well in practice and was sufficiently flexible to cope with complicated or unusual situations. We accept this point and stress again that the recommended short forms are entirely optional. One advantage of the suggested form is that in many cases it could be already on the document at

the time of execution, which is convenient if a word processor is used. Only the blanks would have to be filled in and that could be done at the time of execution. Where the document was sent out to the granter for execution (rather than being executed in, say, a solicitor's office) it could be accompanied by notes for guidance which would, for example, explain that the witness should not be a granter or under the age of 16. We **recommend** that:

21. It should be provided that, without prejudice to the effectiveness of any other form of testing clause, the information necessary for the acquisition of probativity in the case of an individual granter may be given by means of a short form of testing clause of the type set out in Form 1(a) of Appendix B. We recommend that the form be included in a statutory instrument.

(Paragraphs 5.19 to 5.21; clause 20)

Alterations

5.22 In the memorandum we suggested that any alteration to a writing which was, or could be, material and which was not declared in the testing clause should prevent the writing from being probative. It was pointed out on consultation, however, that this was unnecessarily severe. There was no reason why the writing itself (minus the alterations) should not be presumed to be authentic. A party wishing to found on an unaltered part of the writing should be able to do so without having to prove the authenticity of the granter's signature. The alteration, however, would not be probative and a party wishing to found on it would have to prove that it was made before subscription.[1] We think that this is correct and that, for the avoidance of doubt, it should be provided that proof that the alteration was made before subscription may be by any competent evidence.[2] We also think that "alteration" should be defined sufficiently precisely to make it clear that it does not cover the completing of a form by filling in blanks left for that purpose. We suggest no change in the present rule that an alteration which is declared in the testing clause is presumed to have been made before subscription but we think that this presumption should arise only if nothing in the document or testing clause indicates that the alteration was made after subscription.[3] We **recommend** accordingly that:

22(a) An alteration in an attested writing which is declared in the testing clause to have been made before subscription should be presumed to have been made before subscription, even if not separately signed or initialled, provided that nothing in the writing, or the testing clause or its equivalent, indicates the contrary.

(b) It should be possible to prove by any competent evidence that an alteration was made before subscription.

(c) "Alteration" in this recommendation means any interlineation, marginal addition, erasure or deletion and anything written on erasure.

(Paragraph 5.22; clauses 2(3), 9 and 23)

5.23 A properly authenticated post-subscription alteration (for example, one written after the end of a will on the last page, or in a side margin) would be treated in the same way as a separate document of variation. In order to be probative it would have to be subscribed and attested (which might be practicable in the case of a codicil added at the end of a document or in the case of an alteration in a wide side margin but would not be practicable in the case of an interlineation) or set up in court as described later.[4] One problem which could arise in relation to a post-execution deletion is that the deletion could be so effectively done that the original words could no longer be read. In such a case a person wishing to found on the writing as unaltered would have no alternative but to prove the tenor of the missing words.

1. Unless, of course, the alteration took effect as a properly authenticated post-subscription variation of the writing—eg a codicil in the form of a signed marginal addition.
2. Under the present law extrinsic evidence is inadmissible for this purpose. In effect this means that, unless the alteration is declared in the writing or testing clause, there is an irrebutable presumption that it was made after subscription. See Walker and Walker, *Evidence* 188.
3. Halliday, *Conveyancing Law and Practice* Vol I 88. Under recommendations made later in this Report it would be possible to set up an undeclared alteration.
4. See paras 5.30-5.35. The draft Bill modifies the provisions on probativity by attestation so that they can apply to post-subscription alterations. See Sch 1. In practice we imagine that properly attested alterations will be rare.

5.24 We expressed some concern in the memorandum at the looseness implicit in the practice of authenticating alterations in a testing clause which was itself added after subscription. We pointed out that this enabled the holder of a deed to alter it after subscription and then himself authenticate the alteration by declaring, in the testing clause, that it had been made before subscription.[1] Most consultees did not share our concern on this point. Most thought that there was no good reason for abandoning the convenient practice of adding testing clauses after execution. The danger of fraud was more theoretical than real and had not materialised in practice. One consultee suggested that alterations should be declared in a schedule to be signed by the granter of the deed. There is no reason why this technique should not be used in conjunction with either the long form, or the proposed statutory short form, of testing clause: the declaration in the testing clause would simply refer to the alterations specified in the schedule. We would be reluctant, however, to make a schedule compulsory for very short alterations which could be more simply mentioned in the testing clause. In the end we have concluded that it would be impracticable to prohibit or penalise the completion of testing clauses after execution, even where they authenticate alterations. There is probably less danger from fraudulently authenticated alterations than from substituted complete pages and, in any event, a declaration in the testing clause only raises a presumption, and does so only if there is nothing on the face of the writing or testing clause which indicates that the alteration was made after subscription. If the holder of a deed alters it in his favour after subscription and declares the alteration in the testing clause it would still be possible for anyone with a contrary interest to prove that the alteration was added after subscription. While we are not recommending any change in the law, we have included in the notes to the model testing clauses in Appendix B a note to the effect that where the testing clause declares that alterations were made before subscription it is advisable that it, or at least the relevant part of it, should be on the document before subscription as otherwise there is no identifiable person who is making the declaration.

Effect of probativity

5.25 The whole purpose of probativity is to enable a writing to be founded on without the need to produce extrinsic evidence that it was actually subscribed by the granter as it bears to have been. It follows that a writing which is probative by virtue of attestation should be presumed to have been subscribed by the granter. This rule would have to be modified to deal with the situation which would arise if, in the course of court proceedings in which the writing was challenged it was proved that there was a latent defect in the attestation or some error in the stated particulars. It might be proved, for example, that the person signing as witness did not in fact see the granter sign. In such a case it would clearly be unreasonable for the presumption of authenticity to continue to apply. If the challenger established such a defect in the attestation then, for the purposes of those proceedings, the presumption of authenticity should fly off and the position should be the same as if the writing had been simply subscribed. If the challenge to the writing eventually failed then it would remain probative, for all purposes other than those proceedings. If the challenge to the writing succeeded and it was proved not to have been subscribed by the granter, then the writing would be formally invalid and questions of probativity would in practice be immaterial—just as they are under the present law in relation to a writing which has been reduced. We considered whether we should recommend a provision whereby a certificate of non-probativity could be endorsed on the document. This led to difficulties, however, particularly in relation to documents already registered or recorded, and we concluded that it was unnecessary and undesirable. If the document was found to be genuinely subscribed by the granter there is no objection to its being presumed to be authentic. If it has been found not to have been subscribed by the granter then, for all practical purposes, the greater aspect of invalidity will swallow up the lesser defect of improbativity. If there has been no finding either way, then in any subsequent court proceedings to enforce the writing the presumption could be destroyed again.

1. See the criticisms in *Earl of Strathmore* v *Paul* (1840) 1 Rob App 189 at 209; *Reid* v *Kedder* (1834) 12S 781 at 786 and *Brown* v *Duncan* (1888) 15R 511 at 517. Another danger is that the grantee might deliberately omit to declare in the testing clause an alteration to his prejudice made before subscription.

5.26. It is necessary to consider in more detail what latent defects should cause the presumption of authenticity to be lost for the purposes of particular proceedings. Here a distinction has to be drawn between latent defects in the attestation process itself and latent errors in the statement of the witness's name and address. If the latent defect is such that the writing is not properly attested (as defined in recommendation 17(c) above)—for example, a forged signature by a witness, or a witness who was also a granter, or *incapax*, or under the age of 16, or did not know the granter, or did not see him sign, or did not sign after him as part of one continuous process-then it is clear that the presumption of authenticity should fly off. The same result should follow in the case of a testamentary writing if it is established that the testator's signature on a sheet other than the last has been forged. If, however, there is an innocent error in the statement of the witness's name or address, then the considerations are slightly different. It seems clear that there has to be some sanction against the intentional addition of a false name or address. If these particulars are accurate a challenger of the writing has a fair opportunity to trace and interview the witness: if either of them is false he may not. From this point of view an error in the statement of a witness's name or address ought, if established in a court, to cause the presumption of authenticity to be lost. On the other hand there may be an innocent and trivial mistake in the statement, such as a mis-spelling of the name of a street or town. Such an error ought not to affect the presumption. It seems to us therefore that the sensible solution is to say that the benefit of the presumption will be lost if a court finds that there is a material error in the statement of the witness's name or address. A late addition of the witness's name and address (e.g. after the document has been founded on in court proceedings) should also cause probativity to be lost, although we do not think that this problem will arise very often.

5.27 Under the present law a probative writing is presumed to have been executed as stated. "Its testing clause is taken *pro veritate*".[1] There is therefore a presumption that it was executed on the date and at the place stated. This common law rule is supplemented by a statutory rule applying to holograph wills.[2] Under section 40 of the Conveyancing (Scotland) Act 1874 every holograph writing of a testamentary character is, in the absence of evidence to the contrary, deemed to have been executed or made of the date it bears. We would propose to retain both of these rules but to extend the second to cover all testamentary writings and to cover place as well as date. The reasons for having a special rule for testamentary writings are practical. When several testamentary writings are found in a deceased's repositories there may be no evidence at all, apart from what is stated on them, as to where and when they were executed. Yet this information may be necessary if it is to be known which of them regulate the succession. The present rule for holograph testamentary writings does not seem to have given rise to any problems and we can see no reason why it should not be re-enacted and generalised. There would be no justification, under the scheme recommended in this Report, for retaining a special presumption for holograph wills as such. The generalisation would be more apparent than real because the combined effect of the two presumptions as to date of execution in the present law is that valid wills (whether probative or holograph) are presumed to have been executed on the date they bear. We would propose, in effect, to preserve the position that a valid will is presumed to have been executed on the date it bears. So far as the place of execution of a will is concerned, it could be useful to have a presumption.[3] With regard to non-testamentary writings it would, we think, be safer to confine the presumption as to date and place of execution to probative writings.[4] Taking all these presumptions together, we therefore **recommend** that:

23(a) A writing which is probative by virtue of attestation should be presumed to have been subscribed by the granter.

1. *Ferrie* v *Ferrie's Trs* (1863) 1M 291 per Lord Deas at 301.
2. There is also a special statutory rule relating to bills of exchange and acceptances or endorsements thereon. Bills of Exchange Act 1882 s 13(1). We do not propose any alteration of this rule.
3. Cf Currie, *Confirmation of Executors* (7th edn 1973) 41. In the case of a foreign will where "no place is given in the will" then evidence may be required as to where it was executed. It appears from this that a statement in the will as to place of execution may already be presumed, in certain proceedings, to be correct. A statutory rule would give a firm backing to this sensible practice.
4. Cf *Purvis* v *Dowie* (1869) 7M 764.

(b) For the purposes of any court proceedings in relation to the writing this presumption should cease to apply if it is established in those proceedings—

(i) that the writing was not properly attested (as defined in recommendation 17 above), or

(ii) in the case of a testamentary writing, that the writing, although bearing to be signed on each sheet by the testator, was not in fact so signed, or

(iii) that there is a material error in the statement of the witness's name or address or that that statement was added after the permitted time.

(Paragraphs 5.25 to 5.27; clause 5(1) and (4))

24. Where a non-testamentary writing which is probative by virtue of attestation or a testamentary writing (whether or not it is probative) bears to have been subscribed (or subscribed by a particular granter) on a stated date or at a stated place, and there is nothing in the writing to indicate that the statement of date or place is wrong, then it should be presumed that that statement is correct.

(Paragraphs 5.25 to 5.27; clause 6)

Sanctions 5.28 Under the Subscription of Deeds Act 1681 it is a criminal offence for a person to subscribe as witness to any party's subscription unless he knows that party, and either saw him subscribe or received his acknowledgement of his signature. Although there was support on consultation for continuing this offence, in an updated form, we have come to the conclusion that it is directed at the wrong person. Very often the witness is simply obliging the granter or someone else (such as an employer) by acting as such. It is unrealistic to expect that a person asked to act as a witness will know that he or she may be committing a criminal offence, in certain circumstances, in doing as requested, and we are not convinced that this is an appropriate case to invoke the maxim that everyone is presumed to know the law. We are not aware of any prosecutions under the 1681 Act and we doubt whether the Crown would be likely to prosecute "innocent" witnesses under an updated equivalent. If, of course, the witness were party to a fraudulent scheme involving the preparation of a forged document the position would be different, but in that event more serious offences could be charged and there would be no need to rely on a technical offence of false witnessing. It seems to us that the real offender in cases of false witnessing is the person who deliberately induces or otherwise causes someone to act as a witness knowing that he or she did not see the granter subscribe or is not qualified to act.[1] Some sanction seems desirable for this case in order to discourage cynical abuse of the attestation process. We accordingly **recommend** that:

25. It should be a criminal offence for a person to cause another person to sign as witness knowing that the other person did not see the granter subscribe, or is under the age of 16 or is mentally incapable of acting as a witness.

(Paragraph 5.28; clause 10)

5.29 This criminal law sanction would not cover all cases of abuse of the attestation process. It would not cover, for example, acting as a witness when a granter, or without knowing the granter, or inserting a wrong address for a witness. If any of these defects appeared on the face of the writing then the sanction would be that the writing would not acquire probativity. If they were latent then the sanction would be the potential loss of the benefit of probativity once the defect was established in court proceedings. Of course, if the insertion of any false particulars were part of a fraudulent scheme then the general criminal law on fraud would apply. There could also be professional disciplinary sanctions.

Probativity by court docquet

Introduction. 5.30 There may be cases where someone has a writing which is subscribed by the granter but which is not probative-either because it is not attested at all or because

1. We do not include the case where the witness does not know the granter because the concept of knowledge for this purpose seems too vague and subjective to form the basis of a criminal offence.

there is some patent defect in the attestation or the particulars required for probativity.[1] If it is important for that person to have a writing which is not only valid but also probative—for example, so that the writing can be registered or recorded—then it would be convenient to have a procedure whereby the writing could become probative. In some cases the defects could be remedied at once: the name and address of a subscribing witness could be added at any time before the writing is registered for preservation or founded on in any legal proceedings.[2] In some cases the writing could be re-executed by the granter. However, the defect may be more serious than the absence of the witness's name or address and re-execution may not be possible or desirable. The granter may be dead or incapax, or it may be essential to retain the original date of the writing. In such cases it would be useful to be able to set up the writing by proving in court proceedings that it has been subscribed by the granter. In the memorandum we suggested that it should be possible not only to establish the authenticity of the writing in court proceedings but also to have the writing docquetted accordingly by the clerk of court. The writing would then be self-proving by virtue of the court docquet. It would carry around on its face evidence of its own authenticity. It would acquire probativity by virtue of the court docquet. This suggestion was welcomed by consultees. We therefore **recommend** that:

26(a) It should be possible for a writing which is not probative to be set up in court proceedings by proof that it was subscribed by the granter and to acquire probativity by virtue of a court docquet written on the writing.

Section 39 of the Conveyancing (Scotland) Act 1874 enables a writing which has some informality of execution to be proved formally valid in any proceedings in which the writing is founded on or objected to or in a special application to the Court of Session or the sheriff court of the defender's residence. We think this policy should be adopted for the new setting up procedure. However, we envisage that there will not be a defender in a separate application for setting up. The procedure should, we think, be by way of summary application in the sheriff court of the applicant's residence.[3] We accordingly **recommend** that:

26(b) Any person who claims that the improbative writing was subscribed by the granter should be able to apply for a finding, and docquet, to that effect either (a) by means of a separate summary application to a sheriff within whose sheriffdom the applicant resides (or, if the applicant does not reside in Scotland, to the sheriff at Edinburgh) or (b) in the course of other proceedings.

The "other proceedings" would include commissary proceedings and the new general provision on setting up would replace, for wills executed after the date of commencement of the new legislation,[4] the existing special provisions for holograph wills in section 21 of the Succession (Scotland) Act 1964.

Setting up date and place

5.31 It would be convenient if the new setting up procedure could be used to obtain a presumption as to the date or place of subscription in any case where a presumption was not already operative.[5] Normally this facility would, we envisage, be used where an improbative writing was being set up in any event. The applicant would seek a finding, not only as to the authenticity of the granter's subscription, but also as to the date and place of subscription. There is no reason, however, why the same facility should not be available in an application confined to date or place. An attested deed, for example, may be undated and yet it may be desirable, for some special purpose, that it should carry on its face an official note of its date. We do not imagine that separate applications regarding date or place will be frequent but the possibility of making such an application could occasionally be useful. We therefore **recommend** that:

1. Including in the case of a testamentary writing signature by the testator on each sheet other than the last.
2. Para 5.11 above.
3. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters regulates where persons may be sued. It does not regulate applications of the type discussed in the test, where the court is in effect being asked to authenticate a writing. See also the Civil Jurisdiction and Judgments Act 1982 s 21(1)(a) and (b) and Sch 9 para 13.
4. See para 5.57 below.
5. See para 5.27 above.

26(c) The above procedure should also be available to obtain a court finding, and docquet, as to the date or place of subscription of a writing, in any case where there is not already a presumption as to date or place.

Evidence and procedure

5.32 In the memorandum we invited views as to whether in setting-up proceedings proof that the writing was subscribed by the granter might be by affidavit, as is presently the case in relation to holograph wills under section 21 of the Succession (Scotland) Act 1964. The general view on consultation was that it would be useful to provide that evidence should be by affidavit unless the court directed otherwise. We therefore **recommend** that:

26(d) In any such proceedings or application proof that the writing was subscribed by the granter, or was so subscribed on a particular date or at a particular place, may be by affidavit unless the court directs otherwise.

We also consider that the court should be entitled to be satisfied on the evidence of one witness.[1] This does not mean, of course, that a court would have to be satisfied on the evidence of one witness. Indeed if there were any suspicious circumstances a court would be likely to exact the clearest proof.[2]

5.33 Procedural regulations would be a matter for rules of court. There are, however, two procedural matters which merit special mention. One is the question of intimation of an application for a docquet. It is conceivable that a person holding a forged deed might wish to have it set up as probative with a view, for example, to having it recorded. Clearly the apparent granter of the deed would have an interest to object. It seems reasonable, therefore, that intimation should be required, unless the court otherwise directs, to any living person who appears to be a granter of the deed. Beyond this we think the rules should give the court power to order intimation to such other persons as it thinks fit.[3] The other matter which should be regulated by rules is the form of the docquet. We envisage that it would take the form of a short certificate signed by a clerk of court to the effect that such and such a court had on such and such a date found that the writing was subscribed by the granter, or was subscribed by the granter on a particular date, or was subscribed by the granter at a particular place, or was subscribed by the granter on a particular date and at a particular place, as the case may be. We therefore **recommend** that:

26(e) Rules of court should provide—

(i) for an application for a court docquet to be intimated to any living person who appears to have subscribed the writing as a granter (unless that person is a party to the proceedings in which the application is made or the court dispenses with intimation) and to any other person the court may direct and

(ii) for forms of docquet and for their authentication.

Effect of probativity by court docquet.

5.34 The actual finding of a court that a writing had been duly subscribed could have an effect on the parties to the proceedings by virtue of the operation of the normal rules on *res judicata*. Our recommendations are not intended to affect that. They are concerned with the further effect, in relation to the world in general, resulting from the court docquet. The effect of probativity by virtue of a court docquet should be that the writing would be presumed to have been subscribed by the granter as stated in the docquet. Thus if the docquet said nothing about date or place of subscription the writing would prove the genuineness of the granter's subscription but not the date or place of subscription. If, however, the docquet mentioned date or place or both then they would be brought within the presumption. Our intention is that a writing should be probative (for all purposes, including registration in any

1. It may not be necessary to provide for this expressly if the Civil Evidence (Scotland) Bill currently before Parliament is enacted.
2. See *McLaren* v *Menzies* (1876) 3R 1151 per Lord Gifford at 1170.
3. In proceedings for confirmation of executors (which may involve the setting up of a non-probative will) this would confirm the present practice whereby the court may order intimation on parties who may have an interest. See Currie, *Confirmation of Executors* (7th edn 1973) 131 and 304. This could be an important safeguard in some cases.

register) by virtue of the court docquet if it is probative as to the granter's subscription. Date and place would be optional extras. We **recommend** that:

26(f) A writing which is probative by virtue of a court docquet should be presumed to have been subscribed by the granter as stated in the docquet.

(Paragraphs 5.30 to 5.34; clause 7)

It could happen that a deed relating to land is formally valid but not probative and hence not capable of being recorded in the Register of Sasines. The holder of the deed may wish to set it up and have it made probative by court docquet. We considered whether in such circumstances he should be empowered to protect his interests by registering a notice in the Register of Inhibitions and Adjudications and making the land litigious. We concluded that this was unnecessary. A person who accepts a defectively executed and unrecordable deed under the present law is not entitled to "freeze" the register while he arranges for matters to be put right by for example, having the deed re-executed. We see no reason why his position should be any different under the new law. The fact that there will be an additional way of putting matters right is, in our view, irrelevant.

Setting up alterations

5.35 There may be cases where a non-attested writing which is being set up contains alterations made before subscription. In such a case it could be useful to be able to obtain a court finding that the alteration was made before the granter or any of the granters had subscribed and to have the writing docquetted accordingly. The alteration would then, without prejudice to the effect of *res judicata* on the actual parties to the application, be presumed to form part of the writing as subscribed. Under the present law there is authority for the proposition that an undeclared alteration can be set up under section 39 of the Conveyancing (Scotland) Act 1874.[1] It could be useful to retain a setting up facility for undeclared pre-subscription alterations even in cases where the writing has been subscribed and attested. This could be particularly useful in relation to testamentary writings. We initially had some concern that this could give rise to problems where a deed with undeclared pre-subscription alterations had been recorded in the Register of Sasines. In theory someone could have relied on the deed as unaltered. In practice, however, such an occurrence is likely to be rare. No problems have been caused by section 39 of the 1874 Act in relation to the Register of Sasines. Even if someone had relied on the deed as unaltered and then found that a decree finding that the alteration had been made before subscription had been recorded, the existing law would provide the right answer. A person is entitled to rely on the register as it is at the time he relies on it. We think therefore that there should be a setting-up facility for undeclared pre-subscription alterations, whereby a court could be asked to find that the alteration had been made before subscription and to docquet the writing accordingly. In relation to the different question of post-subscription alterations there is no real difficulty. Properly authenticated post-subscription alterations (e.g. a signed or initialled marginal addition or interlineation) would, in effect, be treated as separate minutes of variation and could be set up and could acquire probativity by court docquet. For such alterations it would, however, be necessary to modify the normal setting-up rules by substituting a reference to signing or initialling for a reference to subscription and by making it clear that the docquet could be placed at any convenient place on the document. We therefore **recommend** that:

27(a) The setting up procedure should apply to alterations made before subscription but not declared in a testing clause.

(b) Accordingly a court should be able to findthat an alteration to a document was made before it was subscribed by the granter or any of the granters and to have the document docquetted accordingly.

(c) An alteration so set up should be presumed to have been made before subscription by the granter or by any of the granters.

(d) A properly authenticated post-subscription alteration (e.g. a signed or initialled marginal addition or interlineation) should be treated, for setting-up purposes, like a separate minute of variation, references to signing or

1. *Elliot's Exrs Petrs* 1939 SLT 69. See also *McLaren* v *Menzies* (1876) 3R 1151 per Lord Curriehill (*obiter*) at 1172.

initialling being substituted for references to subscription and the docquet being placed at any convenient place on the document.

(Paragraph 5.35; clause 9)

Effect of probativity on prescription

5.36 Most voluntary obligations prescribe in five years under section 6 of the Prescription and Limitation (Scotland) Act 1973. There are, however, exceptions where the prescriptive period is twenty years. The exceptions include "any obligation constituted or evidenced by a probative writ not being a cautionary obligation...".[1] "Probative writ" is defined for this purpose as "a writ which is authenticated by attestation or in any such other manner as, in relation to writs of the particular class in question, may be provided by or under any enactment as having an effect equivalent to attestation."[2] In the course of our work on the prescription of claims relating to latent damage to property we received complaints that the effect of these provisions was unclear. In particular, it was said to be unclear whether, in a probative building contract, only the primary obligation to construct was excluded from the five year rule or whether all obligations under the contract were so excluded. In addition, it may be regarded as unfortunate that the prescriptive period in relation to obligations under building or engineering contracts may be inadvertently quadrupled in length by the mere fact that the contract is attested. It should also be noted that if a claimant elected to sue in delict rather than contract he would have only five years to commence proceedings, whether or not the contract was probative. These doubts and possible anomalies have led us to consider whether, under the new law on probativity, the prescriptive period of an obligation ought to be affected by the form of the writing by which it is constituted or evidenced.

5.37 With the repeal of the authentication statutes and the abolition of the common law *obligationes literis* it will be clear under the new law that probativity is simply a matter of evidence. A probative writing will prove its own authenticity: it will not be necessary to produce witnesses in court to give evidence that the writing was actually subscribed by the granter as it bears to have been. As a matter of principle, we cannot see why the prescriptive period for an obligation should be affected by the evidential value of the writing in which it is contained or recorded. As a matter of principle, the prescriptive period applying to an obligation should, in our view, depend on the nature of the obligation and not on the form of the writing containing or recording it. This seems to us to be particularly clear if, as would be the case under our proposals, a writing which is not orginally probative becomes probative by being set up in court and docquetted accordingly. If the definition of "probative writ" in the 1973 Act were to be amended to include this new kind of probative writ, then the result would be that one party to a written contract, which was subscribed but not attested, could unilaterally quadruple the prescriptive period applying to obligations under it, simply by having the writing set up in court and docquetted. This would be strange. It would, however, be equally strange to distinguish for this purpose between one type of probative writing and another. Both would have the same evidential value and there would be no obvious reason to make the effect on prescription different. The changes in the law on probativity recommended in this Report therefore call into question the policy of having an extended prescriptive period for obligations contained in, or evidenced by, probative writing.

5.38 What reasons could there be for having a special rule for probative writs? The only reason given in the Commission's Report on the *Reform of the Law Relating to Prescription and Limitation of Actions* was that in English law a longer limitation period applied to an action on a specialty (e.g. on a contract under seal) and that

1. Prescription and Limitation (Scotland) Act 1973 ss 6 and 7 and Sch 1, para 2(c).
2. Sch 1, para 4(b).

it was desirable that a similar rule, using a reference to attested writs, should apply in Scotland.[1] This, with respect to our predecessors, is not much of a reason.[2]

5.39 It might be argued that, as the Subscription of Deeds Act 1579 requires obligations of great importance to be constituted in attested writing, the special rule in the 1973 Act for probative writs achieves the result that minor obligations are subject to the short prescription of 5 years and important obligations are subject to the long prescription of 20 years. This, however, does not take account of the many exceptions to the rule in the 1579 Act nor of the fact that a writing which does not require to be attested may be attested in order to add a touch of formality or provide better evidence. In any event this argument, never strong, would disappear entirely with the repeal of the 1579 Act and the introduction of a general rule that subscription would suffice for formal validity.

5.40 It might still be suggested, even under our proposed scheme, that parties would in fact choose an attested document if the obligations in question were important and that it would therefore still be quite logical to apply an extended prescriptive period to such obligations. We are not convinced, however, that there is necessarily a correlation between the importance of the obligation and the form of the writing or writings in which it is contained. Nor do we think that the importance, rather than the nature, of the obligation, ought to determine the length of the prescriptive period. Nowhere else in the 1973 Act is there any suggestion that, say, the value of a claim ought to affect the length of the prescriptive period.

5.41 It might also be argued that the special prescription for probative writs enables parties to contract out of the short prescription, notwithstanding the prohibition of express contracting out provisions in section 13 of the 1973 Act. However, there is no necessary link between probative writing and contracting out. Parties may wish to use probative writing but not to extend the prescriptive period. They may wish to extend the prescriptive period but not use probative writing. Most commonly of all, they will use probative writing for its other advantages without ever thinking of prescription and will then find that they have contracted out inadvertently. Contracting out is a separate issue, on which there are arguments both ways, and on which we are seeking views in another exercise.[3] Whatever may be thought on contracting out, it seems undesirable that one party should be able to opt out of the short prescription unilaterally by setting up a subscribed writing as probative.

5.42 A special rule for obligations contained in probative writs might be thought to be necessary to cover certain obligations relating to land such as obligations to contribute to the repair of mutual fences or obligations to recognise servitudes. However, there already is special provision for a twenty year prescription for land obligations in the 1973 Act. So no justification for the rule on probative writs can be found in this direction.

5.43 One effect of repealing the special rule for probative writs is that the obligation to repay under a personal bond, or a bond secured over moveable property, would prescribe in five years from the date when the obligation became enforceable, even if the bond was attested. This does not seem to us to be inappropriate. The date from which the five years would run would normally be the date specified in the bond as the date on or before which repayment is due, which failing the date when a written demand for repayment is made.[4] A creditor who allows five years to elapse from that date cannot be heard to complain if prescription has run against him. Indeed, we fail to see how a five year period could be appropriate for a loan evidenced by an unattested bond yet not appropriate in the case of an attested bond.

1. Scot Law Com No 15 (1970) para 60.
2. It is interesting to note that the rule in English law and some systems based on it that there is a longer limitation period for an action on a specialty is itself coming under challenge. The Ontario Law Reform Commission has recently recommended that the limitation period in such cases should be the same as that applicable to contracts generally. Report on *Amendment of the Law of Contract* (1987) 46.
3. See our Consultative Memorandum No 74 on *Prescription and Limitation of Actions (Latent Damage)* (1987) paras 6.96 to 6.100.
4. 1973 Act, Sch 2 para 2.

5.44 Whatever may have been the merits of the special rule for probative writs when it was enacted, it seems to us that it would be not only unnecessary but also anomalous and undesirable under the scheme recommended in this Report. Accordingly, we **recommend** that:

28. An obligation should be subject to the normal five year prescriptive period notwithstanding that it is constituted or evidenced by a probative writ.
(Paragraphs 5.36 to 5.44; clause 25 and Schedules 7 and 8)

Presumptions where more than one granter

5.45 We began our consideration of the question of probativity, as was natural in view of the present law, by looking at the concept of the probative *writ*. In the course of our work on the attached draft Bill, however, it became clear that there were advantages in concentrating on the question whether a particular granter's *subscription* could be presumed to be authentic.[1] Apart from simplifying the drafting and making it easier to accommodate cases where, for example, both individuals and companies are granters of the same document, this makes it clear that the presumptions arising from attestation and from setting up can be combined. A writ, for example, may be subscribed by four granters. Only three of the subscriptions may be attested. In this case the fourth subscription alone would need to be set up. Once it is set up the whole writ will be probative because of the combined effect of the presumptions arising from attestation and the presumption arising from the court docquet. For some purposes, such as registration in the registers mentioned in the next paragraph, it will be important for the whole writ to be probative.[2]

Requirements for registration

5.46 We are concerned here with three categories of writings which may be presented for registration.[3] First, there are those presented for registration, in the Books of Council and Session or sheriff court books, for preservation. Secondly, there are those presented for registration, in the Books of Council and Session or sheriff court books, for execution. Thirdly, there are documents, such as dispositions, relating to land which are presented for registration for publication in the Register of Sasines.[4] A document may be registered for one, two, or for all three, of these purposes. We are not concerned here with the registration in the Books of Council and Session or sheriff court books of judgments or orders under such statutes as the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Civil Jurisdiction and Judgments Act 1982, the Maintenance Orders Act 1950 and 1958 or the Family Law Act 1986. Such judgments or orders do not fall readily into the categories of registration for preservation or execution and are best regarded as being in a class by themselves. There is a separate register in the Books of Council and Session called the Register of Judgments[5] and there are separate Maintenance Orders Registers kept by the sheriff clerks.[6] Nothing in our recommendations is intended to apply to the registration of judgments or orders in any separate register maintained for that purpose.

5.47 Registration for publication in the Register of Sasines is appropriate only in relation to writs relating to land. It has important effects in relation to the creation of real rights. Under the existing law only probative deeds will, as a general rule, be accepted for recording in the Register of Sasines, but certain court decrees affecting land are registrable even if not attested. Again we would propose no change in the

1. See clause 5 of the draft Bill attached.
2. See clause 11(1) of the draft Bill attached.
3. See Halliday, *Conveyancing Law and Practice* Vol I, 140-149. For the Land Register, see para 5.55 below.
4. Technically, deeds are recorded rather than registered in the Register of Sasines but we use the term registration here for convenience.
5. This is referred to in eg Rules of Court 249 C and 249 I.
6. Maintenance Orders Acts, Rules 1980 (Sheriff Court) Rule 4.

existing position. Recording in the Register of Sasines confers real rights and affects priorities. It is a matter of great practical importance. It seems reasonable that, in the case of private deeds as opposed to court decrees, the Keeper of the Registers should be expected to record only probative deeds unless an enactment provides otherwise in any particular case.[1]

5.48 Under the present law, it is generally accepted that, subject to certain exceptions, a writing must be probative before it can be registered for preservation or execution in the Books of Council and Session.[2] Although the applicable law is the same for the sheriff court books, in practice non-probative writs are accepted for registration in some sheriff courts. We think that there should continue to be a general requirement of probativity for registration in the Books of Council and Session and sheriff court books, subject to the exceptions noted later. Not only does this seem right as a matter of principle in the case of registration for execution, but it also operates as a filtering device to stop the registers from being used for non-legal documents. This is particularly important in relation to the Books of Council and Session. It is less important in relation to those sheriff court books which are rarely used, but there are advantages in retaining a uniform rule on registrability. We think, therefore, that the general rule should continue to be that only a probative writing should be registrable in the Books of Council and Session or sheriff court books.

5.49 There would, however, have to be certain exceptions. There should, firstly, be an exception for any document which is required or permitted to be registered under any enactment. Although many cases of statutory registration in the Books of Council and Session or sheriff court books involve judgments, which we are expressly excluding from our recommendations, a number relate to registration of various other documents, such as protests of bills of exchange, bills of exchange themselves and promissory notes;[3] exchequer bonds;[4] certain statutory arbitration awards;[5] and the orders of certain tribunals.[6] There should also, as a matter of principle, be an exception for anything directed to be registered by the appropriate court-that is, the Court of Session in the case of the Books of Council and Session and the sheriff in the case of the sheriff court books.[7]

5.50 At present holograph wills are registered in the Books of Council and Session or sheriff court books even although not probative. It would be convenient to continue this practice but, as no special privilege will attach to holograph wills under our scheme, to extend it to all wills and other testamentary documents, such as codicils.

5.51 At present deeds executed under a law other than Scots law are accepted for registration in the Books of Council and Session if they are accompanied by a certificate that they were validly executed under the applicable law and, if they are not in English, by a certified translation. Again this seems a convenient practice which should be continued. It would enable certain valid foreign deeds to be registered even although they could not be set up[8]—for example, because subscribed by a private individual on behalf of the granter.

5.52 Although it would be possible to say nothing in the draft Bill about registration and simply leave this to turn on existing law and practice, we do not believe this would

1. Crown writs will be excepted from the recommended provisions on the method of execution, and on the recording or registration, of writings. See clause 24 of the draft Bill appended.
2. *Carnoway* v *Ewing* (1611) Mor 14988; Registration Act 1698.
3. Bills of Exchange Act 1681, Inland Bills Act 1696, Bills of Exchange (Scotland) Act 1771; Bills of Exhange Act 1882 s 98.
4. Court of Exchequer Act 1856 s 38.
5. See eg the Agricultural Holdings (Scotland) Act 1949 s 69 (as extended by the Agrciultural (Miscellaneous Provisions) Act 1968 s 11(5)); the Arbitration Act 1950 s 41(3); the Arbitration (International Investment Disputes) Act 1966 s 7.
6. See eg the Lands Tribunal Act 1949 s 3(12)(d) as inserted by the Conveyancing and Feudal Reform (Scotland) Act 1970 s 50(2) and as amended by the Land Tenure Reform (Scotland) Act 1974; the Iron and Steel Act 1982 s 26(5). See also the Merchant Shipping (Liner Conferences) Act 1982 s 9 and Rule of Court 249B.
7. For an example see *Colville Petr* 1962 SC 185 at 195 (registration of variation of trust deed. There is no statutory authority for this but registration of such variation orders is regarded as authorised by the *dicta* in this case.)
8. See paras 5.30 to 5.35 above.

be a responsible course of action. Questions would be bound to arise as to the registrability of valid but non-probative writings under the new law and as to whether holograph wills, say, continued to enjoy any special privilege. In the context of changes in the law on the formal validity and probativity of writings, solicitors and officials are entitled to be informed clearly about the requirements for registration. We are concerned, above all, to make it clear that, although subscription by itself will suffice for validity, attestation or court docquet will be required for recording or registration subject to the exceptions noted above. We therefore **recommend** that:

29(a) It should be provided by statute that, as a general rule, only a probative writ may be recorded for publication in the Register of Sasines. There should be exceptions for court decrees and for any other document required or permitted to be recorded under any enactment.

(b) It should be provided by statute that, as a general rule, only a probative writ may be registered in the Books of Council and Session or sheriff court books. There should be exceptions for (i) any document which is required or permitted to be registered under any enactment (ii) any document directed to be registered by the appropriate court (iii) any will or other testamentary document and (iv) any document executed under an applicable law other than Scots law if the Keeper or sheriff clerk (as the case may be) is satisfied that the document was validly executed under that law.

(c) These recommendations are not intended to affect the law and practice on the registration of judgments or court orders in any separate register maintained for that purpose.

5.53 Under the draft Bill annexed to this Report the presumptions of authenticity resulting from attestation or court docquet arise separately in relation to each granter. It goes without saying that by a "probative writ" in the above recommendation we mean one in which the subscriptions of *all* the granters are presumed to be authentic, whether by virtue of attestation or court docquet or a combination of these methods.[1] We do not include within the term "probative writ" for this purpose a document which is merely signed, even if, by virtue of a special statutory provision, it is to be accepted in evidence and deemed to be authentic unless the contrary is proved. There are numerous examples of such provisions in the case of bodies corporate, but we doubt whether they have been framed with registration in mind.[2]

5.54 In the case of the Land Register of Scotland the existing law provides that "an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require".[3] Nothing in our recommendations gives rise to any need to alter this provision.

5.55 There is one other procedural point concerning registration for preservation which could usefully be regulated. It concerns the situation which could arise if a non-probative writ which was already registered for preservation (e.g. a holograph will under the existing law or a subscribed will under our recommendations) were to be set up in court proceedings (whether the setting up related to subscription, date, place or alterations). In this situation it would be useful to provide by rules of court for an extract decree and certified copy interlocutor to be sent to the Keeper or sheriff clerk so that it could be registered.[4] We **recommend** that:

1. See clause 11 of the draft Bill annexed. It would not matter that the writing contained undeclared and non-probative alterations.
2. See eg the Forestry Act 1967 Sched 1 para 5(1) "Every document purporting to be an order or other instrument issued by the Commissioners and to be ... signed by the secretary to the Commissioners or any person authorised by the Commissioners to act on behalf of the secretary, shall be received in evidence and be deemed to be such order or instrument without further proof, unless the contrary is shown.".
3. Land Registration (Scotland) Act 1979 s 4(1).
4. The draft Bill contains a provision (clause 11(2)(c)(iv)) to ensure that the certified copy decree can be registered and, in particular, to ensure that a certified copy of a sheriff court decree can be registered in the Books of Council and Session if the document to which it relates is registered there. As a matter of practice the decree will have to identify the document in the register sufficiently accurately (eg name, parties, dates of execution and registration) to enable the decree to be related to it.

29(d) Provision should be made by rules of court for transmitting to the Keeper of the Registers of Scotland or to the appropriate sheriff clerk an officially certified copy of any decree setting up any improbative writing (such as a will) which is registered for preservation so that the certified copy decree can be registered in the same register as the original writing.

(Paragraphs 5.46 to 5.55; clause 11)

Requirements for confirmation of executors

5.56 Section 21 of the Succession (Scotland) Act 1964 provides that:[1]—

> "Notwithstanding any rule of law or practice to the contrary, confirmation of an executor to property disposed of in a holograph testamentary disposition shall not be granted unless the court is satisfied by evidence consisting at least of an affidavit by each of two persons that the writing and signature of the disposition are in the handwriting of the testator."

If, as we have recommended, wills were to be formally valid by virtue of subscription and if, accordingly, no special privilege attached to holograph wills, it would clearly be necessary to amend this provision in relation to wills executed after the new law came into force. The introduction of a setting up procedure for all non-probative writings would also make a special setting up procedure for testamentary writings unnecessary. The logical replacement for section 21 would be a provision to the effect that confirmation of an executor to property disposed of in a testamentary writing would be granted only if the writing were probative by virtue of attestation or court docquet. The writing could be set up and the docquet could be added in the confirmation proceedings themselves. Affidavit evidence could be accepted. So, to this extent, there would be little difference from the present system. A rule to this effect would, we believe, be satisfactory for wills where formal validity is governed by Scottish internal law. It would have to be extended, however, to deal with cases where the formal validity of a will is governed by some other law.[2] This is because the Scottish rules on probativity (by attestation or setting up) would not be appropriate in such cases. Probativity raises a presumption of subscription by the testator, but subscription may not be sufficient for formal validity under the applicable foreign law. Indeed subscription by the testator (or a notary or equivalent official) may not be necessary for formal validity under the applicable law: subscription by any person on behalf of the testator may suffice. For these reasons it seems clear that it should be possible, where the formal validity of a testamentary writing is governed by a law other than Scots law, for confirmation to be granted where the court is satisfied that the will was validly executed in accordance with the applicable law. We therefore **recommend** that:

30. Section 21 of the Succession (Scotland) Act 1964 should be replaced, in relation to writings executed after legislation to implement this Report comes into force, by a provision to the effect that confirmation of an executor to property disposed of in a testamentary writing should be granted only if

(a) the formal validity of the writing is governed by Scots law and the writing is probative by virtue of attestation or court docquet, or

(b) the formal validity of the writing is governed by a law other than Scots law and the court is satisfied that the writing was validly executed in accordance with the applicable law.

(Paragraph 5.56; clause 25 and Schedule 7)

These rules would, as stated in the recommendation, apply to testamentary writings executed after the new legislation comes into force. The old law would continue to apply in relation to writings executed before that date.

1. For the background to this section, and the previous practice, see Currie, *Confirmation of Executors* (7th edn 1973) 51-52; Meston, *The Succession (Scotland) Act 1964* (3rd edn 1982) 81-82.
2. This situation can easily arise. A testator who dies domiciled in Scotland, leaving assets in Scotland, may have made his will some years earlier when domiciled in England or some other country.

5.57 Section 32 of the Succession (Scotland) Act 1964 provides that testamentary dispositions which are not already treated as probative are to be treated as probative if confirmation of an executor has been granted in Scotland to property disposed of in them. The same rule applies to a testamentary disposition if

> "probate, letters of administration or other grant of representation has been issued in England and Wales or Northern Ireland in respect of property disposed of in the disposition and notes the domicile of the deceased in England and Wales or in Northern Ireland, as the case may be, or probate, letters of administration or other grant of representation issued outwith the United Kingdom in respect of such property has been sealed in Scotland under section 2 of the Colonial Probates Act 1892."

We take it that "probative" in this provision means validly executed in accordance with the Scottish authentication statutes.[1] This section serves a useful purpose in making enquiries into the formal validity of a will as a link in title to Scottish property unnecessary in the cases covered by it. There would still be a role for it under our scheme. An English will might, for example, be subscribed by a friend on behalf of the testator and might be perfectly valid under English law. It would not, however, be formally valid under Scottish internal law because not subscribed by the testator and not notarially executed. We would therefore propose to retain the section but to alter it slightly to fit the proposed new law. The only alteration necessary to it would be to change the word "probative", which would have a purely evidential connotation under the new law, to a reference to formal validity under Scots law. We therefore **recommend** that:

31. Section 32 of the Succession (Scotland) Act 1964 should be amended by substituting for the references to probativity references to formal validity under Scots law.

(Paragraph 5.57; clause 25 and Schedule 7)

We stress that only *formal* validity is at issue here. Section 32 would not prevent a testamentary disposition from being challenged on the ground that it was a forgery, or that the testator was mentally incapable, or on any other ground of substantial invalidity.

1. See Meston, *The Succession (Scotland) Act 1964* (3rd edn 1982) 73-74.

Part VI Execution of writings

Introduction

6.1 In this part we discuss some technical questions relating to the execution of writings by individuals, partnerships, companies and other bodies corporate. Some of these questions were discussed in the memorandum: others were raised by those submitting comments on it.

Subscription on extra pages

6.2 A practical problem which some consultees mentioned on consultation is that there may not be enough room on the last page of a writing for all the signatures (and, in the case of companies, seals). In certain types of commercial agreement there may be many signatories and, even if the actual text on the last page is kept to one or two lines, it may be impracticable for all the signatories to sign in the space available. One way of dealing with this problem under the present law is to glue an extra length of paper to the last page. This can produce a hybrid between a book-form deed and a roll-form deed and is not a very elegant solution. The Law Society of Scotland suggested to us on consultation that, provided at least one of the parties subscribed on the final page of the document, it should be possible to have subscriptions on further pages if required.

6.3 Even though the reduction in the number of witnesses to one, and recommendations made later on the execution of writings by bodies corporate,[1] would do something to ease congestion on the last page, it is clear that problems could still remain. We have seen deeds from other jurisdictions with many pages of subscriptions. The suggestion made by the Law Society of Scotland seems an eminently sensible one. It could, among other things, allow more space for testing clauses or docquets to be set out in a clear and easily comprehended way instead of being squeezed into the minimum space. We therefore **recommend** that:

32. Provided that at least one granter subscribes at the end of a writing it should be permissible for other granters to sign on an additional page or additional pages.

(Paragraphs 6.2 to 6.3; clause 12(3))

6.4 We considered limiting this facility to cases where it was not reasonably practicable for all the granters to sign on the last page. That, however, would have introduced an element of vagueness and uncertainty. It would also have posed practical problems for those preparing deeds for signature: it is not always possible to tell in advance how much space a signatory will require or use: an estimate that two pages would be needed for all the signatures might turn out to be excessive if all the signatures were small and compressed. It would be most unsatisfactory to peril the validity of a writing on such matters. We also considered limiting the facility to one extra page, so as to avoid the possibility of a large number of pages each with, say, only one signature. We were persuaded, however, that there were cases where one extra page would not suffice: once the principle of going beyond the final page of the text has been accepted there is no convincing reason for stopping at one extra page.

1. See paras 6.41 to 6.70 below.

Meaning of subscription

6.5 In the memorandum we expressed no view as to the need for, or possible nature of, any change in the present rules on what constitutes subscription by an individual but invited views on the questions whether there was a need for any change in the law and, if so, what the content of any new rules should be. We also asked whether, if any change was required, there should be a more liberal rule for testamentary than for other writings.[1] Most consultees thought that there was no need for any change. The Sheriffs' Association considered that in the case of non-testamentary writings a valid subscription should consist of the surname of the subscriber together with sufficient indication of the forenames to identify the individual: for testamentary writings they considered that any subscription which, taken in the context of the document as a whole, was sufficient to identify the subscriber should suffice. The Institute of Chartered Accountants of Scotland was inclined to the view that a more liberal approach should be taken in all cases, not merely for testamentary writings. They pointed out that it was doubtful whether many people had a "usual" signature which they invariably used. An experienced practising solicitor expressed the view that where a person signed his usual signature possibly leaving out an initial of a middle name, this should not have to be declared in the testing clause. Another experienced practising solicitor pointed out that there could be difficulties in relation to illegible signatures and signatures by some people from foreign countries. He observed that at one end of the scale of legibility there was the easily legible signature. This gave rise to no difficulty.

> "Next there is the somewhat illegible signature which can nevertheless be identified with some degree of certainty by comparing it with the names appearing in a deed. Many signatures do not attain even that standard. They are not truly "written" at all. Many of these contain shapes vaguely approximating to the written shape of the name. Some do not even achieve that: they are in truth personal marks, not subscribed names at all. At what point along this continuum does a 'signature' cease to be valid subscription? In present day Scotland the problem is more complex than that. For many domiciled Scots nowadays, their 'usual signature' is in truth a Chinese character, or a name written in Arabic or other non-European script. If we exclude such 'signatures', do we recognise only signatures in standard English script? If we do that, do we invalidate signatures containing individual letters found in some European scripts, but not in English (such as the Scandinavian ø)? If we disallow that, do we permit an ampersand in the subscription of a firm name? If as regards both legibility and choice of script, we permit anything, then presumably a simple 'X' could be a valid subscription".

6.6 The results of consultation suggest that there is no general dissatisfaction with the present law on what constitutes subscription by an individual but that this opportunity could usefully be taken to remove a few doubts and difficulties. Three other considerations make it desirable to try to set out the law on subscription in statutory form. First the repeal of the old authentication statutes will remove the basis of some distinctions made in the present law. Secondly, our recommendations will mean that no special privileges will attach to holograph writings, but some of the rules on what constitutes a subscription under the present law are relaxed in the case of holograph writings. It would be desirable to make it clear how far the approach formerly taken to holograph writings applied to simple subscribed writings. Thirdly, our other recommendations would make it possible, and highly desirable, to dispense with the special category of writs *in re mercatoria*. It would be unsatisfactory to do this, however, without making it clear how writings formerly falling within this category could be subscribed.

6.7 The present law on what constitutes a valid subscription depends mainly on a long series of cases going back to the early 17th century. There are, however, two early statutes which also have a bearing on the question. The Subscription of Deeds Act 1579 requires writs relating to heritable title or matters of importance to be subscribed by the principal parties if they can subscribe and to be executed notarially

1. Paras 8.5 and 8.6.

if they cannot. This has not prevented the court recognising subscription by initials[1] but has prevented recognition, in the case of writs coming within the scope of the Act, of signature by mark.[2] The Lyon King of Arms Act 1672, which was mainly concerned with those who assumed arms to which they had no right, declared as an incidental matter that

> "it is onlie allowed for Noblemen ... to subscrive by their titles And that all others shall subscrive their Christned names or the initiall letter therof with there Sirnames and may if they please adject the designations of their Lands prefixing the word Of to the saids designations And the Lyon King at Armes and his Brethren are required to be carefull of informeing themselvis of the contraveiners heirof...."

The Court of Session, however, in two 17th century cases in which the Act was pleaded, upheld subscriptions which did not conform to the Act's requirements, apparently accepting the argument that the Act did not invalidate non-conforming subscriptions.[3] The result is that the 1672 Act provides permissible forms of subscription but does not invalidate other forms. It has been held that a full signature is a valid subscription even if the granter's usual method of subscription is by initials.[4]

6.8 In addition to the forms permitted by the 1672 Act the following have been held to be valid subscriptions.

(a) The granter's initials, where this was proved to be his usual method of subscription.[5]

(b) The granter's initials, even without proof that this was his usual method of subscription, where there was no doubt that the writing was subscribed by the granter.[6]

(c) The granter's mark, in a writ *in re mercatoria*, where this was proved to be his usual method of subscribing.[7]

(d) The granter's surname followed by the designation of his lands - "Fullerton of that Ilk"[8]

(e) The granter's illegible signature.[9]

(f) A married woman's use of her maiden name instead of her husband's surname.[10]

(g) A signature containing a surplus initial[11] or middle name.[12]

---

1. See cases cited in the first two notes to para 6.8 below. In *Crosbie and Pickens* v *Picken* (1749) Mor 16814 the majority of the judges noted that in spite of the 1579 Act "subscription by initials is daily sustained".
2. *Morton* v *French* 1908 SC 171.
3. *Earl of Traquair* v *Gibson* (1724) Mor 16809; *Gordon* v *Murray* (1765) Mor 16818. The authority of these decisions is not, it is thought, shaken by the *obiter dictum* of Lord O'Hagan in *Gardner* v *Lucas* (1878) 5R (HL) 105 at 114 to the effect that the 1672 Act provided "a sort of definition of signature" particularly as that *dictum* contrasts with *dicta* by Lord Chancellor Cairns and Lord Hatherley in the same case at 107 and 112 on the recognition of marks.
4. *Crosbie and Pickens* v *Picken* (1749) Mor 16814 and the case of *Anderson* (1739) referred to therein.
5. *Piery* v *Ramsay* (1628) Mor 16801 (a bond); *Culterallers* v *Chapman* (1667) Mor 16803 (a bond); *Couts* v *Straiton* (1681) Mor 16804 (an assignation of a bond); *Galloway* v *Thomson* (1683) Mor 16805 (a bond); *Ker* v *Gibson* (1693) Mor 16805 (a disposition); *Thomson* v *Shiel* (1729) Mor 16810 (a bill); *Weirs* v *Ralstons* June 22, 1813, FC (consent to disposition and settlement); *Gardner* v *Lucas* (1878) 5R (HL) 105, *obiter* at 107 and 115; *Speirs* v *Home Speirs* (1879) 6R 1359 (holograph will); *Donald* v *McGregor* 1926 SLT 103 (attested will-*obiter*).
6. *Caraway* v *Ewing* (1611) Mor 16802 (a bond); *Houston* v *Houston* (1631) Mor 16801 (a bond); *Grierson* v *Grierson* (1633) Mor 16802 (a discharge); *Forrest* v *Marshall* (1701) Mor 16805 (a contract of employment); *Earl of Traquair* v *Gibson* (1724) Mor 16809 (tack subscribed as cautioner); *Irvine of Neworchard* (1739) Mor 16810 (execution of warning in a process of removing); *Shepherd* v *Innes* (1760) Mor 16818 (bills); *Lowrie's J F* v *McMillan's Exrx* 1972 SC 105 (holograph will).
7. *Brown* v *Johnston* (1669) Mor 16803 (bill of exchange—decision "not to be a general rule"); *Craigie* v *Scobie* (1832) 10S 510 (bill of exchange); *Rose* v *Johnston* (1878) 5R 600 (warranty of horse); *Morton* v *French*, 1908 SC 171 (*obiter*). See also *Brown* v *Johnstoun* (1662) Mor 16802 (bill of exchange).
8. *Gordon* v *Murray* (1765) Mor 16818. This decision is not liked by conveyancers and was not followed by the sheriff-substitute in *Allan and Crichton Petrs* 1933 SLT (ShCt) 2 where he held that "Mrs. Bernard" was not a valid subscription by a witness.
9. *Stirling Stuart* v *Stirling Crawfurd's Trs* (1885) 12R 610.
10. *Dunlop* v *Greenlees' Trs* (1863) 2M 1.
11. *Grieve's Trs* v *Japp's Trs* 1917, 1 SLT 70 (Mrs Isabella Williamson or Moncur signed "Isabella C. Moncur").
12. *Ibid* (Mrs Joan Colville or Brown signed "Joan Colville Brown").

(h) A signature with the initial of one Christian name missing.[1]

(i) A familiar form of a Christian name ("Connie") without more, in a holograph will, where that was the testatrix's usual signature in the circumstances.[2]

(j) "Mum" in a holograph letter (with testamentary provisions) to a daughter, where that was the testatrix's usual signature in the circumstances.[3]

6.9 The following have been held not to be valid subscriptions.

(a) A *witness's* initials, on the ground that, while "parties must sign their obligations as they can" (and may therefore subscribe by initials where that is their usual method) they should always choose witnesses who can write.[4]

(b) A mark (such as a cross) on a writ not *in re mercatoria*[5]

(c) A granter's initials on the earlier pages of a writ, where he had subscribed in full at the end.[6]

(d) A signature by a stamp.[7]

(e) An incomplete signature followed by a cross (the granter having been too ill and weak to finish her signature).[8]

(f) A witness's signature in the form "Mrs Bernard".[9]

6.10 Not all of the subscriptions which have been held to be sufficient for formal validity would necessarily be sufficient, under the present law, for probativity in the case of an attested writ. Probably, for example, a writing which bore to be subscribed by the granter's initials could not be founded on in court proceedings without evidence being led that the initials were actually appended by the granter and possibly also that this was his usual method of subscription.[10] The position of a completely illegible signature in this respect is not clear.[11]

6.11 To be valid, a subscription must be written by the subscriber personally. As we have seen, the use of a stamp is not sufficient. Nor will a cyclostyled signature suffice for the purposes of the authentication statutes.[12] A subscription is not valid if the writer's hand is guided by another person,[13] or if the writer simply traces a name written or scratched on the paper by another person.[14]

6.12 As the above account shows, there are certain unsatisfactory features in the present law. One is the uncertainty over the treatment of initials. Some cases have required proof that the use of initials was the subscriber's usual custom: others have not. Probably the difference is explicable by the way in which different cases have presented themselves. Where it has been clear that the initials were actually appended

1. *Stirling Stuart* v *Stirling Crawfurd's Trs* (1885) 12R 610 (where W Stirling Crawfurd was held to be a good signature for William Stuart Stirling Crawfurd).
2. *Draper* v *Thomason* 1954 SC 136.
3. *Rhodes* v *Peterson* 1971 SC 56.
4. *Meek* v *Dunlop* (1707) Mor 16806.
5. *Graham* v *McLeod* (1848) 11D 173 (discharge); *Crosbie* v *Wilson* (1865) 3M 870 (a case in which there was in any event no evidence that the granter was in the habit of signing by a mark); *Morton* v *French*, 1908 SC 171. See also the *dicta* in *Stirling Stuart* v *Stirling Crawfurd's Trs* (1885) 12R 610. It is not clear whether a mark would be a valid subscription of a holograph writing.
6. *Gardner* v *Lucas* (1878) 5R (HL) 105.
7. *Stirling Stuart* v *Stirling Crawfurd's Trs* (1885) 12R 610.
8. *Donald* v *McGregor* 1926 SLT 103.
9. *Allan and Crichton Petrs* 1933 SLT (Sh Ct) 2, not following *Gordon* v *Murray* (1765) Mor 16818.
10. *Caraway* v *Ewing* (1611) Mor 16802; *Couts* v *Straiton* (1681) Mor 16804; *Galloway* v *Thomson* (1683) Mor 16805; *Weirs* v *Ralstons* June 22, 1813 FC.
11. *Stirling Stuart* v *Stirling Crawfurd's Trs* (1885) 12R 610. Lord President Inglis said, at 626, that "You require evidence ... to enable you to say what the writing is ...". On the other hand, Lord Shand indicated, at 631, that if the deed had been presented as it stood without any parole testimony it would have received effect.
12. *Whyte* v *Watt* (1893) 21R 165 (where this form of signature was, however, held to be sufficient for the purposes of a UK statute on election law).
13. *Moncrieff* v *Monypenny* (1710) Mor 15936. Cf *Clark's Exr* v *Cameron* 1982 SLT 68. It is different however if the subscriber's wrist is merely supported: *Noble* v *Noble* (1875) 3R 74.
14. *Crosbie and Pickens* v *Picken* (1749) Mor 16814.

by the granter as a deliberate and completed authentication of the writing the court has been understandably reluctant to require proof of usual custom in addition.

6.13 Another unsatisfactory feature in the present law is the treatment of marks. It is generally accepted that a mark is a valid subscription in the case of a writ *in re mercatoria*, at least if it is the granter's usual method of subscribing, but not in the case of other writs. Under the present law the courts have regarded this result as being forced on them by the Subscription of Deeds Act 1579 which requires notarial execution if a granter cannot subscribe. The results can be unfortunate. In one case, for example, the pursuer was unable to found on an attested settlement and discharge of a sum due under a decree because it had been subscribed by a mark.[1] The court said that there was "one mode, and one alone, of authenticating a document where the party cannot write". In another case a nomination of a small sum under the Friendly Societies Act 1896 was held to be invalid, although it was attested and was undoubtedly genuine, because subscribed by mark.[2] The court observed that the law was strict and depended "on distinct statutory enactments"—presumably a reference to the 1579 Act. The repeal of the 1579 Act would require the question of subscription by mark to be reconsidered.

6.14 So far as the policy of any reformulation is concerned we think that there is value in laying down a method of subscription which is always safe, whether or not it is the granter's usual method. As the Institute of Chartered Accountants of Scotland pointed out, a person may not have a usual method of subscribing. For this purpose we would propose retaining the well established method of the present law—that is, surname preceded by forename(s)[3] or initial(s). To deal with the point, also established in the present law, that a subscription is not invalidated by the omission of one of two or more forenames or initials, or the addition of an extra forename or initial, or the addition of something like Mr. or Mrs., we suggest that a surname, preceded by at least one forename (or an initial or abbreviation or familiar form of it) should suffice. To deal with the point that some people may have only a single name (and not a surname preceded by other names) we suggest that it should always be a sufficient subscription for the granter to write out the full name by which he is identified in the body of the writing or in the testing clause or the equivalent.[4] These rules would be without prejudice to the accepted methods of authentication by the Queen[5] or by peers and their wives and eldest sons.[6] In all cases the subscription would have to be written by the granter himself, not necessarily by his hand—he could use his foot or his mouth, for example—but by the direct application by him of a pen or pencil or similar instrument. We shall refer to the type of signature mentioned in this paragraph as a "standard signature". A standard signature would always be sufficient, for formal validity and probativity, even if it was not the person's usual signature.

6.15 A rule on the above lines would be too strict if it stood alone. It would invalidate many writings which would be valid under the present law. So far as formal validity is concerned the main purpose of subscription is to authenticate the writing finally and conclusively. We think therefore that any name, description, initials or mark written by the granter himself at the end of a writing should be regarded as his subscription, for the purposes of formal validity, if (a) it is shown to have been his usual method of signing, or his usual method of signing writings of the type in question[7]

1. *Graham* v *McLeod* (1848) 11D 173.
2. *Morton* v *French* 1908 SC 171.
3. We use the term "forename" instead of "Christian name" because the former covers more easily those who are not of the Christian religion.
4. The reference to the testing clause or the equivalent is necessary to cover eg the case where a writing granted by a partnership or company is subscribed by a partner or director whose own name does not appear in the body of the writing.
5. The Queen normally superscribes. (Halliday, *Conveyancing Law and Practice* Vol 1 79). See also the Crown Private Estates Act 1862, s.6 (relating to the disposition of the private estates of the Sovereign in Scotland).
6. Peers normally subscribe by their title alone. Their wives subscribe their husband's title prefixed by their own Christian names. Their eldest sons may subscribe their courtesy title. (Halliday, *op cit* 80).
7. Cf *Rhodes* v *Peterson* 1971 SC 56 (letter to daughter signed "Mum"). We have included "description" in the above list to prevent any argument that a word such as "Mum", or a descriptive phrase, is neither a name nor a mark, but rather a description.

or (b) it is shown that he in fact used it as a completed authentication of the writing in question. The justification for the extra requirements of proof in the case of a non-standard signature is that, whereas it is commonly accepted that a standard signature indicates concluded intention, that is not the case with initials or marks. A person's initials might, for example, just be an incompleted signature, broken off in the middle because he had changed his mind. A mark written by the granter at the end of a holograph writing might be a sort of punctuation mark, or an indication of where he intended to sign, or an indication of where he wanted a witness to sign. The reasons for allowing a non-standard subscription to be valid if it is shown that it was in fact used as a completed authentication of the writing in question are, first, that it prevents a person who admits having subscribed by initials, or in some other non-standard way, from escaping from his obligation by showing that that was not his usual method of subscription,[1] and secondly, that it enables a writing to be upheld where there is no doubt that it was completely authenticated by the granter, but it cannot be proved that the method used was his *usual* method. He may, for example, have used initials on one occasion because his arms were in plaster. Or he may not have been in the habit of signing documents. We must stress that we are here talking of formal validity, not probativity. We are assuming, therefore, that a person founding on the writing in question is able to prove, where that is not admitted, that it was actually signed by the granter.[2]

6.16 So far as probativity is concerned, the position is more difficult. Under our recommendations a writing may be probative by virtue of either attestation or a court docquet. We consider first the case of attestation. The question here is whether a writing can appear on its face to have been subscribed by the granter if it bears only, say, a mark, or initials. There are conflicting arguments. On the one hand it can be said that if subscription by initials or mark is a valid method of subscription in certain circumstances there is no reason why a writing which bears on its face to be so subscribed should not be treated as probative. If, for example, the testing clause narrates that the granter has subscribed by the initials M H in his usual way, or that he has subscribed by appending his usual mark, it is reasonable to say that the writing does bear on its face to be subscribed by the granter. Indeed, even if the testing clause does not contain any such narrative the fact that the witness has signed indicates in itself that the granter's initials or mark represented a completed authentication by him. It must be presumed that a witness would not sign as such if the granter had merely made an accidental mark on the paper, or had changed his mind after writing the first two letters of his signature, or had otherwise not completed a deliberate act of authentication. On the other hand it can be said that probativity is a considerable privilege, a privilege which in some legal systems would be reserved for writings executed before a notary, and that this privilege should not be conferred on a writing unless it bears on its face all the marks of authenticity, including the granter's subscription in standard form. If the granter cannot append a subscription in standard form the writing should be notarially executed. To confer the privilege of probativity, and hence to presume valid, a writing signed by a cross or by initials or by a wavy line, would be to open the door too wide to fraud. The onus of proving that such a writing was not properly authenticated would often be impossible to discharge, particularly if the granter had died. Moreover to allow a writing to be probative when signed by initials or by a mark would be a change in the law for which there is no need and no demand.

6.17 In our view the arguments against allowing an attested deed to be probative if signed by initials or by a mark, or in some other non-standard way, are more convincing. There was no demand for this change on consultation. The present law appears to give rise to no difficulty and it could be dangerous to relax it. The reformulation of the rule on the standard subscription suggested above would cater for anyone who can write his name in the form in which it appears in the body of the writ. Notarial execution is available for anyone who cannot and, as we note below,

1. Cf *Shepherd* v *Innes* (1760) Mor 16818;
2. The pursuer failed for this reason in *McIlwraith* v *McMikin* (1785) Mor 16820. The proof need not be direct but may be circumstantial. See *Craigie* v *Scobie* (1832) 10S 510.

a writing subscribed in a non-standard way could always acquire probativity by court docquet after proof that it had been subscribed by the granter.

6.18 There remains the problem of the illegible signature. It would be possible to provide that, for a writing to acquire probativity by virtue of attestation, it would have to appear to be subscribed by the granter not only in the standard way but also legibly. However, legibility is a vague criterion. What is legible to one person may not be legible to another. Moreover, legibility is a matter of importance not only in relation to the granter's subscription but also in relation to other matters which must appear on the face of a writing if it is to be probative. There is indeed an implicit requirement of legibility in relation to all parts of a writing and it could lead to confusion to make specific provision for legibility in relation to only one part. If the legislation merely provided that, for the acquisition of probativity by virtue of attestation, the writing should appear on its face to have been subscribed by the granter in standard form, then it would be open to a court, or anyone else, asked to accept the writing as a probative writing to refuse to accept it as such on the ground that it did not appear on its face to be properly subscribed by the granter.

6.19 Under the present law a witness's signature by initials is not effective.[1] This seems reasonable enough. It should be possible to choose a witness who can write. We think therefore that in the case of a witness a standard signature should be required and that initials or a mark should not suffice.

6.20 The position is quite different, and much more straightforward, in relation to probativity by virtue of court docquet. Here any subscription should suffice, including subscription by initials or mark if the conditions mentioned above are satisfied. Probativity is gained in this case only *after* proof that the writing was subscribed by the granter. Initials or a mark would count as a person's subscription, but only if it were proved that this was his usual method of signing, or his usual method of signing documents of the type in question, or that he used the initials or mark as a completed authentication of the writing in question. Once this was proved to a court, and once the writing was docquetted with a statement that the writing had been found by the court to have been subscribed by the granter, then it could thereafter be accepted as probative by anyone.

6.21 We therefore **recommend** that:

33(a) A writing should be regarded as subscribed by a person if he has himself written at the end of it either

(i) the full name by which he is identified in the body of the writing or in the testing clause or the equivalent, or

(ii) his surname, preceded by at least one of his forenames (or an initial or abbreviation or familiar form of it).

(b) A writing should also be regarded as subscribed by the granter if he has himself written at the end of it a name (otherwise than in a form mentioned in paragraph (a)), a description, initials or a mark and it is shown

(i) that the name, description, initials or mark was his usual method of signing, or his usual method of signing documents of the type in question, or

(ii) that the name, description, initials or mark was in fact used by him as a completed authentication of the writing in question.

(c) For the purposes of probativity by virtue of attestation only subscription (whether by a granter or by a witness) in a form mentioned in paragraph (a) should suffice. For the purposes of probativity by court docquet subscription in a form mentioned in paragraph (a) or (b) should suffice.

1. *Meek* v *Dunlop* (1707) Mor 16806.

(d) This recommendation is without prejudice to the accepted methods of authentication by the Queen, or by peers and their wives and eldest sons.
(Paragraphs 6.14 to 6.20; clauses 12 and 24)

We should perhaps add that nothing in this recommendation is intended to interfere with the existing law whereby a person may be authorised by power of attorney to sign on behalf of someone else.[1]

Subscription of inventories, schedules etc.

6.22 Section 44(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides that

> "where—
>
> (a) a conveyance, deed, instrument or writing, whether relating to land or not;
>
> (b) an inventory, appendix, schedule, plan or other document annexed to such a conveyance, deed, instrument or writing,
>
> is subscribed and (where appropriate) sealed on the last page, it shall be no objection to its probative character that it is not subscribed or, as the case may be, subscribed and sealed on every other page."

The subsection does not apply to wills or other testamentary writings. It does not, it will be noted, say expressly that a writing will be invalid or improbative merely because an inventory, schedule or other annexure is not subscribed. The fact that it refers separately to annexures does, however, give rise to doubts. Why was it thought necessary to include paragraph (b)? Was the intention to create an implied requirement that an annexure *must* be subscribed on the last page? If so, what is the sanction for non-compliance? It is interesting to note that Professor Halliday cites section 44 as authority for the proposition that an annexure "must also be subscribed and (where appropriate) sealed on the last page", this being part of "the requirements for formal execution of a probative deed in modern practice."[2]

6.23. Section 44 will fall to be repealed by legislation to implement this Report, as it will be rendered unnecessary by new provisions on the requirements for formal validity and probativity. This raises the question of what, if anything, should be said about annexures. There are at least four options. The first is to say nothing. It would be up to the granter to identify an annexure in any way he chose. This solution would be consistent with the principle that "an unsubscribed document may be rendered effective by another effectively executed writing which plainly identifies it and adopts it".[3] It would produce the same results whether an incorporated document was annexed or not. It would reduce the risk of invalidating writings because of informalities in the authentication of schedule and plans. It would not, of course, prevent people from identifying annexures by subscribing them and this would doubtless continue to be the normal practice. On the other hand to say nothing might leave an apparent gap in the law, given that there is already some provision on this matter in the 1970 Act and might not provide sufficient guidance as to what is an adequate way of incorporating an annexure. A second option would be to provide that the granter's signature on each annexure is necessary for the formal validity of the whole document. This would lay down a clear rule. It would resolve the doubts as to how much can properly be read into section 44. And it would reduce the risks of substitution. It would, however, go too far. There is, in our view, no need to invalidate a whole document merely because an annexure is not subscribed. The document may be complete and sufficient in itself and the annexure may be added merely for convenience (e.g. a plan, where there is already a sufficient description in words). The annexure may contain matters of procedural or peripheral detail which are not essential for giving effect to the writing itself. It would, we think, be unduly harsh to invalidate a writing because such an annexure was not subscribed. The third option

1. See clause 23(2) of the draft Bill annexed.
2. *Conveyancing Law and Practice* Vol 1, 77.
3. Halliday *op cit*, 108. See also *Stenhouse* v *Stenhouse* 1922 SC 370 at 372, 373.

falls half way between the first two. Under this option it would be provided that an annexure would not be regarded as forming part of a writing unless the annexure was referred to in the writing and subscribed. This would have the advantage of not invalidating the whole document merely because an annexure was not subscribed. It would still produce the result, however, that certain documents would be denied effect, or denied complete effect, because an annexure was not subscribed. In the case of documents produced without legal assistance, it could easily happen that a schedule was not subscribed by the granter even although there was no doubt that it was the schedule referred to in the document. The fourth option, and the option we favour, is to fill the gap in the law caused by the repeal of section 44 of the 1970 Act by a provision which sets out a safe and advantageous way of incorporating annexures but which is expressly stated to be without prejudice to other methods of doing so. This would be facilitative rather than restrictive, which is in keeping with the whole philosophy of this Report. The provision should, we suggest, be to the effect that an annexure will be regarded as incorporated in a document if it is referred to in the document and subscribed by the granter (or, in the case of plans, drawings or photographs, signed by the granter). This method of incorporation would be without prejudice to any other method—for example, referring to an unsigned annexure and identifying it by a sufficient description. To give some advantage to the specified method and to obviate the need to prove that the annexure was signed by the same person as the person who signed the document we further suggest that, for the purpose of this provision an annexure which bears to be signed by a granter should be presumed to have been signed by the person who subscribed the document as that granter. Putting it this way (rather than saying "presumed to have been signed by the granter") prevents a person arguing "The inventory is presumed to have been signed by the granter. The main document bears the same signature. Therefore the main document must be presumed to have been subscribed by the granter." We therefore **recommend** that:

34(a) An inventory, appendix, schedule, plan or other document annexed to a writing should be regarded as incorporated in the writing if referred to in it and subscribed (or, in the case of a plan, drawing or photograph, signed) by the granter.

(b) This should be without prejudice to any other method of incorporating an annexure in a document.

(c) For this purpose there should be a presumption that an annexure which bears to be signed by the granter was signed by the person who subscribed the document as that granter.

(Paragraph 6.23; clause 13)

In the case of a written annexure consisting of several pages it would be sufficient for the granter to sign at the end of the last page. If there were two or more granters recommendation 32 would apply and the signatures could spill over on to an extra page or pages. In the case of a plan, drawing or photograph it would be sufficient to sign it anywhere. We considered whether there should be any requirement as to the time at which an annexure must be signed but concluded that it would be best to impose no restriction other than that the annexure should be signed before the document is founded on in legal proceedings or registered for preservation.[1] We have no wish to increase opportunities to object to deeds on technicalities of timing. Normally the annexure would be signed immediately after the main document but as the main purpose is simply identification of the annexure and the protection of the granter there is no reason why it should not be signed earlier or later. If, for example, a disposition presented for recording in the Register of Sasines was found to have an annexure which, through oversight, had not been subscribed by the granter we can see no reason why this defect should not be rectifiable by getting the granter to sign the annexure late.

1. This is the formula used in relation to the addition of a witness's name and address. See para 5.11 above.

Person subscribing in several capacities

6.24 A point put to us since publication of the memorandum is that it would be desirable to make it clear that where a person is a party to a writing in two or more capacities he needs to subscribe only once. We are told that some solicitors require a separate signature in each capacity. This seems to us to be quite unnecessary. We therefore **recommend** that:

35. Where a person subscribes a writing in two or more capacities which are apparent on the face of the writing he should be required to subscribe only once to bind himself in both or all of those capacities.

(Paragraph 6.24; clause 12(4))

Notarial execution

6.25 Under the present law a writing can be executed on behalf of a person who 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"[1]

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 in this respect as a parish minister acting in his own parish.[2] The rationale behind the law on notarial execution was considered by the Court of Session in *Stephen* v. *Scott*[3] where it was held that an enrolled law agent who had not taken out a practising certificate was qualified to execute a deed notarially. The court took the view that the right to execute writings notarially was a privilege conferred on the listed categories of people by virtue of their standing and responsibilities. Notarial execution was not professional work.

6.26 The question we have to consider is whether the list and the rationale behind it are right for present conditions. In the memorandum we argued that, on any view, it was difficult nowadays to see why ministers of the Church of Scotland should be singled out. We suggested that, if a change in the list was thought desirable, then either it could be restricted to notaries and Scottish solicitors (on the view that they would have the necessary legal expertise) or it could be extended to all ministers and also to doctors and possibly certain other professional people (on the view that those who were unable to execute a will normally should be able to call on the help of a trusted professional person with whom they had regular contact). Most consultees thought that some change in the list was needed. The Church of Scotland's Board of Practice and Procedure submitted particularly helpful comments. The Board pointed out that this role of the Church of Scotland minister was readily understandable in the historical context. Before the Reformation, clergymen were often admitted as notaries. The Act of 1584, c.133 prohibited ministers of the Church of Scotland from holding office as notaries but made an exception for notarial execution of testamentary writings. Clergymen of the only relevant church at the time were persons of standing in the community who would be likely, in the nature of their calling, to be available to assist persons wishing to make wills, possibly on deathbed. Nowadays the Church saw notarial execution as a duty, rather than a right or privilege, and as a duty which could present ministers with difficulties. Nonetheless the Board considered that there was a continuing need for such a service and that it would be over-restrictive to confine it to notaries and solicitors

1. Conveyancing (Scotland) Act 1924, s 18.
2. S 13.
3. 1927 SC 85.

"unless one could with confidence say that a person so qualified would be readily available in case of need to provide the service, at times and places which can be unsociable".

The Board's view was that, in view of the historical explanation of the provisions, it was impossible to contend now that Church of Scotland ministers alone should be authorised to act as notaries: the nature of the demand was such that a wider range of persons should be authorised. They recommended therefore (a) that it should continue to be competent for Church of Scotland ministers to execute testamentary writings notarially (b) that the existing territorial restrictions should be removed as no longer appropriate and (c) that the class of qualified persons should be extended. They did not express a view on the form the extension should take. A number of other consultees also thought the list should be extended. Suggestions for extensions included

(a) "those in the medical and perhaps certain paramedical professions"

(b) "clergymen of all denominations and ... registered medical practitioners"

(c) "all clergy who are entitled to celebrate marriage and ... professional men of standing in the community, who are able to command public confidence"

(d) "all of those clergymen who are presently able to conduct a marriage ceremony" and "general practitioners"

(e) "those professions which have a close and regular association with the general public in the course of their practice" including "the medical and accountancy professions, both of which subject their members to ethical and disciplinary rules"

(f) "those persons entitled to countersign a passport,"

(g) "all persons of standing in the community"

(h) anyone, in relation to wills—"as long as the will was otherwise validly executed I see no reason to challenge it on the ground that the person making it did not fall into a particular category".

6.27 Approximately the same number of consultees favoured a restriction of the list to notaries public and Scottish solicitors. The comments of the Association of Directors of Social Work were particularly interesting. They recognised

"two needs requiring to be met when elderly persons or persons who are blind or unable to write become involved in this area. Firstly, they may have a need for the support, advice or interpretation of a trusted person who may be lay or professional. Such a need can be met in our view by the attendance of such a person at the client's invitation, on an informal basis. Secondly, there is a need to ensure in all cases that matters are conducted competently and with a degree of professional expertise which would ensure that the client's interests are protected. This appears to us to be the primary consideration, and for this reason we would support the proposal to restrict the list to notaries and Scottish solicitors".

6.28 Opinion being divided on the nature of the changes required, it is necessary to examine the issue again from first principles. The first point to establish is the need which has to be met. We are talking of the *execution* of a writing. The assumption is that the person concerned has already had the writing prepared, after taking whatever advice he has thought necessary. In the case of a blind person who can write there is no reason why the writing should not be subscribed in the normal way, before a witness if probativity is desired.[1] There is no rule that documents have to be read by the granter before being subscribed: if there were, many documents would be invalidated. The same would apply to a person who is illiterate for general purposes but who can write his signature in standard form. In the case of a person who cannot write a standard signature but who can write his initials or a mark, our recommendations on subscription would enable the writing to be executed by initials or mark. If necessary it could then be set up in court and docquetted. It would then

1. See *Duff* v *Earl of Fife* 1819 1 Shaw's App 498.

be probative as well as formally valid. It may be, of course, that such a person would rather have the writing executed in probative form from the outset. There will also be cases where the granter is unable to write even his initials or a mark. So there will still be a need for notarial execution, but it will be less extensive than might be thought and less extensive than under the present law. This consideration points, we think, in the direction of restricting rather than extending the list of those entitled to act.

6.29 Another consideration which points in the same direction is the difficulty of deciding who should be in an extended list. We have mentioned various suggestions put to us. Clearly these suggestions were not intended as legislative formulae, but the vagueness of such criteria as "standing in the community" demonstrates the difficulty of drawing a line.

6.30 Yet another consideration which points in the direction of a restricted list is that, under the law on liability for negligence, as it has developed in recent years, a person who bungled the execution of a legal writing, such as a will, could be liable in damages to those who lost financially as a result.

6.31 All of these are just considerations. The fundamental question is whether notarial execution should be regarded as a matter requiring legal expertise or as a matter akin to the countersigning of a passport. In our view it should nowadays be regarded as a matter requiring legal expertise. It is not, in our view, reasonable to expect people other than notaries or solicitors to undertake this task and to incur potential liability in doing so. It requires a knowledge of the law on what is a valid subscription, on when notarial execution is permissible and necessary or desirable, and on the mechanics of executing a writing in this way. These are matters within the expertise of notaries and solicitors. So far as solicitors are concerned, we think it would be appropriate to confine this function to those who hold a current practising certificate from the Law Society of Scotland. This follows from our view that notarial execution is professional work, rather than a privilege accorded to persons of standing. There is no need to provide separately for notaries public in relation to deeds executed in Scotland: all notaries public in Scotland have to be solicitors. There is, however, a need to provide for notaries public in relation to deeds executed outside Scotland. There is occasionally a need to have a document relating to Scottish land executed abroad in Scottish form and it would clearly be convenient if this could be done by a properly instructed foreign notary. One difficulty here is that the name given to those who execute the functions of a notary public may vary from country to country. We think that it is the official position and the function performed that matter, not the name, and that accordingly in the case of a document executed abroad a notary public or any other person with official authority to execute writings on behalf of another person should be entitled to act.

6.32 In the memorandum we suggested, in line with our proposals on normally executed writings, that 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 a matter of probativity but not formal validity. This was approved of by a majority of those who commented on it. Some of those who disagreed did so because they thought attestation should in some cases be generally necessary for formal validity. We suspect that, in practice, the distinction between formal validity and probativity will not often be important in this context: where a notary or solicitor has been asked to execute a writing notarially he or she would almost invariably have it attested so as to gain the benefit of probativity. As a matter of principle, however, the subscription by the notary or solicitor should simply take the place of subscription by the granter, and if the latter suffices for formal validity so should the former. This could be useful in practice in rare cases—for example, if a witness were unavailable and execution of the writing was a matter of urgency or if something went wrong with the attestation by the witness.

6.33 Under the present law the person executing a writing notarially has to read the writing over to the granter. One consultee pointed out that this had to be done even in the case of someone who was perfectly able to read the writing himself and

whose sole difficulty (through stroke, injury, handicap or the like) was an inability physically to sign. This, understandably, caused upset and resentment. He therefore suggested that there should be no requirement to read the writing over to anyone well able to read it, who did in fact read it. We think this is a useful suggestion. We would, however, prefer to give effect to it by giving the granter the right to waive the requirement of reading. This would then be available not only to a granter who had read the document himself (and there could be some doubt about what is meant by "read" in this context) but also to a granter who did not want a long formal document read out to him word for word. We think, however, that it should continue to be a requirement that the execution of the writing by the notary or solicitor should take place in the presence of the granter.

6.34 So far as probativity by attestation is concerned we suggest that the normal rules should apply with any modifications necessary to take account of the fact that someone else is subscribing on behalf of the granter. For example, the requirement that the witness should see the granter subscribe would have to be expanded and modified. In the case of notarial execution the witness would have to witness the document being read over to the granter (or witness that requirement being waived) and witness the authority being given by the granter for the notary or solicitor to sign on his behalf, would have to see the solicitor sign, and would have to sign after the solicitor as part of one continuous process. All of this should be recited in the testing clause for probativity to be acquired by attestation. It follows from this approach that one witness should suffice for probativity in the case of notarial execution—a proposition which we made expressly in the memorandum and which was approved of by a majority of those who commented on it. The same principle should govern probativity by court docquet: a writing subscribed notarially but not attested, or defectively attested, could acquire probativity if docquetted with a statement that the court had found it to have been duly subscribed notarially on behalf of the granter.

6.35 The present law requires a holograph docquet, in prescribed form, to be written on the writing at the time of execution by the person acting as notary. This is in addition to a testing clause. In the memorandum we suggested a new form of docquet consisting of separate statements by the notary and the witness (if any). This met with a mixed response on consultation. Some consultees criticised the length of the new form. The Law Society of Scotland suggested a shorter form designed to replace both the testing clause and the docquet required by the present law. We accept these criticisms and have considered this question afresh. So far as formal validity and probativity by court docquet is concerned we think there should be no prescribed form of docquet. The sole question should be whether the writing was in fact read over to the granter (where he has not waived this requirement) and subscribed by the notary or solicitor in his presence on his behalf and by his authority. This would be a matter of proof. A docquet is necessary only for probativity by virtue of attestation. Even here we do not think that any prescribed form of docquet should be mandatory. As in the case of normal testing clauses the information necessary for probativity could be given in any suitable way. The important thing is that it should appear somehow on the face of the writing. A recommended form, with notes, is given in Appendix B.[1]

6.36 One of the most troublesome features of the present law on notarial execution relates to essential validity rather than formal validity. The whole writing will be invalidated if the person acting as notary has a disqualifying interest in its provisions - for example, if he stands to gain remunerative legal work in connection with a trust set up by the writing.[2] In the memorandum we observed that it seemed unfortunate that those who lost most as a result of a disqualifying interest on the part of the person executing the writing were the beneficiaries. We suggested for consideration that the effect of a disqualifying interest on the part of the person executing the writing should

1. Form 2(a) is for those cases where the document is read over to the granter and Form 2(b) is for those cases where the granter declares that he does not wish the document to be read over to him.
2. *Ferrie* v *Ferrie's Trs* (1863) 1M 291; *Newstead* v *Dansken* 1918, 1 SLT 136; *Finlay* v *Finlay's Trs* 1948 SC 16; *Gorrie's Tr* v *Stiven's Exrx* 1952 SC 1; *Hynd's Tr* v *Hynd's Trs* 1955 SC (HL) 1; *Crawford's Trs* v *Glasgow Royal Infirmary* 1955 SC 367; *Irving* v *Snow* 1956 SC 257; *McIldowie* v *Muller* 1979 SC 271.

only be to invalidate any provision conferring a benefit, or the possibility of a benefit, on that person. There was almost unanimous support for this suggestion. One qualification suggested was that the legislation should also invalidate any provision conferring a benefit on members of the immediate family of the person executing the writing. We are not satisfied, however, that this extra restriction is necessary. Moreover, if the restriction went beyond the notary or solicitor himself it would be very difficult to draw a satisfactory line. Another point made on consultation was that the legislation should be precise about what constitutes a disqualifying interest. There are limits to what the law can do in this respect. It could, however, provide that a writing would be invalid in so far as it conferred a benefit in money or money's worth, directly or indirectly, on the notary or solicitor executing the writing. A benefit to the firm of which a solicitor was a member would, as under the present law, be an indirect benefit to him.

6.37 Our recommendations on notarial execution are as follows:

36(a) It should continue to be possible for a writing to be executed notarially on behalf of, with the authority of, and in the presence of, someone who declares that he is blind or unable to write.

(b) Those entitled to carry out notarial execution should be (i) solicitors holding a current Scottish practising certificate and (ii) in the case of writings executed outside Scotland, notaries public or other persons with official authority to execute writings on behalf of others.

(c) Before subscribing on behalf of the granter the notary or solicitor should, as under the present law, read over the writing to the granter. The granter should, however, be able to waive this requirement.

(d) The subscription of the person carrying out notarial execution should be regarded as the equivalent of the granter's subscription. Accordingly a notarially executed writing should be formally valid (even if not attested) if it would have been formally valid if subscribed by the granter.

(e) So far as probativity is concerned the rules recommended above for writings subscribed in the normal way should apply with any necessary modifications. Accordingly one witness should suffice for probativity by attestation in the case of a notarially executed writing.

(f) It should be provided that the information required for probativity, in the case of a notarially executed writing, may be given by means of one of the forms of testing clause set out in Form 2 of Appendix B. The forms should be set out in a statutory instrument but should be optional and without prejudice to any other way of giving the required information.

(g) A writing executed notarially should be invalid in so far as, but only in so far as, it confers a benefit in money or money's worth, directly or indirectly, on the person executing the writing.

(Paragraphs 6.26 to 6.36; clause 14 and Schedule 2)

Execution of writings by partnerships

6.38 The problem here is that a partnership, which is a legal person in Scots law, may be the granter of a writing but cannot subscribe. It is necessary therefore to make some provision for what counts as subscription by the granter when the granter is a partnership and for that subscription to acquire probativity in certain circumstances. Sections 5 and 6 of the Partnership Act 1890 have a bearing on this issue. They are as follows:

"Power of partner to bind the firm

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with

whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Partners bound by acts on behalf of firm

6. An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments."

Formal deeds granted by a partnership are normally executed

"by the firm name adhibited by one of the partners together with the signatures of all the individual partners, all the signatures being attested."[1]

6.39 In the memorandum we suggested that a writing could be validly subscribed on behalf of a partnership by a partner or by any person acting under its authority. This was approved of by a majority of those who commented on it. For the purposes of formal validity of non-attested documents anything less would be much more restrictive than the present law which has not, so far as we are aware, given rise to any problems. Under the scheme which we have recommended for writings granted by individuals, probativity is simply a matter of evidence. A writing is presumed to have been executed as it bears to have been if the granter's subscription bears to be attested by a witness or if the writing carries the appropriate court docquet. The same should apply in the case of partnerships. A writing subscribed on behalf of a partnership by a partner or authorised person should acquire probativity in the same way as a writing subscribed by an individual granter. We think that it would be useful, however, to add that where the writing bears to be subscribed by a person as a partner or authorised person on behalf of the firm it should be presumed that that person was a partner or authorised person. This would meet a concern expressed by several consultees and could be particularly useful after the lapse of a number of years. We also think that it would be useful to provide, as is done by section 6 of the Partnership Act 1890, that the person subscribing on behalf of the partnership may use either the firm name or his own name, provided that it is clear in the latter case that he is subscribing on behalf of the firm. At present, missives by firms of solicitors for the purchase or sale of houses are signed in the firm name and we see no reason to interfere with this practice. In the case of a document which is to be attested it would be preferable for the person subscribing to use his own name and for the testing clause to narrate that he is subscribing on behalf of the firm. This would provide a visible link between the subscription and the name of the person subscribing as stated in the testing clause. However, if the firm name is preferred, there is no reason why the testing clause should not be modified to show that the person subscribing has signed the firm name instead of his own. We therefore **recommend** that:

37(a) In the case of a writing granted by a partnership the above recommendations should apply as if references to subscription by the granter were references to subscription (either of his own name or the firm's name) on behalf of the partnership by a partner or any person authorised so to subscribe.

(b) For the purposes of these recommendations there should be a presumption that a person purporting to subscribe on behalf of a partnership as a partner or authorised person was a partner or authorised person, as the case may be.

(Paragraphs 6.38 to 6.39; clause 15)

6.40 In the memorandum we suggested a form of testing clause for attested writings by partnerships. This was based on the form suggested for individuals and was, we now recognise, too long and cumbersome. The Law Society of Scotland made a helpful suggestion for an alternative form and, in the light of this suggestion and our earlier recommendation on a suitable form for individuals, we have drafted a new recommended, but optional, form which is set out as Form 3 in Appendix B. As with

1. Halliday, *Conveyancing Law and Practice* Vol I, 80.

the other forms of testing clause, we think that this should be set out in a statutory instrument.

Execution of writings by companies

6.41 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.

6.42 The main statutory provision[1] 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."

It is also worth noting section 41 of the 1985 Act which provides that:

> "A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under the company's common seal."

6.43 Section 36(1) ought in our view to be disapplied to Scotland. Paragraph (a) is clearly entirely unsuitable for Scotland. Paragraph (b) does not cater properly for missives for the purchase or sale of heritage, which require not only to be signed but also to be adopted as holograph or otherwise formally authenticated. The subsection as a whole is open to the criticism that it applies only to contracts. For Scotland it ought also to apply to other voluntary obligations. The subsection also mixes up questions of who can bind the company and questions of formal validity. The Bill to implement our recommendations will deal with formal validity. It will say what contracts and obligations require to be in writing and what type of writing will be required. It will apply generally and will cover contracts or obligations entered into

1. Sections 37 to 40 of the Companies Act 1985 deal respectively with bills of exchange and promissory notes, execution of deeds abroad and power to have a seal for use abroad. There are other statutory provisions on the execution of specific writings by companies. See, for example, ss 462(2) and 466(2) of the Companies Act 1985 (floating charges and alterations of floating charges). We discuss some of these provisions later when we consider amendments to miscellaneous statutory provisions.

on behalf of companies. For Scotland, therefore, all that needs to be said in the equivalent of section 36(1), is that a contract or obligation may be made or entered into on behalf of the company by any person acting under its authority express or implied. Section 36(2) seems to add nothing and could also be disapplied to Scotland.

6.44 The main criticisms of the existing law on the execution of writings by companies must, however, be directed at section 36(3). First, 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[1]—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. 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,[2] it derives support from the case of *Clydesdale Bank (Moore Place) Nominees Ltd.* v. *Snodgrass*.[3] 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",[4]

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."[5]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.

6.45 A second criticism 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".[6] 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 is that the provision really means "if it is executed in accordance with the company's articles". Although it takes a considerable feat of the intellect—or the imagination—to construe "this Act" as meaning "the company's articles", this view has been seriously entertained in Scotland. Even if a deed executed in accordance with the company's articles is

1. For the further difficulties which arise in relation to the first alternative see para 6.45 below.
2. 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.
3. 1939 SC 805.
4. At 815.
5. At 827.
6. 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.

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.[1] However, some doubt is thrown on this view by the *Clydesdale Bank* case, referred to above, where the validity of the document in question seemed to depend on the fact that there were two witnesses.[2] 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. A similar possibility is that section 36(3) refers forward to section 41 (quoted above) on the authentication of documents. On this view a deed would be validly executed if signed by a director, the secretary or another authorised officer, but again would not be probative unless attested.

6.46 A third criticism of section 36(3) will already have become apparent. There is no definition of what is meant by a "deed". This is not a technical term of art in Scots law, as it is in English law. What is the difference, if any, between a document and a deed?

6.47 Another doubt about section 36(3) 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, a director or the secretary or another authorised officer of a company and attested by two witnesses in accordance with the old authentication statutes, a valid and probative writing under Scots law? There is reason to suppose that it is. Burns points out that the provision on the execution of deeds by companies is permissive only and does not prohibit any other method of execution.[3] Moreover, section 41 of the 1985 Act authorises a director, secretary or other authorised officer to authenticate documents, and the addition of witnesses would seem to result in compliance with both the companies legislation and the old authentication statutes.

6.48 Before leaving this description of the present law we should add that companies which have to execute many formal documents frequently authorise specified officers to execute documents on behalf of the company, generally by sealing and subscribing. The practice is to accept these documents, at least if they are attested, the authorisation being referred to in the testing clause.[4]

6.49 In the memorandum we invited comments on whether the law on the execution of writings by companies needed to be clarified and, if so, on how this might best be done. There was strong and virtually unanimous support for the view that clarification was required. It is clear from the comments received that this is an area of the law which gives rise to considerable difficulty in practice. It is also clear that section 36(3) is regarded as confusing and unsatisfactory. We therefore **recommend** that:

38(a) Sections 36(1) and (2) of the Companies Act 1985 (on contracts on behalf of a company) should be disapplied to Scotland and replaced, for Scotland, by a provision in the 1985 Act to the effect that a contract or obligation may be made or entered into on behalf of a company by any person acting under its authority, express or implied.

(b) Section 36(3) of the Companies Act 1985 (on the execution by companies of deeds under Scots law) should be repealed. The formal validity and probativity

1. This is the opinion of Professor Halliday. See "Execution of deeds by limited companies", Journal of Law Society of Scotland, January 1979 (Workshop) iii.
2. See "Swinney, Execution of deeds by limited companies", Journal of Law Society of Scotland, July 1979 (Workshop) xlvii.
3. *Conveyancing Practice* (4th edn 1957) 7-8.
4. See Halliday, *Conveyancing Law and Practice* Vol. I, 81-82.

of writings by companies should be regulated by provisions in the Bill to implement the recommendations in this Report.

(Paragraphs 6.41 to 6.49; clauses 16 and 25 and Schedules 7 and 8)

6.50 So far as concerns what should count as a subscription by the granter in the case of a writing granted by a company the considerations are essentially the same as in the case of partnerships. For the reasons given in relation to partnerships we **recommend** that:

39(a) In the case of a writing granted by a company registered under the Companies Acts the above recommendations should apply, in relation to formal validity, as if references to subscription by the granter were references to subscription on behalf of the company by a director of the company, or by the secretary of the company, or by any person authorised so to subscribe.

A proposal on these lines in the memorandum was approved of by a majority of those who commented on it. A few consultees would have restricted the proposal to subscription by a director or secretary. We think, however, that this would be too restrictive, bearing in mind the provisions of sections 36(1)(b) and 41 of the Companies Act 1985 and the great number and range of writings granted by certain companies. We should add that, in line with provisions in the 1985 Act, the reference to a director should include a person occupying the position of director by whatever name called.[1] The reference to the secretary should include one of two or more joint secretaries. The reference to "a person authorised so to subscribe" should include not only a person authorised by the company's articles or board of directors (whether or not there is a formal power of attorney)[2] but also a person (such as an assistant or deputy secretary if there is no secretary capable of acting,[3] or an administrator, receiver or liquidator appointed under the Insolvency Act 1986)[4] who is authorised by law to subscribe. We **recommend** that:

39(b) "Director" should have the same meaning as in the Companies Act 1985 and "secretary" should include one of two or more joint secretaries. "Person authorised so to subscribe" should include a person (such as an administrator, receiver or liquidator) empowered by law to subscribe.

6.51 So far as probativity by attestation is concerned we must emphasise again that, under the scheme proposed in this Report, a probative writing is not one which has to be executed in a special way in order to be formally valid. It is a writing executed in the normal way (i.e. by simple subscription) which has on its face a badge of authenticity which enables it to be accepted in legal proceedings or for other purposes (such as registration) as genuine until the contrary is proved. In the case of a writing by an individual the badge of authenticity is the subscription of an attesting witness. That ought to be available, with necessary modifications,[5] as an option in the case of a company too. The use of seals by companies is firmly established and it seems reasonable to regard the affixing of the company's common seal as an alternative badge of authenticity. In sum, a writing bearing to be subscribed by a director or by the secretary or by an authorised person and to be attested or sealed with the common seal of the company should be probative. As in the case of partnerships, we believe that it would be useful to have a presumption that a person purporting to subscribe on behalf of the company as a director, or secretary or authorised person was in fact a director, or secretary or authorised person.[6] This could be particularly useful after the lapse of a number of years.

---

1. Companies Act 1985, s 741(1).
2. We have been informed that doubts are sometimes raised about the validity in Scots law of a deed signed by an attorney appointed by the directors of a company, the argument being that duties delegated to directors cannot be delegated by them to someone else. (In English law section 74(3) of the Law of Property Act 1925 provides expressly for deeds by attorneys for corporations.) There should be no such doubts under our proposed rules. A duly appointed attorney would clearly be an authorised person.
3. See Companies Act 1985, s 283(3).
4. See ss 14(1), 55(2), 165(3), 167(1) and Sch 1 paras 8 and 9; Sch 2 paras 8 and 9; Sch 4 para 7.
5. For example, the witness should know the person subscribing, not "the granter" (which would be the company).
6. A presumption to this effect is found in several statutes. See eg the Local Government (Scotland) Act 1973, s 193(2); the Re-organisation of Offices (Scotland) Act 1939, s 1(8). There is a similar presumption in the United States of America in the case of documents executed by the officers of corporations. See 19 CJS § 1100.

6.52 The proposals in the preceding paragraph go further than we proposed in the memorandum. They take account, however, of criticisms made on consultation to the effect that the important point was who could sign on behalf of the company and that it was illogical to require more people to sign on behalf of the company for purposes of probativity than for purposes of formal validity. Probativity is just an evidential extra gained by the addition of a witness's signature or some equivalent to a document subscribed in the normal way. The proposals now made meet these criticisms and follow on logically from our earlier recommendations. They also have considerable practical advantages. First, the reduction in the number of signatories required under the statute will make the authentication of formal writings easier for many companies and should result, over time and over the country as a whole, in a useful saving of time and cutting of costs for both companies and solicitors. Several consultees, including the Committee of Scottish Clearing Bankers, thought that the present requirement of signature by two directors, or director and secretary, ought to be considerably relaxed, pointing out that some companies had to execute considerable numbers of deeds every day.[1] The Law Society of Scotland who recommended that subscription by one director (but only a director) plus attestation should suffice for probativity, pointed out that one of the main problems in practice is that it is not always possible to ensure that two directors (or a director and the secretary) will be in the same place as the seal of the company at the same time. Our proposals would meet these practical concerns. They would go further in this direction than recommended by the Law Society of Scotland but this would be a difference of form rather than substance because the Society considered that authorisation of a non-director by power of attorney would be sufficient. Under our proposals, no particular form of authorisation would be required and there would be a presumption of authorisation. We think this would achieve the same result in a more convenient way. Secondly, the availability of attestation as an optional alternative to sealing will be useful in cases where the seal is not readily available or has been mislaid. One experienced solicitor, commenting on our memorandum, described what can happen.

> "Many small companies asked to seal a document will typically search frantically through their own premises, search the studies and bedrooms of various directors, accuse their accountants and solicitors of having the seal (whereupon they also will dutifully turn their offices upside down), and eventually express doubts as to whether they ever had a seal in the first place. A new seal is then ordered up."

Under our proposal this trouble and delay could be avoided: the document could be subscribed by, say, a director and attested. Thirdly, the fact that the proposed statutory requirements are so simple will mean that many simplified forms of execution by companies which at present rest on the companies' articles, or board resolutions in accordance with the articles, will in future be justified by the statute. This will minimise the need for solicitors asked to accept deeds by companies to refer to the articles or resolutions in question and should cut out a good deal of unnecessary trouble and delay. If, for example, a document is subscribed by a director and an authorised officer and sealed with the common seal there will be no need to inquire whether that method is authorised by the company's articles, no need to check the officer's authority (the director's signature being sufficient) and no need to worry whether attestation is also necessary.[2] Fourthly, our proposals would enable the execution of formal documents by companies to be decentralised where this is desired. It would no longer be necessary for documents to be sent to a company's head office (possibly in London) for execution. This too should enable savings in time and money to be achieved. Finally, an incidental advantage of our proposals is that one of the statutory methods of authenticating a probative document by a company in Scots law (by sealing and subscription by a director, secretary or authorised officer) would be such as to present no difficulties or novelties to English companies required to execute

1. The Scottish Special Housing Association (a company incorporated by guarantee under the Companies Acts) pointed out that as at 31 March 1985 it owned 86,815 houses and that it executed literally thousands of conveyancing writs a year. It is fair to say that the Association did not itself request a reduction in the number of signatories required although it was, understandably, strongly opposed to anything which would have increased the formalities.
2. Cf Halliday, "Execution of deeds by limited companies", Journal of Law Society of Scotland, January 1979 (Workshop) iii and Swinney, *loc. cit* xlvii.

documents relating to Scottish land. This could help to avoid a number of time-consuming explanations and re-executions.

6.53 Some people may feel that, in the case of, say, a disposition of land, the reduction in the required signatories from two directors, or a director and the secretary, to one director, or the secretary, or an authorised person would be too dangerous. We do not think it would be. First of all, a director, or the secretary or an authorised person can already bind the company and authenticate, on its behalf, what may be extremely important documents.[1] As some of our consultees observed, it is the power to bind the company that is the really important point. Secondly, many companies already provide, under their articles, for the authentication of deeds under seal by one signatory. This is also the method of authentication prescribed for various important bodies corporate under special statutory provisions.[2] Our proposals would generalise what is already a common and accepted practice which, so far as we are aware, has not given rise to any problems. Thirdly, it is of interest to note that in the United States of America it has for many years been the law that, unless a statute otherwise provides, a conveyance by a corporation can be executed by one authorised officer, the corporate seal being affixed where necessary.[3] Fourthly, if any company wished to lay down extra requirements for the authentication of particular types of document granted by it, then it would, of course, be free to do so. It could, if it wished, require dispositions to be subscribed by two directors and the secretary. Any such extra requirement would be a matter of internal regulation only and would not prevail over a statutory provision saying that one signature sufficed: third parties dealing with the company would not be concerned with such extra requirements: but if a company wanted them it could have them. Finally, as we have observed already in another context, there is something unrealistic about requiring heavy formalities for the last page of a document if no formalities at all are required for the earlier pages. We therefore **recommend** that:

39(c) A writing purporting to be granted by a company registered under the Companies Acts should be probative if it bears to be subscribed on its behalf by a director or the secretary or by any person authorised to subscribe and to be

(i) attested by a witness, or

(ii) sealed with the common seal of the company

and if nothing in the writing indicates that it was not subscribed, and attested or sealed, as it bears to have been.

(d) In the case of option (i) the normal rules on attestation by a witness should apply with any necessary modifications.

(e) For the purposes of this recommendation there should be a presumption that a person purporting to subscribe on behalf of a company as a director or secretary or authorised person was in fact a director or secretary or authorised person.

6.54 So far as a form of testing clause is concerned we have been greatly assisted by suggestions made by consultees with practical experience and expertise in this area. In the light of these suggestions we suggest that, without prejudice to the effectiveness of any other form of testing clause, forms of the type set out in Form 4 of Appendix B might be used to convey the information necessary for the acquisition of probativity. Again, we think that the forms should be set out in a statutory instrument.

6.55 The above rules on probativity would replace section 36(3) of the Companies Act 1985 (which applies only to Scotland and which, as we have seen, is open to serious criticism). They would be unalterable by a company. A company could not,

1. Companies Act 1985, ss 36(1) and 41.
2. See eg Transport Act 1962, Sch 1 paras 4 (as substituted by Transport Act 1968, s 52(4)) and 5.
3. 19 CJS § 1100. In some states, statute has dispensed with the requirement of the seal. Deeds are properly executed in the name of the corporation by the officer or agent but "it is quite generally held" that the proper officer's own signature, with his official title, suffices.

for example, vary the law by providing in its own articles that a writing subscribed by, say, a director or a designated official would be regarded as probative even if not attested. Nor could it provide that only a writing bearing to be subscribed by three directors would be valid or probative. What is valid or probative is a question of the general law and the general law cannot be altered by the internal rules of companies. There would be nothing, of course, as we have noted above, to stop a company laying down, for its own purposes, its own rules on who could adhibit the seal or authenticate writings but these would be matters of internal discipline and would not affect the general law.

6.56 So far as probativity by court docquet is concerned, we envisage that there would normally be little need for this in the case of writings granted by companies, which would usually be prepared and executed with professional advice. It could occasionally be useful, however, as a safety net or in cases where there is a need to set up as probative a writing merely subscribed on behalf of the company. The considerations here are the same as in the case of partnerships and we **recommend** accordingly that:

39(f) The rules on the acquisition of probativity by court docquet should apply to writings granted by a company registered under the Companies Acts.
(Paragraphs 6.50 to 6.56; clauses 16 and 23 and Schedule 3)

Execution of writings by building societies

6.57 The Building Societies Acts contain no direct provisions on the formal validity or probativity of writings executed by or on behalf of building societies, although they do provide for societies to have rules relating, among other things, to the powers and duties of the board of directors and other officers, and to the use of the society's common seal.[1] The rules of a society could not, however, modify the general law on the validity or probativity of writings. It seems therefore that under the present law the authentication statutes would apply and that, in the case of writings coming within their scope, attestation would be required for formal validity and probativity. It is possible that, at common law, the seal of the society would be regarded as its signature and that the signatures of, say, two directors or a director and a secretary, designed as such, would be regarded as the subscriptions of two attesting and properly designed witnesses but the position is not entirely clear. Moreover, as we pointed out in the memorandum, the old authentication statutes do not apply very happily to execution by bodies corporate. What is meant by "knowing" the granter, in this context? Must the pseudo-witnesses see the seal adhibited before they sign? We invited views in the memorandum as to whether there should be statutory provisions on the formal validity and probativity of writings by building societies and, if so, whether such provisions should be analogous to those suggested for companies incorporated under the Companies Acts.[2]

6.58 All of those who commented on this question, including the Building Societies Association, the Keeper of the Registers of Scotland and the Law Society of Scotland, expressly supported both suggestions. The Building Societies Association suggested, however, that special provision should be made for discharges of loans. These have to be probative (for recording purposes) but they are numerous and it would be impractical for them all to be signed by directors. In the rest of the United Kingdom special provision is made for discharges to be authenticated by the society's seal countersigned by any person acting under the authority of the board of directors.[3] We are sympathetic to this request, which is in line with our whole approach of seeking to eliminate unnecessary and inconvenient formal requirements. It would, however, be met by the proposals which we are now making for the execution of documents by companies generally. Under these proposals *any* writing by a company could acquire probativity by being subscribed by a director or the secretary or an authorised

1. Building Societies Act 1986, Sch 2 para 3.
2. Para 8.37.
3. Building Societies Act 1986, Sch 4 para 2.

person and by being sealed or attested by a witness. No special provision for discharges would be necessary. The arguments for and against the scheme we are now recommending for companies are set out fully above. If anything, the arguments for the proposed scheme are even stronger in the case of building societies, because of the great number of conveyancing writs executed by them. We therefore **recommend** that:

40. There should be statutory provision, to the same effect as the rules recommended for writings by companies, on the formal validity and probativity of writings granted by building societies.

(Paragraphs 6.57 and 6.58; clause 18 and Schedule 5)

As registered building societies are bodies corporate under the relevant legislation[1] the draft Bill appended to this Report does not have a separate clause for building societies. They are covered by the provisions on bodies corporate generally. The forms of testing clause suggested for companies could also be used by building societies.

Execution of writings by other bodies corporate (apart from local authorities)

6.59 There are many other bodies corporate which have been created by statute or by royal charter. They go by various names - corporation, council, commission, board, authority, agency and others. It is quite common to find that the statute setting up a statutory corporation contains provisions regulating the authentication of the common seal and providing that a document purporting to be duly executed under the seal of the corporation shall be received in evidence and shall be deemed to be so executed unless the contrary is proved. The assumption underlying these provisions appears to be that there is a background law which regards sealing as a valid method of execution and which determines what documents require to be sealed. This is not so in Scotland where the background law determines what documents require to be attested, holograph or adopted as holograph, and it is difficult to avoid the suspicion that provisions of this nature have been framed with English law in mind, or have been derived from provisions framed with English law in mind. They have nonetheless been widely, but perhaps not universally,[2] accepted in practice as providing a valid method of authenticating Scottish documents which, if executed by an individual, would be attested. The method of authenticating the seal varies. In modern statutes a very common provision is that the fixing of the seal is to be authenticated by the holder of a named position (e.g. chairman, secretary, board member or commission member) or some other authorised person. A typical provision is on the following lines—

> "The fixing of the common seal of the Commission shall be authenticated by the signature of the secretary of the Commission or some other person authorised by the Commission to act for that purpose."[3]

1. See the Building Societies Act 1986, s 5(2).
2. We have been told that some bodies, notwithstanding a statutory provision of the type referred to, continue to have documents such as dispositions attested.
3. Employment and Training Act 1973, Sch 1 para 18 (Manpower Services Commission). Similar provisions allowing authentication by one authorised signatory have been used in a large number of enactments. See eg Transport Act 1962, Sch 1 para 4; Forestry Act 1967, Sch 1 para 4; Coal Industry Nationalisation (National Coal Board)(Amendment) Regs 1968 (SI 1968 No 1781) reg 2; Post Office Act 1969, Sch 1 para 13; Development of Tourism Act 1969, Sch 1 para 15; Radiological Protection Act 1970, Sch 1 para 9; British Library Act 1972, Sch para 9; Social Security Act 1973, Sch 17 para 15; Employment and Training Act 1973, Sch 1 para 18; Nature Conservancy Council Act 1973, Sch 3 para 13; Local Government (Scotland) Act 1973, Sch 4 para 1(4) (re Local Government Boundary Commission for Scotland); Health and Safety at Work etc Act 1974, Sch 2 para 17; Industry Act 1975, Sch 1 para 16; Employment Protection Act 1975, Sch 1 para 10; Air Travel Reserve Fund Act 1975, Sch para 6; Co-operative Development Agency Act 1978, Sch 2 para 15; Electricity (Scotland) Act 1979, Sch 1 para 9; Transport Act 1981, Sch 2 para 9; Iron and Steel Act 1982, Sch 1 para 10; Civil Avaiation Act 1982; Sch 1 para 16; Oil and Pipelines Act 1985, Sch 1 para 7; Building Societies Act 1986, Sch 2 para 14 (re Building Societies Commission).

A few enactments which provide for the seal of the body corporate to be authenticated by one signature require the signature to be that of a member,[1] or that of a member or the secretary.[2] Some enactments require the seal to be authenticated by two signatures—for example, that of a board member *and* the secretary, or that of a board member *and* an authorised person.[3] A very few enactments provide for authentication by more than two signatories.[4] In the case of some bodies corporate there is no statutory provision on the authentication of writings.[5] It must also be kept in mind that foreign bodies corporate may have to execute writings under Scots law: such bodies corporate may not have a common seal.

6.60 Under the scheme which we are recommending for the formal validity of certain writings, subscription by the granter would be required. A body corporate cannot itself put pen to paper and it is therefore necessary to spell out what counts as subscription by the granter in the case of a writing granted by a body corporate. Existing enactments do not provide a solution. As we have seen, they are generally confined to authentication of the seal. It is also necessary for the purposes of our recommended scheme to adapt the provisions on probativity to bodies corporate. In the memorandum we invited views as to whether there should be statutory provisions on the formal validity and probativity of writings granted by bodies corporate other than companies under the Companies Acts, Building Societies and local authorities[6] and, if so, whether these should be analogous to those suggested for companies incorporated under the Companies Acts.[7] All of those who commented on this issue thought that there should be express provision and that it should follow the lines of the provision for companies. Some, however, commented that the variety of forms of bodies corporate could make it very difficult to devise a uniform rule. Fortunately this task is eased by the fact that the rules we have recommended for companies generally have been reduced to a functional minimum. A writing granted by a body corporate must of necessity be executed on its behalf by an individual, or individuals, authorised to do so. Most bodies corporate, other than those with only a few members, have a governing body (whatever called), an official who performs the functions of a secretary (whatever called) and a common seal. Legislation to implement our recommendations could provide that subscription, in the case of a writing granted by a body corporate (other than those specifically dealt with), should mean subscription on behalf of the body corporate by a member of the governing body or the secretary (or equivalent officer, whatever called) or other authorised person. In the case of bodies corporate which have only a few members, and no separate governing body, subscription by any member should suffice. Probativity could be acquired by the addition of a witness's signature, or the common seal, or a court docquet, all as in the case of companies incorporated under the Companies Acts.[8] All bodies corporate could comply with such a requirement without difficulty (even if, for the purposes of their own rules, they had to have additional signatories) and there would be great practical advantages for practitioners and officials in having a simple, uniform statutory rule. There would also be advantages for overseas corporations, which may not have a seal, in having the option of attestation available to them. We therefore **recommend** that:

1. See eg New Towns (Scotland) Act 1968, Sch 2 para 10; National Health Service Act 1966, Sch para 11.
2. See eg Agricultural Act 1967, Sch 5 para 10.
3. See eg Atomic Energy Authority Act 1954, Sch 1 para 8; Crofters (Scotland) Act 1955, Sch 1 para 13; Deer (Scotland) Act 1959, Sch 1 para 12; Highland and Islands Development (Scotland) Act 1965, Sch 1 para 15; Countryside (Scotland) Act 1967, Sch 1 para 9; Hallmarking Act 1973, Sch 4 para 17; Local Government (Scotland) Act 1973, Sch 8 para 5.
4. See eg Industrial and Provident Societies Act 1965, s 36; Agricultural Act 1967, Sch 1 para 10; Solicitors (Scotland) Act 1980, Sch 1 para 12.
5. There appears, for example, to be no such provision in the case of the University Courts of the older Scottish Universities, although they are bodies corporate under s 5(3) of the Universities (Scotland) Act 1889. There are also still in existence a number of old common law corporations.
6. We discuss local authorities in the following paragraphs.
7. Para 8.38. In England and Wales express provision for the execution of deeds by *any* "corporation aggregate" is made by s 74 of the Law of Property Act 1925.
8. One commentator suggested that the use of a witness should be permitted only where the body corporate did not have a common seal. This, however, would not appear on the face of the writing and could be impossible to prove.

41. There should be express statutory provision, to the same effect as the rules recommended for companies, on the formal validity and probativity of writings granted by other bodies corporate (apart from local authorities), the reference to a director being treated as a reference to a member of the governing board (or, in the case of a body corporate without a separate governing board, as a reference to a member of the body corporate) and the reference to the secretary being treated as a reference to the secretary, clerk or equivalent officer (whatever called).

(Paragraphs 6.59 and 6.60; clause 18 and Schedule 5)

6.61 A number of statutory provisions on particular bodies corporate provide that certain documents (e.g. those purporting to be signed by an authorised person on behalf of the body) are to be received in evidence and deemed to be issued by the body unless the contrary is shown.[1] These presumptions have been in existence in some cases for many years. They are often in provisions applying throughout the United Kingdom. So far as we are aware they have not given rise to any difficulties. We do not propose to interfere with them. Any presumptions available under our Bill would be in addition to, and not in derogation of, other presumptions. Again, the forms of testing clause suggested for companies incorporated under the Companies Acts could easily be adapted for use by other bodies corporate.[2]

6.62 For many bodies corporate, provisions on the above lines would merely clarify and confirm their existing practices. We have already noted that many bodies corporate execute formal deeds, such as dispositions, by means of the seal and the signature of one authorised signatory. We have given careful consideration to the approach we should adopt to those enactments which require two or more signatories for the authentication of the seal. In some cases, after consultation with the body corporate concerned, we are recommending amendment of the enactment so as to require only one authorised signatory. In other cases, especially where the provisions in question are United Kingdom provisions, we do not feel able to recommend amendment, although we would express the hope that if such provisions are ever being reconsidered consideration will be given to reducing the required number of signatures to one. The result of our recommended approach would be that a body corporate whose statute continues to provide that the seal is to be authenticated by, say, a board member *and* the secretary would continue, for its own purposes, to authenticate its seal in this way. However, if it failed to do so, a deed would still be valid if subscribed by a member of the governing body, or the secretary or an authorised person and would still be probative for all purposes (including registration) if sealed or attested by a witness.

Execution of writings by local authorities

6.63 For the purposes of new statutory provisions on the subscription and probativity of writings it will be necessary to specify what counts as subscription in the case of a local authority,[3] and how that subscription can acquire the presumption of authenticity, which is what we mean by probativity. Section 193 of the Local Government (Scotland) Act 1973 deals with the authentication of documents and provides that any document which a local authority are authorised or required under any enactment to issue may be signed on behalf of the authority by the "proper officer" of the authority. "Proper officer" is defined in section 235(3) as, in relation to any purpose, an officer appointed by the local authority for that purpose. Section 194(1) of the 1973 Act deals with the authentication of "deeds" and provides that a deed to which a local authority are a party will be validly executed if it is sealed with the common seal of the local authority and subscribed on their behalf by two of their members and the proper officer or if it is executed "in such other manner as may be provided in a local Act".

1. See eg the Forestry Act 1967, Sch 1 para 5; the Post Office Act 1969, Sch 1 para 15. There are many other examples.
2. See Appendix B, Forms 4(a) and (b).
3. Ie a regional, islands or district council. Local Government (Scotland) Act 1973, s 235.

6.64 In the memorandum we invited views on questions relating to the formal validity and probativity of writings granted by local authorities.[1] In particular we asked whether there was a case for widening the category of authorised signatory, for purposes of formal validity, to include not only the "proper officer" as defined in the 1973 Act but also any person acting under the council's authority, express or implied. We also asked whether it would be desirable, for probativity, to allow attestation by a witness, as an alternative to sealing and to reduce the number of required signatories to, say, one member of the council and the proper officer.

6.65 We received a number of helpful comments on these questions, including comments from the Society of Directors of Administration in Scotland. On the question of allowing authorised signatories other than the proper officer there was a mixed reaction. Some favoured an extension. Others thought the law should be left as it is. In this situation we have paid particular attention to the views of the Society of Directors of Administration in Scotland, expressed in comments prepared for, and submitted to us by, the Convention of Scottish Local Authorities. They took the view that the provision for signature by the proper officer was perfectly satisfactory and that it would not be desirable or helpful to seek to extend this capacity to any other person. In these circumstances we propose no change in the rule that documents may be signed on behalf of a local authority by the "proper officer" of the authority, as defined in the 1973 Act.

6.66 There was considerable support on consultation for reducing the number of signatories required for probative writings by local authorities. Only two consultees favoured retaining the requirement of signature by *two* councillors. Other consultees favoured our proposal to reduce the number of subscribing councillors to one. The arguments in support of this were that it would simplify the legal requirements, that it would be consistent with what those consultees favoured for execution by companies, and that it would have practical advantages. It was pointed out that in rural areas it was not always easy to arrange for the attendance of councillors to sign documents.

6.67 In the light of these responses we are fortified in our view that there should be a reduction in the number of signatories required for the probativity of local authority documents. However, in the course of our work on this Report we have come to the view that it would be right, both on principle and for practical reasons, to go further and to require subscription only by the proper officer.[2] Interestingly enough, during the same period, the Society of Directors of Administration in Scotland came independently to the same view and agreed that we could treat a letter from them on this subject as a supplementary comment on the memorandum.

6.68 Our initial reason for considering moving to a requirement of subscription by the proper officer (plus sealing or attestation for probativity) was that, under the scheme recommended for individuals, probativity is an evidential extra, acquired by attestation or the equivalent. It is something gained by the *addition* of the appropriate authentication (attestation, seal or court docquet) to what is required for formal validity. It would be quite impracticable to require subscription by councillors for the formal validity of all local authority documents coming within our proposals (including missives). It seemed right, therefore, to continue the policy of section 193 of the 1973 Act with regard to the subscription of documents generally and to require subscription by the proper officer for formal validity. On this view, it followed that the signature of the proper officer plus sealing or attestation or court docquet should suffice for probativity. Another consideration pointing in this direction is that the signing of documents is a purely executive function, not a policy making or decision making function. It is therefore properly a matter for the officers of the authority rather than the elected members. Councillors differ from company directors in that they are not expected (as company directors often are) to play an active executive role. They are more like members of Parliament. As a matter of practice, moreover, we could see little point in arranging for a councillor or councillors to sign bundles

1. Para 8.36.
2. Plus sealing or attestation by a witness for probativity. See para 6.68 below.

of writs. At best this would be a mechanical process: at worst it could be productive of unnecessary work, unnecessary delay and an increased possibility of mistakes. For all of these reasons we had come to the view that the number of persons required to subscribe writings granted by local authorities should be reduced to one—the proper officer. It was with considerable interest that we learned at a late stage in this exercise that, for essentially practical reasons, the Society of Directors of Administration in Scotland had come to the same conclusion and that the Convention of Scottish Local Authorities (COSLA) also no longer considered it necessary for elected members to participate in the execution of deeds by local authorities.

6.69 So far as the additional element required for probativity is concerned we strongly favour an approach which will lead to consistency across the whole field of writings by bodies corporate of all kinds. For this reason we adhere to the suggestion made in the memorandum and supported by a number of consultees that probativity should be acquired by the addition of the authority's seal, or by attestation by one witness, or by court docquet. The Society of Directors of Administration in Scotland favoured restricting such addition to the seal and COSLA also envisaged that deeds would be signed by the proper officer and sealed with the authority's common seal. We concede that there is probably less need for the alternative of attestation in the case of local authorities (who will always have a seal and who can be expected not to mislay it) than in the case of, say, foreign companies or small companies which execute deeds infrequently. However, there is no reason why a local authority should not, for their own purposes, adopt sealing as their standard way of executing probative documents. There is no reason, so far as we can see, for depriving local authorites of an alternative method of authentication which would be available to registered companies, other bodies corporate and government ministers, and which could conceivably be useful in certain circumstances. This would be a facility which they would not need to avail themselves of if they did not wish to.

6.70 As in the case of companies and other bodies corporate we think it would be useful to have a presumption that a person purporting to subscribe on behalf of the authority as an officer of the authority was in fact a proper officer for that purpose. Taking all the above points together we **recommend** that:

42(a) In the case of a writing granted by a local authority the above recommendations should apply, in relation to formal validity, as if references to subscription by the granter were references to subscription on behalf of the local authority by a proper officer as defined in the Local Government (Scotland) Act 1973.

(b) A writing purporting to be granted by a local authority should be probative if it bears to be subscribed on its behalf by a proper officer of the authority and to be

(i) attested by a witness, or

(ii) sealed with the common seal of the local authority

and if nothing in the writing indicates that it was not subscribed, and attested or sealed, as it bears to have been.

(c) In the case of option (i) the normal rules on attestation by a witness should apply with any necessary modifications.

(d) For the purpose of this recommendation there should be a presumption that a person purporting to subscribe on behalf of the authority as an officer of the authority was in fact a proper officer for that purpose.

(e) The rules on the acquisition of probativity by court docquet should apply to writings granted by a local authority.

(Paragraphs 6.63 to 6.70; clause 17 and Schedule 4)

The forms of testing clause suggested for companies could also be used by local authorities.

Execution of writings by government ministers

6.71 Our main purpose in dealing in this Report with writings granted by government ministers is to avoid leaving a gap. A new law requiring subscribed writings for certain purposes should, for completeness, say what is meant by a subscribed writing in the case of a writing granted by a government minister. A new law requiring a deed to be probative before it can be recorded in the Register of Sasines should, for completeness, say what will count as a probative writing in the case of a writing granted by a government minister. We also hope that setting out the rules on the execution of Scottish legal documents by government ministers in a modern statute will make life easier for solicitors, both in private practice and in the public service, who have to consider and advise on the execution of such documents.

6.72 The present law on the execution of writings by government ministers is contained in a number of statutes and statutory instruments. From the Scottish point of view the most important provision is section 1(8) of the Reorganisation of Offices (Scotland) Act 1939. This provides as follows—

> "In any instrument in connection with the acquisition, management, or disposal of any property, heritable or moveable, and in any legal proceedings to which the Secretary of State for Scotland is a party, it shall be sufficient to describe him by the title 'the Secretary of State for Scotland' without naming him, and any such instrument shall without prejudice to any other method of execution, be deemed to be validly executed by him if it is executed on his behalf by any officer authorised by him for the purpose. Any such instrument purporting to have been executed as aforesaid on behalf of the Secretary of State for Scotland shall, until the contrary is proved, be deemed to have been so executed on his behalf."

It will be noted that, so far as the execution of writings is concerned, this provision applies only to instruments relating to property: it does not cover ordinary bonds, for example. The provision makes it clear who (other than the Secretary of State) may execute a document but it does not expressly state *how* such a document is to be executed for the purposes of either formal validity or probativity. If this is governed by the general law then two witnesses would be required for documents coming within the scope of the authentication statutes. The provision says nothing about sealing although in practice a seal is used for certain documents. Again, if the general law applies, then two witnesses would be needed in addition to the seal. This follows from the express words of the Subscription of Deeds Act 1540. We understand that in practice conveyancing deeds by the Secretary of State for Scotland are often sealed and witnessed. It may be, however, that the 1939 Act is to be construed as if the word "executed" means "subscribed" rather than "executed in accordance with the ordinary rules of Scots law" so that the Act's provisions are to be taken as implying that mere subscription is sufficient for formal validity. This, however, would be extremely odd because it would mean that an instrument executed by an officer on behalf of the Secretary of State would be valid if subscribed whereas an instrument executed by the Secretary of State himself would, if it came under the authentication statutes, have to be attested. The better view would seem to be that the provision says who may execute deeds for the Secretary of State for Scotland, but says nothing about how they are to be executed. In the case of an attested deed executed on behalf of the Secretary of State the presumption at the end of the provision is useful only as a presumption of due authorisation. The attestation itself would give rise to the normal presumptions flowing from probativity. It is presumably because the presumption was seen in this way—as a presumption of authorisation—that it does not apply to deeds executed by the Secretary of State personally. The substance of section 1(8) of the 1939 Act would fit in perfectly well with the scheme recommended in this Report. The ideas of subscription by one authorised officer and of a presumption of authorisation would be consistent with the rules recommended for companies, local authorities and other bodies corporate. We think, however, that it would be advantageous to repeal the second half of section 1(8) (from "and any such instrument" to the end) and to re-enact its rules in the legislation implementing this Report. This is partly because section 1(8) is limited to property matters and partly because the new Act would undoubtedly be more familiar and accessible to practitioners than

the Reorganisation of Offices (Scotland) Act 1939. The new rules should also provide expressly for probativity to be acquired by sealing *or* witnessing *or* court docquet.

6.73 The Forestry Act 1967 enables instruments in connection with the management or disposal of Forestry Commission land in Scotland to be executed on behalf of the Secretary of State by an officer of the Forestry Commissioners authorised by him for the purpose: any instrument so executed is deemed, for the purposes of section 1(8) of the Reorganisation of Offices (Scotland) Act 1939, to have been executed by an officer of the Secretary of State duly authorised by him.[1] There is a similar provision in section 79(1A) of the National Health Service (Scotland) Act 1978.[2] These provisions could simply be amended so as to add to the reference to the 1939 Act a reference to any new Act implementing these recommendations.

6.74 Provisions on the authentication of writings by other Secretaries of State or government ministers are contained in various statutory provisions and orders. A typical example is the Secretary of State for Transport Order 1976.[3] Article 4 provides as follows—

"Style, seal and acts of Secretary of State for Transport

4.—(1) The person who at the coming into operation of this Order is Secretary of State for Transport and his successors shall be, by that name, a corporation sole, with a corporate seal.

(2) The corporate seal of the Secretary of State for Transport shall be authenticated by the signature of a Secretary of State, or of a Secretary to the Department of Transport, or by a person authorised by a Secretary of State to act in that behalf.

(3) The corporate seal of the Secretary of State for Transport shall be officially and judicially noticed, and every document purporting to be an instrument made or issued by the Secretary of State for Transport and to be sealed with that seal authenticated in the manner provided by paragraph (2) above, or to be signed or executed by a Secretary to the Department of Transport or a person authorised as above, shall be received in evidence and be deemed to be so made or issued without further proof, unless the contrary is shown.

(4) A certificate signed by the Secretary of State for Transport that any instrument purporting to be made or issued by him was so made or issued shall be conclusive evidence of the fact.

(5) No stamp duty shall be chargeable on any instrument made by, to or with the Secretary of State for Transport."

These provisions appear to be framed with English law in mind. Scottish lawyers are not familiar with corporations sole. Scots law does not have any category of document which has to be sealed. Provisions of this type do not provide a clear answer as to how, say, a disposition of Scottish land should be executed, for the purposes of formal validity, by or on behalf of a particular Secretary of State or Minister. For that, reference may require to be made to the general law of Scotland. For this reason provisions of this type cannot be relied on to fill any gaps left by the repeal of the Scottish authentication statutes.

6.75 One of the difficulties in this area is the frequent redistribution of functions between Ministers. General provisions on this matter are contained in the Ministers of the Crown Act 1975. Section 3 of the Act provides as follows—

"Transfer of property, etc. by or to Secretary of State.

3.—(1) This section applies where any enactment (including an order under this Act) provides that a named Secretary of State and his successors shall be a corporation sole, and applies whether or not the office of corporation sole is for the time being vacant.

1. Forestry Act 1967, s 39(5).
2. Inserted by the Health and Social Services and Social Security Adjudications Act 1983, Sch 7 para 3.
3. SI 1976 No 1775. For other examples, see SI 1970 No 1681; SI 1974 No 692; SI 1983 No 146. See also the Ministers of the Crown Act 1975 Sch 1 paras 5 and 6.

(2) Anything done by or in relation to any other Secretary of State for the named Secretary of State as a corporation sole shall have effect as if done by or in relation to the named Secretary of State.

(3) Without prejudice to the preceding provisions of this section, any deed, contract or other instrument to be executed by or on behalf of the named Secretary of State as a corporation sole shall be valid if under the corporate seal of that Secretary of State authenticated by the signature of any other Secretary of State, or of a Secretary to any department of a Secretary of State, or of a person authorised by any Secretary of State to act in that behalf."

It will be noted that, unlike the provision quoted in the previous paragraph, section 3(3) actually says that a deed, contract or other instrument is "valid" if authenticated in the way provided for. The subsection is, however, dealing with a limited problem; it does not provide for the case where the seal of a named Secretary of State is authenticated by the signature of that Secretary of State himself.

6.76 The statutes and orders on the execution of documents by government ministers generally contain a presumption that certain documents are to be received in evidence and deemed to be made or issued as they purport to be, without further proof, unless the contrary is shown.[1] These presumptions generally arise not only where a document purports to be duly sealed and authenticated but also where a document merely purports to be "signed or executed" by a secretary to the department or ministry or by an authorised person. It is not clear whether a document which purports to be signed by an authorised civil servant but which is not sealed or attested would be regarded as a probative document for all purposes of Scots law.[2] If this is the effect it is curious that the presumptions do not apply if a document purports to be signed by the relevant Secretary of State or Minister himself. It seems more likely that the presumptions are designed to prevent challenges to the authority of the person to sign rather than to confer probativity in the Scottish sense.

6.77 There is no doubt room for argument about the precise effect in Scots law of these provisions on the authentication of writings by, or on behalf of, Secretaries of State and Ministers. What seems beyond argument is that they do not provide a complete, or a conveniently accessible, guide to the requirements under Scots law for the formal validity and probativity of such documents as dispositions and bonds granted by Secretaries of State or Ministers. They would not answer the questions which would inevitably arise as to how such documents would fall to be executed under any new scheme introduced to implement this Report. We think, therefore, that our draft Bill should include provisions designed to adapt its main rules on formal validity and probativity for the case of documents by Secretaries of State and Ministers. We can see no reason why these provisions should not be on the same lines as those recommended for other special cases, like partnerships, companies and local authorities. Indeed provisions on these lines would continue the present policy of authentication by one Minister, Secretary or authorised signatory. A seal, or attestation by a witness, could be added to a formal document if probativity were desired—e.g. for registration. The forms of testing clause used for companies and local authorities could be used with very slight modification.[3] We therefore **recommend** that:

43(a) In the case of a writing granted by a Secretary of State or other Minister of the Crown the above recommendations should apply, in relation to formal validity, as if references to subscription by the granter were references to subscription by the Secretary of State or Minister or by a person authorised by him.

1. See eg the provisions quoted in paras 6.72 and 6.74 above.
2. Such a document would not in practice be regarded as suitable for the conveyance of Scottish land.
3. See Appendix B, Form 4.

(b) A writing purporting to be granted by a Secretary of State or other Minister of the Crown should be probative if it bears to be subscribed by him, or by a person authorised by him, and to be

(i) attested by a witness, or

(ii) sealed with his official seal

and if nothing in the writing indicates that it was not subscribed, and attested or sealed, as it bears to have been.

(c) There should be a presumption that a person purporting to subscribe with the authority of a Secretary of State or other Minister was so authorised.

(d) The rules on probativity by court docquet should apply to writings within the scope of this recommendation as in other cases.

(e) These recommendations are intended to be without prejudice to section 3 of the Ministers of the Crown Act 1975 and to any presumption that any document has been made or issued by or on behalf of a Secretary of State or other Minister.

(Paragraphs 6.71 to 6.77; clause 19 and Schedule 6)

6.78 There are many documents issued by Secretaries of State and Ministers which fall outside the scope of our recommendations on formal validity. These include letters, notices and circulars of all kinds which would not fall under the old authentication statutes and would not therefore be affected by the repeal of those statutes. The execution of such documents would continue to be governed by the present law and practice. Often, indeed, the question of *validity* as such would not arise in relation to such documents; they would often merely convey information rather than purport to bring about, by their own force, a change in anyone's legal position. So far as their authenticity is concerned the existing statutory presumptions that documents purporting to be made or issued by a Secretary of State or Minister, and to be signed by an authorised officer, were in fact so made or issued would continue to apply.[1] The law and practice on the formal validity and probativity of legislative documents would also be unaffected by our recommendations.

Crown writs

6.79 There are special rules on the authentication of Crown writs, which include all charters, precepts and writs from Her Majesty and the Prince and Steward of Scotland.[2] The procedure for obtaining a Crown writ and the method of authentication (which involves signature by the director of chancery or his depute or substitute) are laid down in some detail in the Titles to Land Consolidation (Scotland) Act 1868.[3] We have received no representations on the subject of Crown writs and consider therefore that nothing in our recommendations should prevent the existing statutory procedures from being followed, although the new rules should be available as an option or a safety net. Much of the underlying law will fall to be reviewed in the course of our work on land tenure and the feudal system. In the meantime we note that:

44. The above recommendations should not prevent the authentication, recording or registration of Crown writs in accordance with existing law and practice.

(Paragraph 6.79; clause 24)

1. See eg art 4(3) of the Secretary of State for Transport Order 1976 quoted in para 4.74 above.
2. Titles to Land Consolidation (Scotland) Act 1868, s 3.
3. Ss 63-90. In the case of a disposition by the Crown of property falling to it as *bona vacantia* the writ is signed by the Keeper of the Registers of Scotland.

Part VII Consequential amendments and repeals

Introduction

7.1 Some amendments and repeals have already been mentioned. Others are either straightforward and self-explanatory or are sufficiently explained in the notes on the provisions of the draft Bill appended to this Report. In this part of the Report we discuss a few suggested amendments and repeals which are of particular interest or importance. They fall into three categories—(1) those relating to statutory provisions in the main parts of Acts, (2) those relating to conveyancing forms in schedules to Acts, and (3) those relating to provisions or forms in statutory instruments. Before turning to specific statutory provisions, we should mention one general adaptation of existing enactments which seems to us to be required. A number of statutory provisions refer to probative writings. In relation to writings executed after any legislation implementing these recommendations comes into force such provisions should be read as referring to writings which are probative under the new law. We therefore **recommend** that:

45. Any reference in any existing enactment to a probative writing should, in relation to a writing executed after any legislation to implement these recommendations comes into force, be construed as a reference to a writing which is probative under the new law.

(Paragraph 7.1; clause 25 and Schedule 7)

Statutory provisions

The Blank Bonds and Trusts Act 1696

7.2 This Act does two things. First it provides that deeds blank in the name of the grantee are to be null unless the grantee's name is inserted "before or at the Subscriveing or at least in presence of the same witnesses who were witnesses to the Subscribing befor the delivery." Secondly, it requires certain trusts to be proved by writ or oath. We have already dealt with the question of proof by writ or oath[1] and the result of our recommendation on that subject would be the repeal of the part of the 1696 Act dealing with trusts. The question for consideration here is whether the whole of the Act should be repealed. We think it should be. The part dealing with the situation where the grantee's name is left blank is unnecessary. It has been interpreted as invalidating only anything inserted in the blank space after subscription, and not the entire deed.[2] This result, as has been judicially noted,[3] would be achieved by the general law in any event.[4] The facility of adding the grantee's name after subscription but in the presence of the original witnesses and before delivery also seems to us to be unnecessary. It gives an unusual role to instrumentary witnesses, and would not fit well into a system where subscription alone is sufficient for formal validity. We **recommend** that the 1696 Act should be repealed in its entirety.

The Registration Act 1698

7.3 This Act allowed probative writs to be registered for preservation even although they had no clause of consent to registration. Under our recommendations certain

1. See paras 2.33 to 2.37 and 3.19.
2. *Abernethie* v *Forbes* (1835) 13S 263.
3. *Ibid* per Lord Ordinary Jeffrey at 268. See also *Pentland* v *Hare* (1829) 7S 640.
4. In some cases statutory provisions allow blanks to be filled in after subscription. See eg Bills of Exchange Act 1882 s 20; Stock Transfer Act 1963 s 1(2). These provisions would be unaffected by the repeal of the 1696 Act and would prevail over the general law, whether that depends on the common law or the new legislation proposed in the attached Bill. The Bill preserves the effect of other enactments (see clause 4).

non-probative writs will be registrable without such a clause. Rather than amend the 1698 Act we think it would be better to repeal it and add a short subsection to our Bill allowing documents generally to be registered for preservation without a clause of consent to registration.

Sheriff Courts (Scotland) Act 1907

7.4 Section 35 of the Act deals with the effect of a letter of removal by a tenant in possession of any lands exceeding two acres in extent. The letter, if "either holograph or attested by one witness", has the same effect as an extract decree of removing. The reference to holograph writing is inconsistent with the general policy of this Report. It is doubtful, too, whether the requirement of attestation by a witness provides any protection for the tenant. The witness could be provided by the landlord when he asks the tenant to sign and is, in any event, only a witness to the tenant's signature. The witness provides absolutely no guarantee that the tenant understands the effect of what he is signing. For these reasons, and in the interests of consistency, the draft Bill deletes the words "either holograph or attested by one witness" in section 53 and makes corresponding amendments to Form M in the Appendix to the First Schedule to the Act.

The Industrial and Provident Societies Act 1965

7.5 Section 36 of this Act deals with the execution of deeds in Scotland by societies registered under the Act. Such societies are bodies corporate by virtue of registration.[1] Section 36 provides that:

> "In Scotland, any deed or writ to which any registered society is a party shall be held to be duly executed on behalf of that society if it is sealed with the common seal of the society and subscribed on behalf of the society by two members of the committee and the secretary thereof, whether that subscription is attested by witnesses or not."

There was general support on consultation for the policy of having the same rules apply to the execution of writings by all bodies corporate and two consultees expressly mentioned this provision as one which could usefully be brought into line with the rules for other bodies corporate. As section 36 applies only to Scotland, the simplest way of achieving consistency is to repeal the section and to allow the provisions in the new law to apply.[2] We so recommend. This is the same approach as is being adopted in relation to companies registered under the Companies Acts.

7.6 Section 34 of the 1965 Act provides for forms of receipt to be endorsed on or annexed to heritable securities held by registered societies over land in Scotland. When registered in the General Register of Sasines such receipts act as effective discharges of the security. There is a similar form for property other than land: in this case the form acts as an effective discharge even without registration. All of these forms of receipt must, under the Act, be signed by two members of the committee and countersigned by the secretary of the society. Under the new law which we are recommending this would be a more burdensome requirement than would apply to ordinary discharges, which would have to be signed by only one signatory (member, secretary or other authorised signatory) and, for purposes of registration, sealed or attested by one witness. The whole point of section 34 (which reproduces requirements dating from 1893) was to provide a simpler method of discharge and it would be perverse if a simple endorsed receipt were to continue to require three signatures while an ordinary probative discharge required only two. The draft Bill therefore amends section 34 so as to remove the requirement of three signatures. Under the provisions of the Bill on requirements for registration, the addition of a witness's signature or the society's seal would be necessary for registration in the Register of Sasines. In short the formalities would be the same as in the case of other probative writs, including discharges by building societies.

Prescription and Limitation (Scotland) Act 1973

7.7 Some of the amendments made to this Act[3] are purely consequential on our recommendation that no special prescriptive period should apply to an obligation

1. 1965 Act, s 3.
2. See cl 18 of the draft Bill appended.
3. Ie the repeal of Sch 1, para 2(c) and para 3(1) and 4(b).

constituted or evidenced by a probative writ. Here we consider section 5(2) of the Act. This provides as follows:

> "Where a deed has been at any time *ex facie* invalid by reason of an informality of execution within the meaning of section 39 of the Conveyancing (Scotland) Act 1874, but the appropriate court has subsequently declared, in pursuance of that section, that it was subscribed by the granter or maker and the witnesses, the deed shall be deemed for the purposes of the said sections 1, 2 and 3 not to be, and not at any time to have been, *ex facie* invalid by reason of any such informality of execution."

The subsection seems, however, to be based on a misreading of section 39 of the 1874 Act. Section 39 does not provide that an informality of execution makes a deed *ex facie* invalid. It provides that no deed which suffers only from an informality of execution "shall be deemed invalid". Such a deed is *ex facie* valid from the start: it just does not prove its own authenticity. As the draft Bill appended repeals section 39, and as section 5(2) of the 1973 Act is parasitic on section 39, and unnecessary, the draft Bill repeals section 5(2) as well. The repeal would not in any event affect any document executed before the commencement of the new legislation.[1]

Local Government (Scotland) Act 1973 and related local Acts

7.8 Section 194(1) of the 1973 Act regulates the execution of deeds by Scottish local authorities. It will be superseded by the provisions in the draft Bill relating to the formal validity and probativity of documents granted by local authorities and is therefore repealed in the draft Bill. Section 194(2) of the 1973 Act deals with the giving of authority to affix a local authority's seal. Although the role of the seal will be slightly different under our scheme there is no reason why section 194(2) should not continue in its present form.

7.9 At the time when this Report is being written a number of local statutory provisions applying to the local authorities are in the course of preparation.[2] These will eventually supersede existing local statutory provisions, such as the Edinburgh Corporation Order Confirmation Act 1967.[3] Those responsible for the new provisions are aware of our work in this area and we hope that they will be able, if so advised, to take our recommendations into account in framing any new local provisions on the execution of deeds by local authorities.

Patents Act 1977

7.10 Section 31(6) of this Act provides that in Scotland an assignation or grant of security in relation to a patent must be in writing "probative or holograph of the parties to the transaction". This contrasts with the equivalent provision for the rest of the United Kingdom (section 30(6)) which requires only signed writing. We can see no justification, in the context of the general scheme recommended in this Report, for requiring more than subscription by or on behalf of the parties to the transaction for the formal validity of an assignation or grant of security under section 31 of the Patents Act 1977 and the draft Bill amends section 31(6) accordingly.

Companies Act 1985

7.11 The companies legislation has recently been consolidated in the 1985 Act. For the most part it applies throughout the United Kingdom. For both these reasons we wish to interfere with it as little as possible. The only provisions to which we suggest amendments are section 36 which deals with contracts by companies and the execution of deeds on behalf of companies according to the law of Scotland, sections 38(1) and 39(3), which deal with authority to execute deeds abroad, and sections 462, 466 and 469 which deal with various points of form relating to Scottish floating charges. Section 36 has been discussed already.[4]

7.12 Section 38(1) says that a company, "by writing under its common seal" may empower a person as its attorney to execute deeds on its behalf abroad. So far as Scots law is concerned we can see no good reason for departing from the normal rules

1. See cl 25(3) of the draft Bill appended.
2. The Local Statutory Provisions (Postponement of Repeal) (Scotland) Order 1986 (SI 1986 No 2034) in the meantime preserves existing local statutory provisions.
3. S 16 of this Act contains a special method of authenticating deeds, involving signature by the town clerk and one member of the corporation, without any necessity for sealing or attestation by witnesses.
4. Paras 6.41 to 6.50 above.

on the authentication of documents in this case. The draft Bill amends the section accordingly. In practice no doubt powers of attorney under the section would be subscribed by a director or the secretary on behalf of the company and sealed or attested so as to carry the maximum weight. A similar amendment is made to section 39(3) which deals with the case where a company has a special seal for use abroad and allows the company "by writing under its common seal" to authorise a person appointed for the purpose to affix the seal.

7.13 Section 462 of the 1985 Act contains provisions on the execution of floating charges in the case of companies which the Court of Session has jurisdiction to wind up. The writing creating the floating charge must be under the seal of the company or executed by an attorney authorised for such purpose by the company by writing under its common seal. We consider that the execution of floating charges should be subject to the same rules as the execution of conveyancing writs (including heritable securities) generally.[1] This would mean that, for formal validity, subscription in accordance with the provisions in the appended draft Bill would be necessary and sufficient, while for probativity there would also have to be sealing or attestation. On this approach there would be no need for special provision for authorised attorneys: they would be authorised signatories in any event. The draft Bill amends section 462 accordingly. Amendments, with the same purpose of applying the ordinary rules on the execution of conveyancing writs, are also made to sections 466 (alteration of floating charges) and 469 (appointment of receiver) of the 1985 Act.

Housing (Scotland) Act 1987

7.14 Section 53(1) of this Act provides that a secure tenancy is to be constituted by writing which is probative or holograph of the parties. In accordance with our general policy the draft Bill amends this so as to require only subscription. A similar amendment is made to section 54(6) which deals with agreements to vary a secure tenancy.

Provisions requiring seal

7.15 The draft Bill amends or repeals a few statutory provisions, which at present require the use of a seal, so as to require, so far as Scots law is concerned, only subscription in accordance with the terms of the Bill.[2]

Provisions not recommended for amendment

7.16 As already noted we are not recommending any amendment of the provisions relating to Crown writs,[3] or the Great Seal.[4] We also do not recommend amendment of section 6 of the Crown Private Estates Act 1862 which, in permitting signature by another person on behalf of the granter, departs from the normal rules of Scots law. It may be that Her Majesty's advisers will wish to consider, in the light of any legislation which might follow from this Report, whether section 6 should continue to require two witnesses in all circumstances. The Merchant Shipping Act 1894 requires a bill of sale of a registered ship, or a share in a registered ship, to be "executed by the transferor in the presence of, and be attested by, a witness or witnesses."[5] A duly executed bill of sale is registered by the registrar of the port of registry.[6] As a matter of principle we would prefer to see subscription as the sole requirement for formal validity, with attestation being merely one way of satisfying the registrar (or others) that the document had been duly executed. As, however, the net result would be much the same in practice in both cases and as the Merchant Shipping Act is a United Kingdom Act, which in relation to formal requirements departs to some extent from both English and Scottish general law, and which has recently been reviewed,[7] we do not feel justified in recommending any amendment.

1. This was the view of the majority of those who commented on this question in response to para 8.34 of the memorandum.
2. The provisions in question are the Commissioners Clauses Act 1847, s 59; the Ordnance Board Transfer Act 1855, s 5; the Colonial Stock Act 1877, ss 4(1) and 6; the Colonial Stock Act 1892, s 2(1); the Petroleum and Submarine Pipe-lines Act 1975, s 18(5)(b); and the Oil and Gas Enterprise Act 1982, s 19(2).
3. See the Titles to Land Consolidation (Scotland) Act 1868, ss 63 to 93.
4. See the Writs Act 1672.
5. This provision is not affected by the Merchant Shipping Bill currently before Parliament.
6. *Ibid* s 26.
7. The Merchant Shipping Bill currently before Parliament makes substantial amendments and, in particular, deletes the forms in Part I of Sch 1 to the 1894 Act.

Conveyancing forms

7.17 Many of the Acts on conveyancing matters have forms or styles appended to them. Often these forms include an indication, in one way or another, that two witnesses are required. They should, in our view, be amended in case they cause confusion. The technique adopted in the draft Bill is to substitute a simple reference to "testing clause" at the end of all the forms. This avoids any suggestion that two witnesses are required and also avoids any suggestion that the traditional "In Witness Whereof" style is in any way preferable to the new recommended styles. As many of the conveyancing forms under discussion are intended for registration in the Register of Sasines they will be attested and we think therefore that it would be useful to retain the reference to a testing clause at the end of each form. To preserve the general policy of the reforms, however, and to preserve the safety net provided by the setting up procedure, it is important to make it clear that attestation by a witness will not be necessary for formal validity. The technique used for this purpose in the draft Bill is to include a cross reference to the new law as a note to the relevant forms. The cross reference points out that subscription will be sufficient for formal validity but that attestation may be necessary or desirable for other purposes.

7.18 We are not recommending amendment of some provisions, and forms, requiring witnesses. An example of such a provision, and of a related form which we are not amending, is section 94 of the Bills of Exchange Act 1882 and the form in the Schedule to that Act. Section 94 relates to the method of protesting a dishonoured bill or note when a notary is not available and it enables "any householder or substantial resident of the place" to give a certificate of protest in the presence of two witnesses. This is a United Kingdom provision and questions of international recognition of the protest may also arise. We therefore do not propose any amendment.

7.19 We are not recommending alteration of the forms in the Sea Fishing Boats (Scotland) Act 1886 because this Act is about to be replaced.[1] In future the forms will be specified in subordinate legislation. We hope that the new forms will take into account the recommendations in this Report. For the same reason we are not recommending alteration of the forms in the Merchant Shipping Act 1894.

7.20 The Transmission of Moveable Property (Scotland) Act 1862 gives a form for notarial intimation of an assignation of a personal bond or conveyance of moveable property.[2] The form provides for delivery of a copy of the assignation in the presence of two witnesses. In the interests of consistency we think the number of witnesses should be reduced to one. The draft Bill amends the form accordingly.

Statutory instruments

7.21 A number of statutory instruments contain forms of testing clause which refer to two witnesses.[3] It may be that those responsible for them would wish to consider amendment at some appropriate time so as to avoid any risk of confusion. No harm would be done, of course, if someone used two witnesses when one would have done.

1. See the Merchant Shipping Bill, currently before Parliament.
2. Sch C.
3. See eg the Agricultural Holdings (Specification of Forms) (Scotland) Order 1983, Sch 1 (SI 1983/1073).

Part VIII Summary of recommendations

1. Any rule of the common law which requires writing for the constitution or variation of any agreement or obligation should cease to have effect.
(Paragraph 2.11; clause 22)

2. Section 6 of the Mercantile Law Amendment Act Scotland 1856 should be repealed.
(Paragraph 2.12; clause 25 and Schedule 8)

3. (a) Writing should be required for the constitution of a contract or voluntary obligation for the creation, transfer, variation, or extinction of an interest in land.

   (b) "Land" for this purpose should include the buildings on land (other than moveable structures), the air space above it and the minerals under it but should not include growing crops.

   (c) An "interest" for this purpose should include not only ownership but also a tenancy for more than a year, a right to use or occupy land for more than a year, a servitude, and any restriction on the use or occupation of land which will be operative for more than a year. An "interest" should, however, not include a tenancy for a year or less, or a right to use or occupy land for a year or less, or a restriction on the use or occupation of land which will be operative for a year or less.

   (d) For the purposes of paragraph (c) recurring periods which are such that the time from the beginning of the first period to the end of the last period will be for more than a year should be treated as being for more than one year, whatever their cumulative length.

   (e) Nothing in this recommendation is intended to affect the law on positive or negative prescription.
(Paragraphs 2.17 to 2.19; clauses 1 and 3)

4. Writing should be required for the constitution of a gratuitous obligation, other than one undertaken by a person in the course of a business.
(Paragraphs 2.22 to 2.24; clause 1)

5. Writing should be required for the constitution of a trust by a declaration by the truster that he holds his property in trust.
(Paragraph 2.37; clause 1)

6. The requirements of writing in the three preceding recommendations should not apply if (a) the obligee or a trust beneficiary (as the case may be) has acted, or refrained from acting, in reliance on the contract, obligation or trust with the knowledge and acquiescence of the obligor or truster with the result that his position has been affected to a material extent and (b) the interests of the obligee or trust beneficiary would be adversely affected to a material extent if the other party were allowed to withdraw on the ground of lack of writing.
(Paragraphs 2.42, 2.44 and 2.45; clause 1)

7. (a) Where writing is required in relation to the constitution of a contract, obligation or trust, writing should also be required for its variation.

   (b) The requirement of writing for a variation should not apply if (a) a party has acted, or refrained from acting, in reliance on the variation, with the

knowledge and acquiescence of the other party, with the result that his position has been affected to a material extent and (b) the interests of that party would be adversely affected to a material extent if the other party were allowed to regard the variation as invalid because of a lack of writing.
(Paragraph 2.47; clause 1)

8. (a) There should be a statutory requirement of writing for a valid will or codicil or testamentary trust, disposition and settlement.

(b) There should be no exceptions to this requirement.
(Paragraph 2.49; clause 2)

9. There should be a general statutory requirement of writing for the voluntary creation, transfer, variation or extinction of an interest in land (within the meaning of recommendation 3 above.
(Paragraph 2.50, clause 2)

10. It should be made clear that writing is not required, in the absence of express statutory provision, for the transfer of incorporeal moveable property.
(Paragraph 2.52; clause 22)

11. (a) Any enactment or rule of law that restricts proof of any matter to writ or oath should cease to have effect.

(b) The procedure of reference to the oath of a party should be abolished.
(Paragraphs 3.17 and 3.18; clause 21)

12. The authentication statutes (i.e. the Subscription of Deeds Acts 1540, 1579 and 1681 and the Deeds Act 1696) and the related provisions in sections 38 and 39 of the Conveyancing (Scotland) Act 1874 and section 44 of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be repealed and replaced by a coherent set of rules in modern form.
(Paragraphs 4.2 to 4.8; clause 25 and Schedule 8)

13. (a) Subscription by the granter, or granters, should be the only requirement for formal validity in the case of
   (i) a writing necessary for the constitution or variation of a contract, obligation or trust,
   (ii) a writing which grants, transfers, varies or extinguishes an interest in land,
   (iii) a will or other testamentary writing.

(b) In the case of a contract the above requirement should be held to be satisfied if the offer is subscribed by the offeror and the acceptance by the acceptor (and so on if there is a qualified acceptance).

(c) The above requirement should not prevent a writing which has not been subscribed by the granter or granters from being used as evidence of any right or obligation to which it relates.

(d) These rules should be without prejudice to any other enactment making different provision for formal validity in the case of any type of writing.

(e) Holograph writings and writs *in re mercatoria* should no longer enjoy any special privileges.
(Paragraphs 4.23 to 4.41; clauses 4 and 22)

14. (a) An alteration to a writing which requires subscription for formal validity should be regarded as forming part of the writing if, but only if, it was made before the writing was subscribed by the granter or, if there is more than one granter, by the granter first subscribing.

(b) An alteration to such a writing which is made after the document was subscribed by the granter, or if there is more than one granter, by the granter first subscribing, should be capable of taking effect as a variation of the terms

of the writing if, but only if, it is signed or initialled by the granter or, if there is more than one granter, by all the granters. For the purposes of the other recommendations in this Report such an alteration should be treated as a writing.

(c) "Alteration" in this recommendation means any interlineation, marginal addition, erasure or deletion and anything written on erasure.

(d) Nothing in this recommendation should affect the law on the revocation of testamentary provisions by deletion or erasure, or the operation of the Erasures in Deeds (Scotland) Act 1836 and section 54 of the Conveyancing (Scotland) Act 1874.

(Paragraphs 4.44 to 4.46; clauses 8 and 23)

15. Scots law should continue to make provision for writings to be probative (i.e. to prove their own authenticity) by virtue of attestation.

(Paragraph 5.2; clauses 5 and 14 to 19)

16. A writing should acquire probativity by virtue of attestation if

(a) it appears on the face of the writing that

(i) it was subscribed by the granter, or by each granter if more than one,

(ii) the subscription of the granter, or of each granter if more than one, was attested by the signature of a witness, and

(iii) the name and address of each witness is stated, and

(b) there is nothing on the face of the writing to indicate

(i) that the writing was not subscribed by the granter or granters, or

(ii) that the writing was not properly attested.

(Paragraphs 5.4 to 5.16; clause 5(1))

17. For the purposes of recommendation 16 a writing is not properly attested if the person named, and apparently signing, as the witness to the signature of a granter, or of any granter if more than one,

(i) did not in fact sign the writing, or

(ii) did not see the granter sign, or

(iii) did not, at the time of his subscription, know the granter, or have reliable information as to his identity, or

(iv) did not sign after the granter as part of one continuous process, or

(v) was himself a granter of the writing, or

(vi) was, at the time of his subscription under the age of 16 or mentally incapable of acting as a witness to a writing.

(Paragraphs 5.4 to 5.16; clause 5(1), (4) and (5))

18. A testamentary writing (but not any other writing) should also, as a condition of acquiring probativity by attestation, bear to be signed by the testator on each sheet other than the last.

(Paragraph 5.7; clause 5(2))

19. It should be permissible for anyone to add the name and address of a subscribing witness to a writing at any time before the writing is registered in any register for preservation or is founded on in any legal proceedings.

(Paragraph 5.4 to 5.16; clause 5(3))

20. (a) It should continue to be possible for one person to act as witness to the subscriptions of several granters of a writing and to subscribe only once in that capacity.

(b) In such a case, if those granters subscribe one after the other, as part of one continuous process, and the witness subscribes after the last of those granters as part of one continuous process, then the witness should be regarded, for

the purposes of recommendation 17(iii) above, as subscribing after each of those granters as part of one continuous process.

(Paragraph 5.18; clauses 5(6) and 12(5))

21. It should be provided that, without prejudice to the effectiveness of any other form of testing clause, the information necessary for the acquisition of probativity in the case of an individual granter may be given by means of a short form of testing clause of the type set out in Form 1(a) of Appendix B. We recommend that the form be included in a statutory instrument.

(Paragraphs 5.19 to 5.21; clause 20)

22. (a) An alteration in an attested writing which is declared in the testing clause to have been made before subscription should be presumed to have been made before subscription, even if not separately signed or initialled, provided that nothing in the writing, or the testing clause or its equivalent, indicates the contrary.

(b) It should be possible to prove by any competent evidence that an alteration was made before subscription.

(c) "Alteration" in this recommendation means any interlineation, marginal addition, erasure or deletion and anything written on erasure.

(Paragraph 5.22; clauses 8(3), 9 and 23)

23. (a) A writing which is probative by virtue of attestation should be presumed to have been subscribed by the granter.

(b) For the purposes of any court proceedings in relation to the writing this presumption should cease to apply if it is established in those proceedings—

(i) that the writing was not properly attested (as defined in recommendation 17 above) or

(ii) in the case of a testamentary writing, that the writing, although bearing to be signed on each sheet by the testator, was not in fact so signed, or

(iii) that there is a material error in the statement of the witness's name or address or that that statement was added after the permitted time.

(Paragraphs 5.25 to 5.27; clause 5(1) and (4))

24. Where a non-testamentary writing which is probative by virtue of attestation or a testamentary writing (whether or not it is probative) bears to have been subscribed (or subscribed by a particular granter) on a stated date or at a stated place, and there is nothing in the writing to indicate that the statement of date or place is wrong, then it should be presumed that that statement is correct.

(Paragraphs 5.25 to 5.27; clause 6)

25. It should be a criminal offence for a person to cause another person to sign as witness knowing that the other person did not see the granter subscribe, or is under the age of 16 or is mentally incapable of acting as a witness.

(Paragraph 5.28; clause 10)

26. (a) It should be possible for a writing which is not probative to be set up in court proceedings by proof that it was subscribed by the granter and to acquire probativity by virtue of a court docquet written on the writing.

(b) Any person who claims that the improbative writing was subscribed by the granter should be able to apply for a finding, and docquet, to that effect either (a) by means of a separate summary application to a sheriff within whose sheriffdom the applicant resides (or, if the applicant does not reside in Scotland, to the sheriff at Edinburgh) or (b) in the course of other proceedings.

(c) The above procedure should also be available to obtain a court finding, and docquet, as to the date or place of subscription of a writing, in any case where there is not already a presumption as to date or place.

(d) In any such proceedings or application proof that the writing was subscribed by the granter, or was so subscribed on a particular date or at a particular place, may be by affidavit unless the court directs otherwise.

(e) Rules of court should provide—

(i) for an application for a court docquet to be intimated to any living person who appears to have subscribed the writing as a granter (unless that person is a party to the proceedings in which the application is made or the court dispenses with intimation) and to any other person the court may direct and

(ii) for forms of docquet and for their authentication.

(f) A writing which is probative by virtue of a court docquet should be presumed to have been subscribed by the granter as stated in the docquet.

(Paragraphs 5.30 to 5.34; clause 7)

27. (a) The setting up procedure should apply to alterations made before subscription but not declared in a testing clause.

(b) Accordingly a court should be able to find that an alteration to a document was made before it was subscribed by the granter or any of the granters and to have the document docquetted accordingly.

(c) An alteration so set up should be presumed to have been made before subscription by the granter or by any of the granters.

(d) A properly authenticated post-subscription alteration (e.g. a signed or initialled marginal addition or interlineation) should be treated, for setting-up purposes, like a separate minute of variation, references to signing or initialling being substituted for references to subscription and the docquet being placed at any convenient place on the document.

(Paragraph 5.35; clause 9)

28. An obligation should be subject to the normal five year prescriptive period notwithstanding that it is constituted or evidenced by a probative writ.

(Paragraphs 5.36 to 5.44; clause 25 and Schedules 7 and 8)

29. (a) It should be provided by statute that, as a general rule, only a probative writ may be recorded for publication in the Register of Sasines. There should be exceptions for court decrees and for any other document required or permitted to be recorded under any enactment.

(b) It should be provided by statute that, as a general rule, only a probative writ may be registered in the Books of Council and Session or sheriff court books. There should be exceptions for (i) any document which is required or permitted to be registered under any enactment (ii) any document directed to be registered by the appropriate court (iii) any will or other testamentary document and (iv) any document executed under an applicable law other than Scots law if the Keeper or sheriff clerk (as the case may be) is satisfied that the document was validly executed under that law.

(c) These recommendations are not intended to affect the law and practice on the registration of judgments or court orders in any separate register maintained for that purpose.

(d) Provision should be made by rules of court for transmitting to the Keeper of the Registers of Scotland or to the appropriate sheriff clerk an officially certified copy of any decree setting up any improbative writing (such as a will) which is registered for preservation so that the certified copy decree can be registered in the same register as the original writing.

(Paragraphs 5.46 to 5.55; clause 11)

30. Section 21 of the Succession (Scotland) Act 1964 should be replaced, in relation to writings executed after legislation to implement this Report comes into force, by a provision to the effect that confirmation of an executor to property disposed of in a testamentary writing should be granted only if

(a) the formal validity of the writing is governed by Scots law and the writing is probative by virtue of attestation or court docquet, or

(b) the formal validity of the writing is governed by a law other than Scots law and the court is satisfied that the writing was validly executed in accordance with the applicable law.

(Paragraph 5.56; clause 25 and Schedule 7)

31. Section 32 of the Succession (Scotland) Act 1964 should be amended by substituting for the references to probativity references to formal validity under Scots law.

(Paragraph 5.57; clause 25 and Schedule 7)

32. Provided that at least one granter subscribes at the end of a writing it should be permissible for other granters to sign on an additional page or additional pages.

(Paragraphs 6.2 to 6.3; clause 12(3))

33. (a) A writing should be regarded as subscribed by a person if he has himself written at the end of it either

(i) the full name by which he is identified in the body of the writing or in the testing clause or the equivalent, or

(ii) his surname, preceded by at least one of his forenames (or an initial or abbreviation or familiar form of it).

(b) A writing should also be regarded as subscribed by the granter if he has himself written at the end of it a name (otherwise than in a form mentioned in paragraph (a)), a description, initials or a mark and it is shown

(i) that the name, description, initials or mark was his usual method of signing, or his usual method of signing documents of the type in question, or

(ii) that the name, description, initials or mark was in fact used by him as a completed authentication of the writing in question.

(c) For the purposes of probativity by virtue of attestation only subscription (whether by a granter or by a witness) in a form mentioned in paragraph (a) should suffice. For the purposes of probativity by court docquet subscription in a form mentioned in paragraph (a) or (b) should suffice.

(d) This recommendation is without prejudice to the accepted methods of authentication by the Queen, or by peers and their wives and eldest sons.

(Paragraphs 6.14 to 6.20; clauses 12 and 24)

34. (a) An inventory, appendix, schedule, plan or other document annexed to a writing should be regarded as incorporated in the writing if referred to in it and subscribed (or, in the case of a plan, drawing or photograph, signed) by the granter.

(b) This should be without prejudice to any other method of incorporating an annexure in a document.

(c) For this purpose there should be a presumption that an annexure which bears to be signed by the granter was signed by the person who subscribed the document as that granter.

(Paragraphs 6.23; clause 13)

35. Where a person subscribes a writing in two or more capacities which are apparent on the face of the writing he should be required to subscribe only once to bind himself in both or all of those capacities.

(Paragraph 6.24; clause 12(4))

36. (a) It should continue to be possible for a writing to be executed notarially on behalf of, with the authority of, and in the presence of, someone who declares that he is blind or unable to write.

(b) Those entitled to carry out notarial execution should be (i) solicitors holding a current Scottish practising certificate and (ii) in the case of writings executed outside Scotland, notaries public or other persons with official authority to execute writings on behalf of others.

(c) Before subscribing on behalf of the granter the notary or solicitor should, as under the present law, read over the writing to the granter. The granter should, however, be able to waive this requirement.

(d) The subscription of the person carrying out notarial execution should be regarded as the equivalent of the granter's subscription. Accordingly a notarially executed writing should be formally valid (even if not attested) if it would have been formally valid if subscribed by the granter.

(e) So far as probativity is concerned the rules recommended above for writings subscribed in the normal way should apply with any necessary modifications. Accordingly one witness should suffice for probativity by attestation in the case of a notarially executed writing.

(f) It should be provided that the information required for probativity, in the case of a notarially executed writing, may be given by means of one of the forms of testing clause set out in Form 2 of Appendix B. The forms should be set out in a statutory instrument but should be optional and without prejudice to any other way of giving the required information.

(g) A writing executed notarially should be invalid in so far as, but only in so far as, it confers a benefit in money or money's worth, directly or indirectly, on the person executing the writing.

(Paragraphs 6.26 to 6.36; clause 14 and Schedule 2)

37. (a) In the case of a writing granted by a partnership the above recommendations should apply as if references to subscription by the granter were references to subscription (either of his own name or the firm's name) on behalf of the partnership by a partner or any person authorised so to subscribe.

(b) For the purposes of these recommendations there should be a presumption that a person purporting to subscribe on behalf of a partnership as a partner or authorised person was a partner or authorised person, as the case may be.

(Paragraphs 6.38 to 6.39; clause 15)

38. (a) Sections 36(1) and (2) of the Companies Act 1985 (on contracts on behalf of a company) should be disapplied to Scotland and replaced, for Scotland, by a provision in the 1985 Act to the effect that a contract or obligation may be made or entered into on behalf of a company by any person acting under its authority, express or implied.

(b) Section 36(3) of the Companies Act 1985 (on the execution by companies of deeds under Scots law) should be repealed. The formal validity and probativity of writings by companies should be regulated by provisions in the Bill to implement the recommendations in this Report.
(Paragraphs 6.41 to 6.49; clauses 16 and 25 and Schedules 7 and 8)

39. (a) In the case of a writing granted by a company registered under the Companies Acts the above recommendations should apply, in relation to formal validity, as if references to subscription by the granter were references to subscription on behalf of the company by a director of the company, or by the secretary of the company, or by any person authorised so to subscribe.

(b) "Director" should have the same meaning as in the Companies Act 1985 and "secretary" should include one of two or more joint secretaries. "Person authorised so to subscribe" should include a person (such as an administrator, receiver or liquidator) empowered by law to subscribe.

(c) A writing purporting to be granted by a company registered under the Companies Acts should be probative if it bears to be subscribed on its behalf

by a director or the secretary or by any person authorised to subscribe and to be

(i) attested by a witness, or

(ii) sealed with the common seal of the company.

(d) In the case of option (i) the normal rules on attestation by a witness should apply with any necessary modifications.

(e) For the purposes of this recommendation there should be a presumption that a person purporting to subscribe on behalf of a company as a director or secretary or authorised person was in fact a director or secretary or authorised person.

(f) The rules on the acquisition of probativity by court docquet should apply to writings granted by a company registered under the Companies Acts.

(Paragraphs 6.50 to 6.56; clauses 16 and 23 and Schedule 3)

40. There should be statutory provision, to the same effect as the rules recommended for writings by companies, on the formal validity and probativity of writings granted by building societies.

(Paragraphs 6.57 and 6.58; clause 18 and Schedule 5)

41. There should be express statutory provision, to the same effect as the rules recommended for companies, on the formal validity and probativity of writings granted by other bodies corporate (apart from local authorities), the reference to a director being treated as a reference to a member of the governing board (or, in the case of a body corporate without a separate governing board, as a reference to a member of the body corporate) and the reference to the secretary being treated as a reference to the secretary, clerk or equivalent officer (whatever called).

(Paragraphs 6.59 and 6.50; clause 18 and Schedule 5)

42. (a) In the case of a writing granted by a local authority the above recommendations should apply, in relation to formal validity, as if references to subscription by the granter were references to subscription on behalf of the local authority by a proper officer as defined in the Local Government (Scotland) Act 1973.

(b) A writing purporting to be granted by a local authority should be probative if it bears to be subscribed on its behalf by a proper officer of the authority and to be

(i) attested by a witness, or

(ii) sealed with the common seal of the local authority.

(c) In the case of option (i) the normal rules on attestation by a witness should apply with any necessary modifications.

(d) For the purpose of this recommendation there should be a presumption that a person purporting to subscribe on behalf of the authority as an officer of the authority was in fact a proper officer for that purpose.

(e) The rules on the acquisition of probativity by court docquet should apply to writings granted by a local authority.

(Paragraphs 6.63 to 6.70; clause 17 and Schedule 4)

43. (a) In the case of a writing granted by a Secretary of State or other Minister of the Crown the above recommendations should apply, in relation to formal validity, as if references to subscription by the granter were references to subscription by the Secretary of State or Minister or by a person authorised by him.

(b) A writing purporting to be granted by a Secretary of State or other Minister of the Crown should be probative if it bears to be subscribed by him, or by a person authorised by him, and to be

(i) attested by a witness, or

(ii) sealed with his official seal.

(c) There should be a presumption that a person purporting to subscribe with the authority of a Secretary of State or other Minister was so authorised.

(d) The rules on probativity by court docquet should apply to writings within the scope of this recommendation as in other cases.

(e) These recommendations are intended to be without prejudice to section 3 of the Ministers of the Crown Act 1975 and to any presumption that any document has been made or issued by or on behalf of a Secretary of State or other Minister.

(Paragraphs 6.71 to 6.77; clause 19 and Schedule 6)

44. The above recommendations should not prevent the authentication, recording or registration of Crown writs in accordance with existing law and practice.

(Paragraph 6.79; clause 24)

45. Any reference in any existing enactment to a probative writing should, in relation to a writing executed after any legislation to implement these recommendations comes into force, be construed as a reference to a writing which is probative under the new law.

(Paragraph 7.1; clause 25 and Schedule 7)

Appendix A

REQUIREMENTS OF WRITING (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

1. When writing required to constitute or vary contract, obligation or trust.
2. Writing required for conveyances and wills.
3. Meaning of "interest in land" and "land" in ss. 1 and 2.
4. Type of writing required for formal validity of certain documents.
5. Presumption as to granter's subscription, if witnessed.
6. Presumption as to date or place of subscription of documents.
7. Presumption as to granter's subscription or date or place of subscription when established in court proceedings.
8. Alterations to documents: formal validity.
9. Alterations to documents: presumptions.
10. Offences in relation to defective witnessing.
11. Registration of documents.
12. Subscription and signing.
13. Items annexed to documents.
14. Subscription on behalf of blind person or person unable to write.
15. Documents granted by partnerships.
16. Documents granted by companies.
17. Documents granted by local authorities.
18. Documents granted by other bodies corporate.
19. Documents granted by Ministers of the Crown.
20. Forms of testing clause.
21. Abolition of proof by writ or oath and procedure of reference to oath.
22. Abolition of other common law rules.
23. Interpretation.
24. Application of Act to Crown.
25. Minor and consequential amendments and repeals and transitional provisions.
26. Short title, commencement and extent.

SCHEDULES:

Schedule 1 Sections 5 to 7 as modified in relation to alterations made to a document after it has been subscribed.

Schedule 2 Modifications of this Act in relation to subscription or signing by solicitor under section 14

Schedule 3 Modifications of section 5 where granter of document is a company

Schedule 4 Modifications of section 5 where granter of document is a local authority

Schedule 5 Modifications of section 5 where granter of document is another body corporate

Schedule 6 Modifications of section 5 where granter of document is a Secretary of State or other Minister of the Crown

Schedule 7 Minor and consequential amendments

Schedule 8 Enactments Repealed

DRAFT

OF A

BILL

TO

A.D. 1988.

Reform the law of Scotland with regard to the requirement of writing for certain matters and the formal validity of contractual and other documents and presumptions relating thereto; to abolish any rule of law restricting the proof of any matter to writ or oath and to abolish the procedure of reference to oath; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

When writing required to constitute or vary contract, obligation or trust.

1.—(1) Subject to subsection (2) below and section 2 of this Act and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.

(2) Subject to subsection (3) below, a written document complying with section 4 of this Act shall be required for the constitution of—

(*a*) any contract or voluntary obligation for the creation, transfer, variation or extinction of an interest in land;

(*b*) a gratuitous obligation except an obligation undertaken in the course of business; or

(*c*) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire.

(3) Where a contract, obligation or trust mentioned in subsection (2) above is not constituted in a written document complying with section 4 of this Act, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust ("the first person") has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party, the debtor in the obligation or the truster ("the second person")—

(*a*) the second person shall not be entitled to withdraw from the contract, obligation or trust; and

(*b*) the contract, obligation or trust shall not be regarded as invalid,

on the ground that it is not so constituted if the position of the first person—

(i) as a result of so acting or refraining from so acting has been affected to a material extent; and

(ii) would be adversely affected to a material extent by such withdrawal.

(4) In relation to the constitution of any contract, obligation or trust mentioned in subsection (2) above, subsection (3) above replaces the rules of law known as *rei interventus* and homologation.

(5) This section shall apply to the variation of a contract, obligation or trust as it applies to the constitution thereof but as if in subsection (3) for the references to acting or refraining from acting in reliance on the contract, obligation or trust and withdrawing therefrom there were substituted respectively references to acting or refraining from acting in reliance on the variation of the contract, obligation or trust and withdrawing from the variation.

Clause 1

General

This clause implements the policy of setting out in statutory form those limited cases where writing is required for the constitution of a contract, unilateral obligation or trust. It should be read with clause 22 which abolishes the common law rules on *obligationes literis* (see Recommendation 1).

Subsection (1)

This subsection states the general rule that writing is not required for the constitution of a contract, unilateral obligation or trust, unless required by subsection (2) or some other statutory provision. Existing statutory requirements of writing (unless amended or repealed in Schedules 7 and 8) will continue to apply, e.g., The Matrimonial Homes (Family Protection)(Scotland) Act 1981, section 1(*b*) (renununciation of occupancy rights in a matrimonial home).

Subsection (2)

This subsection states the exceptions to the general rule in subsection (1) and implements Recommendations 3(*a*), 4 and 5. The words "Subject to subsection (3) below" are important. They mean that writing is not required where an informal contract, obligation or declaration of trust has been followed by actings in the circumstances set out in subsection (3).

"Interest in land" is defined in clause 3.

The draftsman has used the word "for" instead of the words "relating to" the creation, etc, in subsection (2)(*a*) so as to exclude from the scope of the requirement of writing contracts such as gardening contracts (see paragraph 2.18 of the Report).

Subsection (3)

This subsection implements Recommendation 6 and, in effect, provides another way of constituting a contract, obligation or trust of the type covered by subsection (2)—namely by informal agreement, promise or declaration, followed by actings of the type, and with the effects, described. It should be noted that, because of clause 21, the underlying agreement, etc, will be provable by any relevant evidence.

Subsection (4)

This subsection makes it clear, for the avoidance of any doubt, that the rule on actings in subsection (3) replaces, within its sphere of operation, any common law rules on *rei interventus* or homologation. The effect is to abolish homologation in this area, as subsection (3) provides only for a type of statutory *rei interventus*. (See paras. 2.43 to 2.46 of the Report.)

Subsection (5)

This subsection implements Recommendation 7 and provides that the same rules apply to a variation of a contract, obligation or trust as apply to the contract, obligation or trust itself. So if a contract needs to be in writing (or to be followed by the requisite actings) to be formally valid, the same applies to a variation of it.

Writing required for conveyances and wills.

2. A written document complying with section 4 of this Act shall be required for—

(*a*) the creation, transfer, variation or extinction of an interest in land otherwise than by the operation of a court decree, enactment or rule of law; or

(*b*) the making of any will, testamentary trust disposition and settlement or codicil.

Meaning of "interest in land" and "land" in ss. 1 and 2.

3.—(1) In sections 1 and 2 of this Act "interest in land" means any estate in land or any right in or over land, including any right to occupy or to use land or to restrict the occupation or use of land, but does not include—

(*a*) a tenancy;

(*b*) a right to occupy or use land; or

(*c*) a right to restrict the occupation or use of land,

if the tenancy or right is not granted for more than one year, unless the tenancy or right is for a recurring period or recurring periods and there is a gap of more than one year between the beginning of the first, and the end of the last, such period.

(2) For the purposes of subsection (1) above "land" does not include—

(*a*) growing crops; or

1978 c.30.

(*b*) notwithstanding the definition of "land" in Schedule 1 to the Interpretation Act 1978, a moveable building or other moveable structure.

Clause 2

General

This clause implements Recommendations 3(*e*), 8 and 9. The distinction between clause 1 and clause 2 is that clause 1 deals mainly with obligations (e.g. missives) whereas clause 2 deals mainly with conveyances of land (e.g. dispositions) and wills. Both clauses lay down a requirement of writing.

There is no provision for actings in clause 2. If a person is entitled to, say, a valid lease or disposition and receives none at all or an unsubscribed and hence invalid one, his remedy is to seek implement of the obligation to provide a valid document, or damages for its breach. It should be noted that a contract for the creation of a tenancy would come under clause 1(2)(*a*) and hence would be covered by the rule on actings in clause 1(3).

Paragraph (a)

The reference in paragraph (*a*) to the operation of any court decree, enactment or rule of law covers in particular the creation or extinction of interests in land by prescription. The general effect of these words is to confine paragraph (*a*) to the voluntary creation, transfer, etc, of an interest in land. Here, as elsewhere in the Bill "enactment" is intended to include subordinate legislation. "Interest in land" is defined in clause 3.

Clause 3

General

This clause defines "interest in land" for the purposes of clauses 1 and 2 and implements Recommendation 3(*b*), (*c*) and (*d*).

Subsection (1)

The recurring period provision in this subsection is intended to cover, e.g., a right to occupy a house or flat on a time-share basis for a certain period each year for a number of years. (See Recommendation 3(*d*)).

Subsection 2(a)

The reference in this subsection to a "moveable building or other moveable structure" is necessary because the Interpretation Act 1978 (Schedule 1) defines "land" as including buildings and other structures.

Subsection 2(b)

The reference in this subsection to "crops" is intended to include natural crops such as trees, as well as other crops.

Type of writing required for formal validity of certain documents.

4.—(1) This section applies to the following documents—

(*a*) any document required by section 1(2) of this Act;

(*b*) any document required by section 2 of this Act.

(2) No document to which this section applies shall be valid in respect of the formalities of execution unless it is subscribed by the granter of it or, if there is more than one granter, by each granter, but nothing apart from such subscription shall be required for the document to be valid as aforesaid.

(3) A contract mentioned in section 1(2) of this Act may be regarded as constituted or varied (as the case may be) if the offer is contained in one or more documents and the acceptance is contained in another document or other documents, and each document is subscribed by the granter or granters thereof.

(4) Nothing in this section shall prevent a document which has not been subscribed by the granter or granters of it from being used as evidence in relation to any right or obligation to which the document relates.

(5) This section is without prejudice to any other enactment which makes different provision in respect of the formalities of execution of a document to which this section applies.

Clause 4

General

Clauses 1 and 2 lay down a requirement of writing for certain cases. Clause 4 now says what kind of writing is required for these cases. It implements Recommendation 13 (*a*) to (*d*). The policy is that a document coming within the clause, if admitted or proved to be genuine, should not be held invalid because of unnecessary formal requirements. Accordingly, the only requirement for formal validity is subscription by the granter. Attestation by a witness is not necessary for formal validity but has value for evidential purposes (clause 5), for recording in the Register of Sasines or registration in the Books of Council and Session or sheriff court books (clause 11), and, in the case of wills, for confirmation of an executor (Schedule 7, para. 42). The practical result is likely to be that legal documents such as dispositions and professionally prepared wills which are attested at present will continue to be attested in practice. However, if something goes wrong with the attestation, the document will still be formally valid if subscribed by the granter or granters. This should be a valuable safety net.

Subsection (2)

This subsection provides that subscription is sufficient for the formal validity of any of the legal documents covered by clause 4. This makes the special privileges of holograph writings and writs *in re mercatoria* unnecessary. A subscribed document which would at present be valid if the granter wrote "adopted as holograph" above his signature would in future be valid even without this formula (see Recommendation 13 (*e*) and clause 22). For the meaning of subscription see clauses 12 and 14 to 19.

Subsection (3)

This subsection is intended to prevent any argument being put forward that a contract coming under clause 4 must be contained in *one* document subscribed by all of the parties to the contract. It is sufficient if, for example, the offer is in one letter and the acceptance in another.

Subsection (4)

This subsection resolves a doubt in the present law. See para. 4.38 of the Report.

Subsection (5)

An example of an enactment making different provision is the Bills of Exchange Act 1882 which (by sections 83 and 91) would allow a gratuitous obligation (covered by clause 1(2)(*b*)) to be constituted by a promissory note which was not subscribed personally by the granter. Another example is the Administration of Justice Act 1982 which (by section 27 and Schedule 2) lays down stringent requirements for the validity of a will as an international will.

Presumption as to granter's subscription, if witnessed.

5.—(1) Subject to the following provisions of this section, where—

(*a*) a document bears to have been subscribed by a granter of it;

(*b*) the document bears to have been signed by a person as a witness of that granter's subscription and in addition the document, or the testing clause or its equivalent, bears to state the name and address of the witness; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates—

(i) that it was not subscribed by that granter as it bears to have been so subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below,

the document shall be presumed to have been subscribed by that granter.

(2) Where a testamentary document consists of more than one sheet, it shall not be presumed to have been subscribed by a granter as mentioned in subsection (1) above unless, in addition to it bearing to have been subscribed by him on the last sheet and otherwise complying with that subsection, it bears to have been signed by him on every other sheet.

(3) For the purposes of subsection (1)(*b*) above—

(*a*) the name and address of a witness may be added at any time before the document is—

(i) founded on in legal proceedings; or

(ii) registered for preservation in the Books of Council and Session or in sheriff court books; and

(*b*) a statement of the name and address of a witness need not be written by the witness himself.

(4) Where, in any proceedings relating to a document in which a question arises as to a granter's subscription, it is established—

(*a*) that a signature bearing to be the signature of the witness of that granter's subscription is not such a signature, whether by reason of forgery or otherwise;

(*b*) that the person who signed the document as the witness of that granter's subscription is a person who is named in the document as a granter of it;

(*c*) that the person who signed the document as the witness of that granter's subscription, at the time of signing—

(i) did not know the granter,

(ii) was under the age of 16 years; or

(iii) was mentally incapable of acting as a witness;

(*d*) that the person who signed the document, purporting to be the witness of that granter's subscription, did not see him subscribe it;

(*e*) that the person who signed the document as the witness of that granter's subscription did not sign the document after him or that such subscription and signature were not one continuous process;

(*f*) that the name or address of the witness of that granter's subscription was added after the document was founded on or registered as mentioned in subsection (3)(*a*) above or is erroneous in any material respect; or

(*g*) in the case of a testamentary document consisting of more than one sheet, that a signature on any sheet bearing to be the signature of the granter is not such a signature, whether by reason of forgery or otherwise;

then, for the purposes of those proceedings, there shall be no presumption that the document has been subscribed by that granter.

(5) For the purposes of subsection (4)(*c*)(i) above, the witness shall be regarded as having known the person whose subscription he has witnessed at the time of witnessing if he had credible information at that time of his identity.

Clause 5

General

Clause 4 deals with formal validity. Clause 5 deals with probativity - in other words with what must appear on the face of a document if it is to provide evidence of its own authenticity. (See Recommendations 15 and 23(*a*).) The draftsman has, however, avoided the word "probative", which is used in different senses in the present law, and has instead simply provided for due attestation to give rise to a presumption that the granter's subscription is authentic.

Subsection (1)

This subsection implements Recommendation 16 and sets out what must appear on the face of a document or in the testing clause or its equivalent if a granter's subscription is to be presumed to be genuine. (See also Recommendation 17.) It will be noted that the presumption can arise in relation to one or more of several granters, even if the subscriptions of other granters are not duly attested. An important change from the present law is that only one witness is required.

Subsection (2)

This subsection implements Recommendation 18. There is a similar distinction in the present law between testamentary and other deeds. See the Conveyancing and Feudal Reform (Scotland) Act 1970, section 44 and para. 5.7 of the Report.

Subsection (3)

This subsection implements Recommendation 19 and replaces a provision in section 38 of the Conveyancing (Scotland) Act 1874. Section 38 is repealed, in relation to documents executed after the commencement of the Bill's provisions, in Schedule 8 of the Bill.

Subsection (4)

This subsection provides for the loss of the presumption of authenticity of a granter's subscription for the purposes of particular proceedings, if it is established in those proceedings that the attestation of the granter's subscription was defective in one of the specified ways. It implements Recommendation 23(*b*). In relation to subsection (4)(*b*), it should be noted that if it is obvious from looking at a document that a witness is a granter, the document will never acquire probativity because of section 5(1)(*c*)(ii). There may be unusual cases, however, (e.g. where a person uses different names) where it would not be obvious that a witness was a granter.

Subsection (5)

Again this reproduces a rule of the present law. See para. 5.14 of the Report.

(6) For the purposes of subsection (4)(*e*) above, where—

(*a*) a document is granted by more than one granter, and

(*b*) a person is the witness to the subscription of more than one granter,

the subscription of any such granter and the signature of the person witnessing that granter's subscription shall not be regarded as not being one continuous process by reason only that, between the time of that subscription and signature, another granter has subscribed the document.

Presumption as to date or place of subscription of documents.

6.—(1) Where—

(*a*) by virtue of section 5(1) of this Act a document to which this subsection applies is presumed to have been subscribed by a granter of it;

(*b*) the document, or the testing clause or its equivalent, bears to state the date or place of subscription of the document by that granter; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates that that statement as to date or place is incorrect;

there shall be a presumption that the document was subscribed by that granter on the date or at the place as stated.

(2) Subsection (1) above applies to any document other than a testamentary document.

(3) Where—

(*a*) a testamentary document bears to have been subscribed and the document, or the testing clause or its equivalent, bears to state the date or place of subscription (whether or not it is presumed under section 5 of this Act to have been subscribed by a granter of it); and

(*b*) nothing in the document, or in the testing clause or its equivalent, indicates that that statement as to date or place is incorrect,

there shall be a presumption that the statement as to date or place is correct.

Subsection (6)

This subsection is designed to prevent the pedantic objection that a witness cannot sign after granter A as part of one continuous process if the continuity has been interrupted by the subscription of the document by granter B. It implements Recommendation 20.

Clause 6

General

This clause deals with presumptions as to the date or place of subscription of a document. It implements Recommendation 24. The presumptions only arise if nothing in the document or the testing clause or its equivalent indicates the contrary.

Subsection (1)

This subsection provides that, where a granter's subscription of a non-testamentary document is duly attested, and the document bears to state, in the testing clause or elsewhere, the date or place of subscription by that granter, then the statement as to the date or place is presumed to be correct. This puts the rule of the present law in statutory form.

Subsection (2)

This subsection provides a more liberal rule in the case of a testamentary document (reflecting the policy of the present law). Whether or not the testator's subscription is attested, any statement in the document as to the date or place of subscription is presumed to be correct. This replaces, and extends, section 40 of the Conveyancing (Scotland) Act 1874 which relates to the presumed date of a holograph will. (See para. 5.27 of the Report.)

Presumption as to granter's subscription or date or place of subscription when established in court proceedings.

7.—(1) Where a document bears to have been subscribed by a granter of it, but there is no presumption under section 5 of this Act that the document has been subscribed by that granter, then, if the court, on an application being made to it, is satisfied that the document was subscribed by that granter, it shall cause the document to be endorsed with a certificate to that effect.

(2) Where a document bears to have been subscribed by a granter of it, but there is no presumption under section 6 of this Act as to the date or place of subscription, then, if the court, on an application being made to it, is satisfied as to the date or place of subscription, it shall cause the document to be endorsed with a certificate to that effect.

(3) The court shall be entitled to be satisfied on an application under subsection (1) or (2) above on the evidence of one witness, and the evidence of the witness shall, unless the court otherwise directs, be given by affidavit.

(4) An application under subsection (1) or (2) above may be made either as a separate summary application or as incidental to and in the course of other proceedings.

(5) The effect of a certificate—

(*a*) under subsection (1) above shall be to establish a presumption that the document has been subscribed by the granter concerned;

(*b*) under subsection (2) above shall be to establish a presumption that the statement in the certificate as to date or place is correct.

(6) In this section "the court" means—

(*a*) in the case of a summary application—

(i) the sheriff in whose sheriffdom the applicant resides; or

(ii) if the applicant does not reside in Scotland, the sheriff at Edinburgh; and

(*b*) in the case of an application made in the course of other proceedings, the court before which those proceedings are pending.

Clause 7

General

This clause implements Recommendation 26 and replaces, in relation to documents executed after the commencement of the Bill's provisions (see clause 25(3)) the "setting up" provisions in section 39 of the Conveyancing (Scotland) Act 1874 and section 21 of the Succession (Scotland) Act 1964. It enables presumptions of the authenticity, and the date and place of a granter's subscription to be obtained by means of a court certificate, normally granted on affidavit evidence. This procedure may have to be used if, for example, it is necessary to have a probative document for purposes of recording, registration or confirmation and if a granter's subscription has not been attested or has not been properly attested.

Subsection (1)

This subsection enables a court certificate to be obtained as to the authenticity of a granter's subscription. In effect, the certificate endorsed on the document takes the place of attestation by a witness. (See Recommendation 26(*a*).)

Subsection (2)

This subsection does the same in relation to date or place of subscription. (See Recommendation 26(*a*).)

Subsections (3) to (6)

The intention is that the procedure will normally be simple and expeditious - normally by summary application to the sheriff, supported by affidavit evidence. Of course, the court is not bound to be satisfied on the evidence of one affidavit. If, for example, there are any suspicious circumstances it could, and no doubt would, require further evidence. It is envisaged that the affidavit should be sworn or affirmed before a notary public or other competent authority. Rules of Court will provide for the form of affidavit and for notice of the application to be given to certain persons. See para. 5.33 of the Report. The issue in the main proceedings to which an application for setting up might be incidental might be, e.g., the authenticity of the document concerned, or the insanity of the granter. The ordinary rules of relevancy will apply to prevent a totally unrelated document being brought into other proceedings for the purpose of setting it up. In such a case, a summary application would be necessary. For the effect of the certificate on the parties to the application, see para. 5.34 of the Report.

Alterations to documents: formal validity.

8.—(1) An alteration made to a document to which section 4 of this Act applies—

(*a*) before the document was subscribed by the granter or, if there is more than one granter, by the granter first subscribing it, shall form part of the document as so subscribed;

(*b*) after the document was so subscribed shall, if the alteration has been signed by the granter or (as the case may be) by all the granters, have effect as a formally valid alteration of the document as so subscribed,

but, subject as aforesaid, no alteration to such a document shall be formally valid.

(2) Subsection (1) above is without prejudice to—

(*a*) any rule of law enabling any provision in a testamentary document to be revoked by deletion or erasure without authentication of the deletion or erasure by the testator;

1836 c.33.
1874 c.94.

(*b*) the Erasures in Deeds (Scotland) Act 1836 and section 54 of the Conveyancing (Scotland) Act 1874.

(3) It shall be competent to establish that an alteration to a document was made before the document was subscribed by the granter of it, or by the granter first subscribing it, by all relevant evidence, whether written or oral.

Clause 8

General

This clause deals with the formal validity of alterations to those documents to which clause 4 applies. It implements Recommendation 14. "Alteration" is defined in clause 23.

Subsection (1)(a)

This subsection provides that if an alteration is made before any granter has subscribed it does not need to be separately authenticated. It is covered by the subscription of the document.

Subsection (1)(b)

This subsection provides that if an alteration is made after subscription it needs to be separately authenticated. However, signature (which includes initialling—see clause 12) is sufficient. Subscription of e.g. an interlineation or erasure would often be impracticable.

Subsection (2)

This subsection is a saving provision. It implements Recommendation 14(*d*).

Subsection (3)

This subsection provides that whether an alteration was made before subscription by any granter is a question of proof, by any competent evidence. Certain presumptions may help (see clause 9).

Alterations to documents: presumptions.

9.—(1) Where a document bears to have been subscribed by the granter or, if there is more than one granter, by all the granters of it, then, if subsection (2) or (3) below applies, an alteration made to the document shall be presumed to have been made before the document was subscribed by the granter or, if there is more than one granter, by the granter first subscribing it, and to form part of the document as so subscribed.

(2) This subsection applies if—

(*a*) the document is presumed under section 5 of this Act to have been subscribed by the granter or granters (as the case may be); and

(*b*) it is stated in the document, or in the testing clause or its equivalent, that the alteration was made before the document was subscribed; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates that the alteration was made after the document was subscribed.

(3) This subsection applies if subsection (2) above does not apply, but the court is satisfied, on an application being made to it, that the alteration was made before the document was subscribed by the granter or, if there is more than one granter, by the granter first subscribing it, and causes the document to be endorsed with a certificate to that effect.

(4) Subsections (3), (4) and (6) of section 7 of this Act shall apply in relation to an application under subsection (3) above as they apply in relation to an application under subsection (1) of that section.

(5) Sections 5 to 7 of this Act as modified in Schedule 1 to this Act shall have effect in relation to an alteration made to a document after the document has been subscribed by a granter of it.

Offences in relation to defective witnessing.

10.—(1) A person shall be guilty of an offence if he causes another person to sign a document, or an alteration to a document, as a witness knowing that that other person—

(*a*) did not see the granter, whose signature he bears to have witnessed, sign the document or alteration (as the case may be);

(*b*) is under the age of 16 years; or

(*c*) is mentally incapable of acting as a witness.

(2) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding the statutory maximum, or both.

Clause 9

General

This clause implements Recommendations 22 and 27.

Subsections (1) and (2)

These subsections provide—in line with the present common law—that an alteration to an attested document which is declared in the document (or the testing clause or its equivalent) to have been made before subscription is presumed to have been so made, provided that nothing in the document or the testing clause or its equivalent indicates the contrary. (See Recommendation 22.)

Subsections (1), (3) and (4)

These subsections, read together, enable an alteration which is not covered by subsection (2) (e.g. an alteration to an attested document which is not declared in the testing clause or its equivalent) to be "set up" by means of an application to a court to have it found that the alteration was made before subscription, and to have the document endorsed accordingly. (See Recommendation 27(*a*), (*b*) and (*c*).)

Subsection (5)

This subsection applies to signed post-subscription alterations. (See Recommendation 27(*d*).) Under clause 8(1)(*b*) post-subscription alterations are formally valid if signed. Under this subsection they can acquire probativity by attestation or court docquet and can have the benefit of the presumptions in clause 6 as to date or place, just as if they were separate documents. In practice, attestation of alterations is likely to be rare, except possibly in the case of substantial alterations or codicils written in a side or bottom margin.

Clause 10

This clause implements Recommendation 25. It catches the person who causes defective witnessing. The intention is that the ordinary criminal law will catch a witness who should be penalised, e.g. for uttering a forged document, or for fraud or attempted fraud. (See paras. 5.28 to 5.29 of the Report.)

Registration of documents.

11.—(1) Subject to subsection (2) below, it shall not be competent—

(*a*) to record a document in the Register of Sasines; or

(*b*) to register a document for execution or preservation in the Books of Council and Session or in sheriff court books,

unless—

(i) the document is presumed under section 5 or 7 of this Act to have been subscribed by the granter; or

(ii) if there is more than one granter, the document is presumed under section 5 or 7 or partly under the one section and partly under the other to have been subscribed by all the granters.

(2) Subsection (1) above shall not apply in relation to—

(*a*) the recording of a document in the Register of Sasines or the registration of a document in the Books of Council and Session or in sheriff court books, if such recording or registration is required or permitted under any enactment;

(*b*) the recording of a court decree in the Register of Sasines;

(*c*) the registration in the Books of Council and Session or in sheriff court books of—

(i) a testamentary document;

(ii) a document which is directed by the Court of Session or (as the case may be) the sheriff to be so registered;

(iii) a document whose formal validity is governed by a law other than Scots law, if the Keeper of the Registers of Scotland or (as the case may be) the sheriff clerk is satisfied that the document is formally valid according to the law governing such validity;

(iv) a court decree granted under section 7 or 9 of this Act in relation to a document already registered in the Books of Council and Session or in sheriff court books (as the case may be);

(*d*) the registration of a court decree in a separate register maintained for that purpose.

(3) It shall be competent to register a document for preservation in the Books of Council and Session or in sheriff court books without a clause of consent to registration.

Clause 11

General

This clause implements Recommendation 29. The general rule is that only "probative" documents (i.e. all of the granters' subscriptions must be presumed authentic) are recordable in the Register of Sasines or registrable in the Books of Council and Session or sheriff court books. There are important exceptions to the general rule which, to a large extent, reflect the existing law and practice. The case of the Land Register is not mentioned because the Keeper enjoys a discretion as to the documents acceptable as accompanying documents under section 4(1) of the Land Registration (Scotland) Act 1979.

Subsection (1)

This subsection contains the general rule. The Bill applies, in general, only to documents executed after the commencement date. (See clause 25(3).) Pre-commencement documents will be recordable or registrable in accordance with existing law and practice.

Subsection (2)

This subsection sets out the exceptions to the general rule in subsection (1). "Court decree" is defined in clause 23.

Subsection (3)

This subsection re-enacts a provision in the Registration Act 1698 and thereby enables the whole of that Act to be repealed in Schedule 8.

Subscription and signing.

12.—(1) Except where an enactment expressly provides otherwise, a document is subscribed by a granter of it if it is signed by him at the end of the last page.

(2) Subject to section 15(2) of this Act, any reference in this Act to a document, or to an alteration to a document, being signed by a granter shall be construed as a reference to the document or alteration being signed by him—

(*a*) with the full name by which he is identified in the document or in any testing clause or its equivalent; or

(*b*) with his surname, preceded by at least one forename (or an initial or abbreviation or familiar form of a forename); or

(*c*) except for the purposes of section 5 of this Act, with a name (not in accordance with paragraph (*a*) or (*b*) above) or description or an initial or mark if it is established that the name, description, initial or mark—

(i) was his usual method of signing, or his usual method of signing documents or alterations of the type in question; or

(ii) was intended by him as his signature of the document or alteration.

(3) Where there is more than one granter, the requirement under subsection (1) above of signing at the end of the last page of a document shall be regarded as complied with (provided that at least one granter signs at the end of the last page) if any other granter signs on an additional page.

(4) Where a person grants a document in more than one capacity, one subscription of the document by him shall be sufficient to bind him in all those capacities.

(5) A document, or an alteration to a document, is signed by a witness if it is signed by him—

(*a*) with the full name by which he is identified in the document or in any testing clause or its equivalent; or

(*b*) with his surname, preceded by at least one forename (or an initial or abbreviation or familiar form of a forename);

and if the witness is witnessing the signature of more than one granter, it shall be unnecessary for him to sign the document or alteration more than once.

(6) This section is without prejudice to any rule of law relating to the subscription or signing of documents by peers or by the wives or the eldest sons of peers.

Clause 12

Subsection (1)

This subsection restates the present law.

Subsection (2)

This subsection implements Recommendation 33(*a*), (*b*) and (*c*). It removes a number of doubts in the present law about what constitutes a valid signature, but will not necessitate any alteration in existing practice. It will be noted that signing by initials or mark or Christian name or description (e.g. "Mum") will not suffice for probativity under clause 5. If a document so signed has to be probative (e.g. for the purpose of confirmation of an executor) it will have to be set up under clause 7.

Subsection (3)

This subsection implements Recommendation 32 and gives effect to a suggestion made by the Law Society of Scotland.

Subsection (4)

This subsection is inserted for the avoidance of doubts which have arisen in practice. It implements Recommendation 35.

Subsection (5)

This subsection implements Recommendation 33(*c*). It provides that a witness must sign in the "standard" way (and not e.g. by initials or mark), the theory being that a granter should take care to choose a witness who can write. See para. 6.19 of the Report.

Subsection (6)

This subsection implements Recommendation 33(*d*). The intention is that peers etc. should continue to be able to subscribe or sign in the traditional manner for the purposes of clause 5, as well as for other purposes.

Items annexed to documents.

13.—(1) An inventory, appendix, schedule or other writing annexed to a document shall be regarded as incorporated in the document if the writing is signed at the end of the last page thereof by the granter or, if there is more than one granter, by each granter of the document, and is referred to in the document.

(2) A plan, drawing or photograph annexed to a document shall be regarded as incorporated in the document if the plan, drawing or photograph is signed by the granter or, if there is more than one granter, by each granter of the document, and is referred to in the document.

(3) Subsections (1) and (2) above are without prejudice to any other means of establishing that any annexed item referred to in those subsections is incorporated in the document concerned.

(4) Any annexed item referred to in subsection (1) or (2) above which bears to have been signed by a granter of the document shall be presumed to have been signed by the person who subscribed the document as that granter.

(5) Section 12(2) of this Act shall apply in relation to anything referred to in subsection (1) or (2) above which is annexed to a document as it applies in relation to a document as if for any reference to a document, except the reference in paragraph (*a*), there were substituted a reference to the thing so annexed.

(6) It shall be competent to sign anything annexed to a document as aforesaid at any time before the document is—

(*a*) founded on in legal proceedings; or

(*b*) registered for preservation in the Books of Council and Session or in sheriff court books.

(7) Where there is more than one granter, the requirement under subsection (1) above of signing at the end of the last page of the writing shall be regarded as complied with (provided that at least one granter signs at the end of the last page) if any other granter signs on an additional page.

Subscription on behalf of blind person or person unable to write.

14.—(1) Where a granter of a document makes a declaration that he is blind or unable to write, a solicitor, having read the document to that granter or, if the granter makes a declaration that he does not wish him to do so, without having read it to the granter, shall, if authorised by the granter, be entitled to subscribe it, and, if it is a testamentary document, sign it under section 5(2) of this Act, on the granter's behalf:

Provided that the subscription or signing by the solicitor under this subsection shall be required to take place in the presence of the granter.

(2) This Act shall have effect in relation to subscription or signing by a solicitor under subsection (1) above subject to the modifications set out in Schedule 2 to this Act.

(3) A document subscribed by a solicitor under subsection (1) above which confers on the solicitor a benefit in money or money's worth (whether directly or indirectly) shall be invalid to the extent, but only to the extent, that it confers such benefit.

(4) In subsection (1) above the references to a declaration made by a granter of a document are references to a declaration made by him to the solicitor who subsequently subscribed the document on the granter's behalf.

(5) This section applies in relation to the signing of an alteration made to a document or of anything annexed to a document as it applies in relation to the subscription of a document.

(6) In this Act "solicitor" means a solicitor who has in force a practising certificate as defined in section 4(*c*) of the Solicitors (Scotland) Act 1980, but, in relation to the execution of documents outwith Scotland, includes a notary public or any other person with official authority under the law of the place of execution to execute documents on behalf of persons who are blind or unable to write.

1980 c.46.

Clause 13

General

This clause implements Recommendation 34. It is permissive in form and provides for one safe and, because of the presumption in subsection (4), advantageous way of incorporating an annexure in a document. It replaces the somewhat obscure provision in section 44 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

Subsections (1) and (2)

These subsections have to be stated separately because it would be inappropriate to talk of signing "at the end of the last page" of a plan or drawing.

Subsection (3)

This subsection makes it clear that the clause does not invalidate other ways of incorporating schedules etc. in a document. In a home-made will, for example, the testator may refer to an annexed inventory of small bequests which is not signed. If it is clear that that is the inventory referred to, it will be incorporated in the will, as in the present law.

Subsection (4)

This subsection is so drafted that the presumption relating to the annexure cannot be used to prove the authenticity of the subscription on the main document. See para. 6.23 of the Report.

Subsection (6)

It is often a matter of chance whether the annexure or the main document is signed first. Very often the natural order of things is to sign the document first and then the annexure. The policy is that the order of signing should not lead to non-incorporation.

Clause 14

This clause implements Recommendation 36. It provides new rules on the execution of documents on behalf of those who declare that they are blind or unable to write. Among the changes are (*a*) that the document does not have to be read over to a granter who is perfectly well able to read it himself and expressly waives the requirement that it be read over to him; (*b*) that the category of those who can act as official signatories is restricted to solicitors holding a Scottish practising certificate and, for documents executed outside Scotland, notaries public and similar official signatories, whatever called; and (*c*) that if a financial benefit is conferred on the solicitor or notary the effect is not to invalidate the whole document, as in the present law, but to invalidate the document only to the extent that it confers such benefit.

Clause 14 should be read along with Schedule 2.

Documents granted by partnerships.

15.—(1) Except where an enactment expressly provides otherwise, where a granter of a document is a partnership, the document is subscribed by the partnership if it is subscribed on its behalf by a partner or by a person authorised to subscribe the document on its behalf; and references to subscription by a granter shall be construed accordingly.

(2) A person subscribing on behalf of a partnership under this section may use his own name or the firm name.

(3) For the purposes of the subscription of a document under this section, a person purporting to subscribe—

(*a*) as a partner shall be presumed to be a partner;

(*b*) as a person authorised to subscribe on behalf of a partnership shall be presumed to have been authorised so to subscribe.

(4) This section applies in relation to the signing of an alteration made to a document or of anything annexed to a document as it applies in relation to the subscription of a document.

(5) In this section "partnership" has the same meaning as in section 1 of the Partnership Act 1890.

1890 c.39.

Documents granted by companies.

16.—(1) Except where an enactment expressly provides otherwise, where a granter of a document is a company—

(*a*) the document is subscribed by the company if it is subscribed on its behalf by a director, or by the secretary, of the company or by a person authorised to subscribe the document on its behalf; and

(*b*) references to subscription by a granter shall be construed accordingly.

(2) Where a granter of a document is a company, section 5 of this Act shall have effect subject to the modifications set out in Schedule 3 to this Act.

(3) For the purposes of the subscription of a document under this section, a person purporting to subscribe—

(*a*) as a director or the secretary of a company shall be presumed to be a director or the secretary thereof;

(*b*) as a person authorised to subscribe on behalf of a company shall be presumed to have been authorised so to subscribe.

(4) This Act is without prejudice to—

1985 c.6.

(*a*) section 283(3) of the Companies Act 1985; and

1986 c.45.

(*b*) paragraphs 8 and 9 of Schedule 1, paragraphs 8 and 9 of Schedule 2, and paragraph 7 of Schedule 4, to the Insolvency Act 1986.

(5) This section applies in relation to the signing of an alteration made to a document or of anything annexed to a document as it applies in relation to the subscription of a document.

Clause 15

Subsection (1)

This subsection deals with documents granted by a partnership and implements Recommendation 37. For formal validity, subscription by a partner or authorised signatory suffices. For probativity, attestation or court certificate is necessary. This is the result of applying clauses 5 and 7 as if references to subscription by a granter were references to subscription by a partner or authorised signatory on behalf of the granter partnership. "Authorised" means expressly or impliedly authorised (clause 23).

Subsection (2)

This subsection reflects the rule in section 6 of the Partnership Act 1890.

Subsection (3)

The presumptions provided for in this subsection will be most useful if a document has to be accepted a number of years after it was executed, by which time the original partners may have died and the records of the firm may have been lost or destroyed.

Clause 16

General

This clause implements Recommendations 38(*b*) and 39 and should be read along with Schedule 3. It represents a considerable simplification of the existing Scottish rules on the execution of documents by companies. Under clause 16 the rule is that subscription on behalf of a company by a director, the secretary or an authorised signatory suffices for formal validity. For probativity (otherwise than by court certificate under clause 7) attestation by a witness or the affixing of the company's common seal is necessary.

Subsection (1)

"Director", "secretary", "company" and "authorised" are defined in clause 23. (See Recommendation 39(*b*).)

Subsection (2)

The main modifications of clause 5 relate to the possibility of using the seal as an alterative to attestation by a witness.

Subsection (3)

The presumptions in this subsection will be of most use after a number of years have elapsed since the document was executed. It could be difficult at that time to prove positively that, e.g., a signatory was authorised.

Subsection (4)

Section 283(3) of the Companies Act 1985 provides that anything required or authorised to be done by the secretary may, if the office is vacant or there is for any other reason no secretary capable of acting, be done by any assistant or deputy secretary or, if there is no assistant or deputy secretary capable of acting, by any officer of the company authorised generally or specially in that behalf by the directors.

The purpose of paragraph (*b*) is to make it clear that an administrator, receiver or liquidator of a company can execute documents on behalf of the company.

Documents granted by local authorities.

17.—(1) Except where an enactment expressly provides otherwise, where a granter of a document is a local authority—

(*a*) the document is subscribed by the authority if it is subscribed on their behalf by the proper officer of the authority; and

(*b*) references to subscription by a granter shall be construed accordingly.

(2) Where a granter of a document is a local authority, section 5 of this Act shall have effect subject to the modifications set out in Schedule 4 to this Act.

(3) For the purposes of the subscription of a document under this section, a person purporting to subscribe on behalf of a local authority as an officer of the authority shall be presumed to be the proper officer of the authority.

(4) This section applies in relation to the signing of an alteration made to a document or of anything annexed to a document as it applies in relation to the subscription of a document.

Documents granted by other bodies corporate.

18.—(1) This section applies to any body corporate other than a company or a local authority.

(2) Except where an enactment expressly provides otherwise, where a granter of a document is a body corporate to which this section applies—

(*a*) the document is subscribed by the body if it is subscribed on its behalf by—

(i) a member of the body's governing board or, if there is no governing board, a member of the body;

(ii) the secretary of the body by whatever name he is called; or

(iii) a person authorised to subscribe the document on behalf of the body; and

(*b*) references to subscription by a granter shall be construed accordingly.

(3) Where a granter of a document is a body corporate to which this section applies, section 5 of this Act shall have effect subject to the modifications set out in Schedule 5 to this Act.

(4) For the purposes of the subscription of a document under this section, a person purporting to subscribe—

(*a*) as a member of the body's governing board, a member of the body, or the secretary of the body, shall be presumed to be such a person;

(*b*) as a person authorised to subscribe on behalf of the body shall be presumed to have been authorised so to subscribe.

(5) This section applies in relation to the signing of an alteration made to a document or of anything annexed to a document as it applies in relation to the subscription of a document.

Clause 17

General

This clause implements Recommendation 42 and should be read along with Schedule 4. It simplifies the requirements for the execution of deeds by local authorities. The policy is the same as for companies and other bodies corporate. For formal validity the subscription of the proper officer suffices. For probativity (otherwise than by court certificate under clause 7) attestation by a witness or the affixing of the common seal is necessary.

Subsection (1)

"Local authority" and "proper officer" have the same meanings as in the Local Government (Scotland) Act 1973. In terms of section 235(3) of that Act a reference to a "proper officer" is, in relation to any purpose, a reference to an officer appointed by the local authority for that purpose.

Subsection (2)

The main modifications of clause 5 relate to the use of the seal as an alternative to attestation by a witness.

Subsection (3)

If a document is subscribed "John Smith, Director of Administration" it is presumed under this subsection that John Smith is the Director of Administration and that the Director of Administration is the officer appointed for the purpose of subscribing documents of that type. This is not the same as the presumption in section 193(2) of the Local Government (Scotland) Act 1973 which presumes the giving, making or issuing of certain documents to have been authorised.

Clause 18

General

This clause implements Recommendation 41 and should be read along with Schedule 5. The clause applies to bodies corporate such as building societies, registered industrial and provident societies, statutory bodies corporate of many kinds and foreign companies. At present the ways in which these bodies execute documents are very varied. The clause provides a standard method which, if used, will be sufficient for formal validity or probativity as the case may be. The policy is essentially the same as for companies registered under the Companies Acts.

Subsection (1)

"Company" and "local authority" are defined in clause 23.

Subsection (2)

The point of the second half of paragraph (*a*)(i) is that many statutory bodies corporate consist of only a few members and have no separate governing board. "Governing board" is defined in clause 23. The point of the words "by whatever name he is called" in paragraph (*a*)(ii) is that some bodies do not have a "secretary" as such, but have instead, e.g., a "clerk" who occupies the position that would normally be held by the secretary.

Subsections (3) to (5)

These subsections are to the same effect as subsections (2), (3) and (5) of clause 16 (companies).

Documents granted by Ministers of the Crown.

19.—(1) Except where an enactment expressly provides otherwise, where a granter of a document is a Secretary of State or other Minister of the Crown—

(*a*) the document is subscribed by the Secretary of State or other Minister if it is subscribed by him or by a person authorised by him to subscribe the document on his behalf; and

(*b*) references to subscription by a granter shall be construed accordingly.

(2) Where a granter of a document is a Secretary of State or other Minister of the Crown, section 5 of this Act shall have effect subject to the modifications set out in Schedule 6 to this Act.

(3) For the purposes of the subscription of a document under this section, a person purporting to subscribe as a person authorised to subscribe on behalf of a Secretary of State or other Minister of the Crown shall be presumed to have been authorised so to subscribe.

1975 c.26.

(4) This section is without prejudice to section 3 of the Ministers of the Crown Act 1975.

(5) This section applies in relation to the signing of an alteration made to a document or of anything annexed to a document as it applies in relation to the subscription of a document.

Forms of testing clause.

20. Without prejudice to the effectiveness of any other way of showing the facts relating to the subscription, signing and witnessing of a document, an alteration made to a document or anything annexed to a document mentioned in sections 5, 6, 9, 13, 14, 15, 16, 17, 18 and 19 of this Act, those facts may be shown in such forms of testing clause as may be prescribed in regulations made by the Secretary of State by statutory instrument.

Abolition of proof by writ or oath and procedure of reference to oath.

21.—(1) Any rule of law and any enactment whereby the proof of any matter is restricted to proof by writ or by reference to oath shall cease to have effect.

(2) The procedure of proving any matter in a cause by reference to oath is hereby abolished.

(3) Subsections (1) and (2) above shall not apply in relation to proceedings pending at the commencement of this Act.

Clause 19

This clause implements Recommendation 43 and should be read along with Schedule 6. The rules are essentially the same as those for companies, local authorities and other bodies corporate except that, unlike those bodies, the Secretary of State or Minister can sign personally. The rules in this clause replace the corresponding, but more limited, rules in section 1(8) of the Reorganisation of Offices (Scotland) Act 1939, but should not require any change in practice.

Clause 20

This clause implements Recommendations 21 and 36(*a*). (See paras. 5.19 to 5.21 of the Report.) Proposed model forms of testing clause are set out in Appendix B to this Report. The model forms are intended to be optional but, if used, they will be a legally safe way of showing the relevant facts.

Clause 21

Subsection (1)

This subsection abolishes all requirements of proof by writ or oath. It implements Recommendation 11(*a*).

Subsection (2)

This subsection abolishes the archaic procedure of proof by reference to the oath of the opposing party. It implements Recommendation 11(*b*).

Subsection (3)

This subsection makes clear that the new rules will apply only in relation to proceedings brought after the commencement of the new legislation. It would be undesirable to change the rules of evidence in the middle of proceedings which had already begun.

Abolition of other common law rules.

22. The following rules of law shall cease to have effect—

(*a*) any rule whereby certain contracts and obligations and any variations of those contracts and obligations, and assignations of incorporeal moveables, are required to be in writing; and

(*b*) any rule which confers any privilege—

(i) on a document which is holograph or adopted as holograph;

(ii) on a writ *in re mercatoria*.

Interpretation.

23.—(1) In this Act—

"alteration" means interlineation, marginal addition, deletion, erasure or anything written on erasure;

"authorised" means expressly or impliedly authorised;

1985 c.6.

"company" has the same meaning as in section 735(1) of the Companies Act 1985;

"decree" includes a judgment or order, or an official certified copy, abbreviate or extract of a decree;

"director" includes any person occupying the position of director, by whatever name he is called;

"governing board", in relation to a body corporate to which section 18 of this Act applies, means any governing body, however described;

"local authority" has the same meaning as in section 235(1) of the Local Government

1973 c.65.

(Scotland) Act 1973;

"proper officer", in relation to a local authority, has the same meaning as in section 235(3) of the Local Government (Scotland) Act 1973; and

"secretary" means, if there are two or more joint secretaries, any one of them.

(2) Any reference in this Act to the subscription or signing by a granter of a document, an alteration made to a document or anything annexed to a document, in a case where a person is subscribing or signing under a power of attorney on behalf of the granter, shall be construed as a reference to the subscription or signing by that person of the document, alteration or thing annexed.

Application of Act to Crown.

24.—(1) Nothing in this Act shall—

(*a*) prevent Her Majesty from authenticating—

(i) a document by superscription; or

(ii) a document relating to her private estates situated or arising in Scotland in

1862 c.37.

accordance with section 6 of the Crown Private Estates Act 1862;

(*b*) prevent a document passing the great seal from being authenticated under the Writs

1672 c.16.

Act 1672; or

(*c*) prevent any document mentioned in paragraph (a) or (b) above authenticated as aforesaid from being recorded in the Register of Sasines or registered for execution or preservation in the Books of Council and Session or in sheriff court books.

(2) Nothing in this Act shall prevent a Crown writ from being authenticated or recorded

1868 c.101.

in Chancery under section 78 of the Titles to Land Consolidation (Scotland) Act 1868.

(3) Subject to subsections (1) and (2) above, this Act binds the Crown.

Clause 22

This clause abolishes any common law rules requiring contracts or obligations to be in writing. It implements Recommendations 1, 10 and 13(*e*) and reinforces clause 1(1) and (4).

Paragraph (*a*) also makes it clear that, in the absence of any statutory provision, writing is not required for the assignation of incorporeal moveable property. (See Recommendation 10.) It should make little difference in practice as there will generally be sound practical reasons for continuing to use written assignations.

Paragraph (*b*) abolishes the special privileges of writings which are holograph, or adopted as holograph, or *in re mercatoria*. (See Recommendation 13(*e*).) There is no place for such privileged writings in the new scheme.

Clause 23

Subsection (1)

The definitions in this subsection have been noted in the appropriate contexts.

Subsection (2)

This subsection makes it clear that references to subscription or signing by the granter of a document do not prevent subscription or signing on behalf of the granter by someone acting under a Power of Attorney. It should be noted that the effect of clause 12(1)(*a*) and (*b*) is that the attorney should subscribe his own name (and not that of the granter, as is sometimes done at present) if he wishes his subscription to be presumed authentic under clause 5.

Clause 24

This clause implements Recommendation 44. It is so drafted that the validating effects of the new rules will be available in relation to the documents concerned if need be. However, the traditional methods of authentication remain available and are unaffected by the Bill.

Minor and consequential amendments and repeals and transitional provisions.

25.—(1) The enactments mentioned in Schedule 7 to this Act shall have effect subject to the minor and consequential amendments respectively specified in that Schedule.

(2) The enactments set out in Schedule 8 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) Subject to subsection (4) below and section 21 of this Act, nothing in this Act shall—

(*a*) apply to any document executed or anything done before the commencement of this Act; or

(*b*) affect the operation, in relation to any document executed before such commencement, of any procedure for establishing the authenticity of such a document.

1696 c.25.

(4) In the repeal of the Blank Bonds and Trusts Act 1696 (set out in Schedule 8 to this Act), the repeal of the words from "And farder" to the end shall have effect in relation to a deed of trust, whether executed before or after the commencement of this Act:

Provided that the repeal of those words shall not have effect in relation to proceedings pending at the commencement of this Act in which a question arises as to the deed of trust.

(5) For the purposes of this Act, if it cannot be ascertained whether a document was executed before or after the commencement of this Act, there shall be a presumption that it was executed after such commencement.

Short title, commencement and extent.

26.—(1) This Act may be cited as the Requirements of Writing (Scotland) Act 1988.

(2) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

Clause 25

Subsections (1) and (2)

Because of subsection (3), the amendments and repeals in Schedules 7 and 8 apply only to documents executed after the commencement of the new legislation.

Subsection (3)

It should be noted in particular that section 39 of the Conveyancing (Scotland) Act 1874 continues to apply, and the procedure under it remains available, in relation to documents executed before the commencement of the new legislation.

Subsection (4)

The words concerned in the Blank Bonds and Trusts Act 1696 relate to proof of trust by writ or oath. They are therefore repealed for proceedings brought after the commencement of the new legislation, no matter when the relevant document was executed.

Subsection (5)

The effect of this provision is to make the new, less restrictive, rules on formal validity and probativity available in relation, for example, to a home-made will found in a testator's desk with no indication of when it was executed.

SCHEDULES

Section 9(5).

SCHEDULE 1

Sections 5 to 7 as modified in relation to alterations made to a document after it has been subscribed

Presumption as to granter's signature, if witnessed.

5.—(1) Subject to the following provisions of this section, where—

(*a*) an alteration to a document bears to have been signed by a granter of the document;

(*b*) the alteration bears to have been signed by a person as a witness of that granter's signature and in addition the alteration, or the testing clause or its equivalent, bears to state the name and address of the witness; and

(*c*) nothing in the document or alteration, or in the testing clause or its equivalent, indicates—

(i) that the alteration was not signed by that granter as it bears to have been so signed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below,

the alteration shall be presumed to have been signed by that granter.

(2) Where an alteration to a testamentary document consists of more than one sheet, the alteration shall not be presumed to have been signed by a granter as mentioned in subsection (1) above unless, in addition to it bearing to have been signed by him on the last sheet and otherwise complying with that subsection, it bears to have been signed by him on every other sheet.

(3) For the purposes of subsection (1)(*b*) above—

(*a*) the name and address of a witness may be added at any time before the alteration is—

(i) founded on in legal proceedings; or

(ii) registered for preservation in the Books of Council and Session or in sheriff court books; and

(*b*) a statement of the name and address of a witness need not be written by the witness himself.

(4) Where, in any proceedings relating to an alteration to a document in which a question arises as to a granter's signature, it is established—

(*a*) that a signature bearing to be the signature of the witness of that granter's signature is not such a signature, whether by reason of forgery or otherwise;

(*b*) that the person who signed the alteration as the witness of that granter's signature is a person who is named in the document as a granter of the document;

(*c*) that the person who signed the alteration as the witness of that granter's signature, at the time of signing—

(i) did not know the granter,

(ii) was under the age of 16 years; or

(iii) was mentally incapable of acting as a witness;

(*d*) that the person who signed the alteration, purporting to be the witness of that granter's signature, did not see him sign the alteration;

(*e*) that the person who signed the alteration as the witness of that granter's signature did not sign the alteration after him or that the signing of the alteration by the granter and the witness was not one continuous process;

Schedule 1

This Schedule sets out clauses 5, 6 and 7 (presumptions as to granter's subscription and date or place of subscription as they apply to signed post-subscription alterations. (See Recommendation 27(*d*) and clause 9(5).)

(*f*) that the name or address of the witness of that granter's signature was added after the alteration was founded on or registered as mentioned in subsection (3)(*a*) above or is erroneous in any material respect; or

(*g*) in the case of an alteration to a testamentary document consisting of more than one sheet, that a signature on any sheet of the alteration bearing to be the signature of the granter is not such a signature, whether by reason of forgery or otherwise;

then, for the purposes of those proceedings, there shall be no presumption that the alteration has been signed by that granter.

(5) For the purposes of subsection (4)(*c*)(i) above, the witness shall be regarded as having known the person whose signature he has witnessed at the time of witnessing if he had credible information at that time of his identity.

(6) For the purposes of subsection (4)(*e*) above, where—

(*a*) an alteration to a document is made by more than one granter, and

(*b*) a person is the witness to the signature of more than one granter,

the signing of the alteration by any such granter and by the person witnessing that granter's signature shall not be regarded as not being one continuous process by reason only that, between the time of signing by that granter and of signing by that witness, another granter has signed the alteration.

Presumption as to date or place of signing of alterations.

6.—(1) Where—

(*a*) by virtue of section 5(1) of this Act an alteration to a document to which this subsection applies is presumed to have been signed by a granter of the document;

(*b*) the alteration, or the testing clause or its equivalent, bears to state the date or place of signing of the alteration by that granter; and

(*c*) nothing in the document or alteration, or in the testing clause or its equivalent, indicates that that statement as to date or place is incorrect,

there shall be a presumption that the alteration was signed by that granter on the date or at the place as stated.

(2) Subsection (1) above applies to any document other than a testamentary document.

(3) Where—

(*a*) an alteration to a testamentary document bears to have been signed and the alteration, or the testing clause or its equivalent, bears to state the date or place of signing (whether or not it is presumed under section 5 of this Act to have been signed by a granter of the document); and

(*b*) nothing in the document or alteration, or in the testing clause or its equivalent, indicates that that statement as to date or place is incorrect,

there shall be a presumption that the statement as to date or place is correct.

Presumption as to granter's signature or date or place of signing when established in court proceedings.

7.—(1) Where an alteration to a document bears to have been signed by a granter of the document, but there is no presumption under section 5 of this Act that the alteration has been signed by that granter, then, if the court, on an application being made to it, is

Sch. 1

satisfied that the alteration was signed by that granter, it shall cause the document to be endorsed with a certificate to that effect. (2) Where an alteration to a document bears to have been signed by a granter of the document, but there is no presumption under section 6 of this Act as to the date or place of signing, then, if the court, on an application being made to it, is satisfied as to the date or place of signing, it shall cause the document to be endorsed with a certificate to that effect.

(3) The court shall be entitled to be satisfied on an application under subsection (1) or (2) above on the evidence of one witness, and the evidence of the witness shall, unless the court otherwise directs, be given by affidavit.

(4) An application under subsection (1) or (2) above may be made either as a separate summary application or as incidental to and in the course of other proceedings.

(5) The effect of a certificate—

(*a*) under subsection (1) above shall be to establish a presumption that the alteration has been signed by the granter concerned;

(*b*) under subsection (2) above shall be to establish a presumption that the statement in the certificate as to date or place is correct.

(6) In this section "the court" means—

(*a*) in the case of a summary application—

(i) the sheriff in whose sheriffdom the applicant resides; or

(ii) if the applicant does not reside in Scotland, the sheriff at Edinburgh; and

(*b*) in the case of an application made in the course of other proceedings, the court before which those proceedings are pending.

Section 14(2).

SCHEDULE 2

Modifications of this Act in relation to subscription or signing by solicitor under section 14

1. For any reference to the subscription or signing of a document by a granter there shall be substituted a reference to such subscription or signing by a solicitor under section 14(1) of this Act.

2. For section 5(1) there shall be substituted the following subsection—

"(1) Subject to the following provisions of this section, where—

(*a*) a document bears to have been subscribed by a solicitor with the authority of a granter of it, and

(*b*) the document states that it was read to that granter by the solicitor before such subscription or states that it was not so read because the granter made a declaration that he did not wish him to do so; and

(*c*) the document bears to have been signed by a person as a witness of the solicitor's subscription and in addition the document, or the testing clause or its equivalent, bears to state the name and address of the witness; and

(*d*) nothing in the document, or in the testing clause or its equivalent, indicates—

(i) that it was not subscribed by the solicitor as it bears to have been so subscribed; or

(ii) that the statement mentioned in paragraph (*b*) above is incorrect, or

(iii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below,

the document shall be presumed to have been subscribed by the solicitor and the aforesaid statement shall be presumed to be correct.".

3. For section 5(4) there shall be substituted the following subsection—

"(4) Where, in any proceedings relating to a document in which a question arises as to a solicitor's subscription on behalf of a granter under section 14(1) of this Act, it is established—

(*a*) that a signature bearing to be the signature of the witness of the solicitor's subscription is not such a signature, whether by reason of forgery or otherwise;

(*b*) that the person who signed the document as the witness of the solicitor's subscription is a person who is named in the document as a granter of it;

(*c*) that the person who signed the document as the witness of the solicitor's subscription, at the time of signing—

(i) did not know the granter on whose behalf the solicitor had so subscribed,

(ii) was under the age of 16 years; or

(iii) was mentally incapable of acting as a witness;

(*d*) that the person who signed the document, purporting to be the witness of the solicitor's subscription, did not see him subscribe it;

(*dd*) that the person who signed the document as the witness of the solicitor's subscription did not witness the granting of authority by the granter concerned to the solicitor to subscribe the document on his behalf or did not witness the reading of the document to the granter by the solicitor or the declaration that the granter did not wish him to do so;

Schedule 2

This Schedule sets out the modifications necessary to the Bill to apply its provisions to the case where a solicitor executes a document on behalf of a granter of that document who declares that he is blind or unable to write. In order to assist in clarifying the procedure which should be followed, the main modifications are set out in full. The Schedule should be read along with clause 14.

Sch. 2

(*e*) that the person who signed the document as the witness of the solicitor's subscription did not sign the document after him or that such subscription and signature were not one continuous process;

(*f*) that the name or address of such a witness was added after the document was founded on or registered as mentioned in subsection (3)(*a*) above or is erroneous in any material respect, or

(*g*) in the case of a testamentary document consisting of more than one sheet, that a signature on any sheet bearing to be the signature of the solicitor is not such a signature, whether by reason of forgery or otherwise;

then, for the purposes of those proceedings, there shall be no presumption that the document has been subscribed by the solicitor on behalf of the granter concerned.".

4. For section 7(1) there shall be substituted the following subsection—

"(1) Where—

(*a*) a document bears to have been subscribed by a solicitor under section 14(1) of this Act on behalf of a granter of it; but

(*b*) there is no presumption under section 5 of this Act (as modified by paragraph 2 of Schedule 2 to this Act) that the document has been subscribed by that solicitor or that the procedure referred to in section 5(1)(*b*) of this Act as so modified was followed,

then, if the court, on an application being made to it, is satisfied that the document was so subscribed by the solicitor with the authority of the granter and that the solicitor read the document to the granter before subscription or did not so read it because the granter declared that he did not wish him to do so, it shall cause the document to be endorsed with a certificate to that effect.".

5. At the end of section 7(5)(*a*) there shall be added the following words—

"and that the procedure referred to in section 5(1)(*b*) of this Act as modified by paragraph 2 of Schedule 2 to this Act was followed.".

Section 16(2).

SCHEDULE 3

Modifications of section 5 where granter of document is a company

1. For section 5(1) there shall be substituted the following subsections—

"(1) Subject to the following provisions of this section, where—

(*a*) a document bears to have been subscribed on behalf of a company by a director, or by the secretary, of the company or by a person bearing to have been authorised to subscribe the document on its behalf;

(*b*) the document bears—

(i) to have been signed by a person as a witness of the subscription of the director, secretary or other person subscribing on behalf of the company and in addition to state the name and address of the witness; or

(ii) (if the subscription is not so witnessed), to have been sealed with the common seal of the company; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates—

(i) that it was not subscribed on behalf of the company as it bears to have been so subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below or that it was not sealed as it bears to have been sealed or that it was not validly sealed for the reason specified in subsection (4)(*h*) below,

the document shall be presumed to have been subscribed on behalf of the company.

(1A) For the purposes of subsection (1)(*b*)(i) above, the name and address of the witness may bear to be stated in the document itself or in the testing clause or its equivalent.".

2. In section 5(4) after paragraph (*g*) there shall be inserted the following paragraph—

"(*h*) if the document does not bear to have been witnessed, but bears to have been sealed with the common seal of the company, that it was sealed by a person without authority to do so or was not sealed on the date on which it was subscribed on behalf of the company;".

Schedule 3

This Schedule sets out clause 5 as it applies to the case where a granter of a document is a company. The main modifications to the clause relate to the possibility of using the company's seal as an alternative to attestation by a witness. (See also Recommendations 38(*b*) and 39 and clause 16.)

Section 17(2).

SCHEDULE 4

Modifications of section 5 where granter of document is a local authority

1. For section 5(1) there shall be substituted the following subsections—

"(1) Subject to the following provisions of this section where—

(*a*) a document bears to have been subscribed on behalf of a local authority by the proper officer of the authority;

(*b*) the document bears—

(i) to have been signed by a person as a witness of the proper officer's subscription and in addition to state the name and address of the witness; or

(ii) (if the subscription is not so witnessed), to have been sealed with the common seal of the authority; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates—

(i) that it was not subscribed on behalf of the authority as it bears to have been so subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below or that it was not sealed as it bears to have been sealed or that it was not validly sealed for the reason specified in subsection (4)(*h*) below,

the document shall be presumed to have been subscribed on behalf of the authority.

(1A) For the purposes of subsection (1)(*b*)(i) above, the name and address of the witness may bear to be stated in the document itself or in the testing clause or its equivalent.".

2. In section 5(4) after paragraph (*g*) there shall be inserted the following paragraph—

"(*h*) if the document does not bear to have been witnessed, but bears to have been sealed with the common seal of the authority, that it was sealed by a person without authority to do so or was not sealed on the date on which it was subscribed on behalf of the authority;".

Schedule 4

This Schedule sets out clause 5 as it applies to the case where a granter of a document is a local authority. The main modifications to the clause again relate to the possibility of using the local authority's seal as an alternative to attestation by a witness. (See also Recommendation 42 and clause 17.)

Section 18(3).

SCHEDULE 5

Modifications of section 5 where granter of document is another body corporate

1. For section 5(1) there shall be substituted the following subsections—

"(1) Subject to the following provisions of this section, where—

(*a*) a document bears to have been subscribed on behalf of a body corporate to which section 18 of this Act applies by—

(i) a member of the body's governing board or, if there is no governing board, a member of the body;

(ii) the secretary of the body; or

(iii) a person bearing to have been authorised to subscribe the document on its behalf;

(*b*) the document bears—

(i) to have been signed by a person as a witness of the subscription of the member, secretary or other person signing on behalf of the body and in addition to state the name and address of the witness; or

(ii) (if the subscription is not so witnessed), to have been sealed with the common seal of the body; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates—

(i) that it was not subscribed on behalf of the body as it bears to have been so subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below or that it was not sealed as it bears to have been sealed or that it was not validly sealed for the reason specified in subsection (4)(*h*) below,

the document shall be presumed to have been subscribed on behalf of the body.

(1A) For the purposes of subsection (1)(*b*)(i) above, the name and address of the witness may bear to be stated in the document itself or in the testing clause or its equivalent.".

2. In section 5(4) after paragraph (*g*) there shall be inserted the following paragraph—

"(*h*) if the document does not bear to have been witnessed, but bears to have been sealed with the common seal of the body, that it was sealed by a person without authority to do so or was not sealed on the date on which it was subscribed on behalf of the body;".

Schedule 5

This Schedule sets out clause 5 as it applies to the case where a granter of a document is a body corporate other than a company or local authority, e.g. a building society, or a registered industrial and provident society. The main modifications again relate to use of the body's seal. (See also Recommendation 41 and clause 18.)

SCHEDULE 6

Section 19(2).

Modifications of section 5 where granter of document is a Secretary of State or other Minister of the Crown

1. For section 5(1) there shall be substituted the following subsections—

"(1) Subject to the following provisions of this section, where—

(*a*) a document bears to have been subscribed by—

(i) a Secretary of State or other Minister of the Crown; or

(ii) a person bearing to have been authorised by him to subscribe the document on his behalf;

(*b*) the document bears—

(i) to have been signed by a person as a witness of the subscription of the Secretary of State or other Minister or (as the case may be) of the person bearing to have been so authorised and in addition to state the name and address of the witness; or

(ii) (if the subscription is not so witnessed), to have been sealed with the official seal of the Secretary of State or other Minister; and

(*c*) nothing in the document, or in the testing clause or its equivalent, indicates—

(i) that it was not subscribed as it bears to have been subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (*a*) to (*e*) of subsection (4) below or that it was not sealed as it bears to have been sealed or that it was not validly sealed for the reason specified in subsection (4)(*h*) below,

the document shall be presumed to have been subscribed by the Secretary of State or other Minister or (as the case may be) by the person on his behalf.

(1A) For the purposes of subsection (1)(*b*)(i) above, the name and address of the witness may bear to be stated in the document itself or in the testing clause or its equivalent.".

2. In section 5(4) after paragraph (*g*) there shall be inserted the following paragraph—

"(h) if the document does not bear to have been witnessed, but bears to have been sealed with the official seal of the Secretary of State or other Minister, that it was sealed by a person without authority to do so or was not sealed on the date on which it was subscribed by the Secretary of State or other Minister or (as the case may be) by the person;".

Schedule 6

This Schedule sets out clause 5 as it applies to the case where a granter of a document is a Secretary of State or other Minister of the Crown. The main modifications again relate to use of the official seal. (See also Recommendation 43 and clause 19.)

Section 25(1).

SCHEDULE 7

Minor and consequential amendments

General adaptation

1. Any reference in any other enactment to a probative document shall, in relation to a document executed after the commencement of this Act, be construed as a reference to a document in relation to which the presumption mentioned in section 11(1)(i) or (ii) of this Act applies.

Specific enactments

The Lands Clauses Consolidation (Scotland) Act 1845 (c.19)

2. In Schedules (A) and (B) at the end of each of the forms there shall be added—

"Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Infeftment Act 1845 (c.35)

3. In Schedules (A) and (B) for the words from "In witness" to the end there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Commissioners Clauses Act 1847 (c.16)

4. At the end of section 59 there shall be added the following subsection—

"(2) This section shall apply to Scotland subject to the following modifications—

(*a*) for the words from "by deed under" to "recorded" there shall be substituted the words—

"by a document—

(*a*) if they are a corporation, subscribed in accordance with sections 12 and 18 of the Requirements of Writing (Scotland) Act 1988;

(*b*) if they are not a corporation, subscribed in accordance with the said section 12 by the commissioners or any two of them acting by the authority of and on behalf of the commissioners;

and a document so subscribed, followed by infeftment duly recorded,";

(*b*) for the words from "under such" to "acting" there shall be substituted the word "subscribed".

Schedule 7

General. A number of the amendments made in this Schedule relate to conveyancing forms set out in various Acts. The amendments are intended to avoid confusion about the effect of witnessing—it will no longer be necessary for formal validity in the cases covered, but may be necessary for other purposes, e.g. recording in the Sasine Register—see para. 7.17 of the Report. Other amendments follow from our recommendation that subscription by the granter should be the only requirement for the formal validity of documents covered by clause 4 (see Recommendation 13(*a*) to (*d*)). They remove therefore additional requirements, such as use of a seal or attestation by witnesses.

General adaptation

This adaptation of other Acts implements Recommendation 45—see para. 7.1 of the Report.

Sch. 7

5. At the end of section 75 there shall be added the following subsection—

"(2) This section shall apply to Scotland as if for the words "by deed" to "five of them" there were substituted the words—

"in a document—

(*a*) which is duly stamped;

(*b*) in which the consideration is truly stated; and

(*c*) which is subscribed, if the commissioners—

(i) are a corporation, in accordance with sections 12 and 18 of the Requirements of Writing (Scotland) Act 1988;

(ii) are not a corporation, in accordance with the said section 12 by the commissioners or any five of them.".

6. At the end of section 77 there shall be added the following subsection—

"(2) This section shall apply to Scotland as if for the words "by deed duly stamped" there were substituted the words "in a document which is duly stamped and which is subscribed in accordance with the Requirements of Writing (Scotland) Act 1988.".

7. In Schedule (B) for the words from "Given" to the end there shall be substituted the words "[If the deed is granted under the law of England and Wales or Northern Ireland insert "Given under our corporate seal (or in witness whereof we have hereunto set our hands and seals) this day of one thousand nine hundred and] [If the document is granted under Scots law, insert testing clause +]

+ Note—As regards a document granted under Scots law, subscription of it by the granter will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

8. In Schedule (C) for the words from "In witness whereof" to the end there shall be substituted the words "[If the deed is granted under the law of England and Wales or Northern Ireland insert "In witness whereof I have hereunto set my hand and seal this day of one thousand nine hundred and] [If the document is granted under Scots law insert testing clause +)

+ Note—As regards a document granted under Scots law, subscription of it by the granter will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Entail Amendment Act 1848 (c.36)

9. In section 50 for the word "tested" there shall be substituted the word "subscribed".

10. In the Schedule—

(*a*) the words "and of the witnesses subscribing" are hereby repealed;

(*b*) for the words from "In witness whereof" to the end there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the heir of entail in possession and the notary public will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Ordnance Board Transfer Act 1855 (c.117)

11. At the end of section 5 there shall be added the following subsection—

"(2) This section shall apply to Scotland as if for the words from "signing" to "his deed" there were substituted the words "subscribing it in accordance with section 12 of the Requirements of Writing (Scotland) Act 1988".

The Registration of Leases (Scotland) Act 1857 (c.26)

12. In Schedule (A) for the words "in common form" there shall be substituted—

"+

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

13. In each of Schedules (B), (C), (D), (F), (G) and (H) after the words "Testing clause" there shall be inserted "+

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Transmission of Moveable Property (Scotland) Act 1862 (c.85)

14. In each of Schedules A and B for the words from "In witness whereof" to the end there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

15. In Schedule C for the words from "and D" to the end there shall be substituted the words "Testing clause".

The Titles to Land Consolidation (Scotland) Act 1868 (c.101)

16. In Schedule (B) nos. 1 and 2 and (AA) for the words from "In witness whereof" to "usual form]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

17. In Schedules (J), (BB) no. 1, (CC) nos. 1 and 2 and (OO) for the words from "In witness whereof" to the end there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

18. In Schedule (FF) no. 1—

(*a*) for the words from "In witness whereof" to "usual form]" there shall be substituted the words "Testing clause +";

(*b*) at the end there shall be added "+ Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

M

Sch. 7

19. In Schedule (GG)—

(*a*) for the words from "In witness whereof" to "1.K witness" there shall be substituted the words "Testing clause +";

(*b*) after Note (*b*) there shall be inserted—

"+ (*c*) Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

20. In Schedule (NN)—

(*a*) for the words from "In witness whereof" to "G H witness" there shall be substituted the words "Testing clause +";

(*b*) at the end there shall be added—

"+ Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Conveyancing (Scotland) Act 1874 (c.94)

21. In Schedules C, L nos. 1 and 2 and N for the words "In witness whereof [testing clause]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

22. In Schedule G—

(*a*) for the words "In witness whereof [testing clause]" there shall be substituted the words "Testing clause +";

(*b*) at the end of the Note there shall be added—

"+ Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

23. In Schedule M for the words "and add [testing clause]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Colonial Stock Act 1877 (c.59)

24. At the end of section 4(1) there shall be added the words "or, in relation to Scotland, subscribed in accordance with section 12 of the Requirements of Writing (Scotland) Act 1988.".

25. At the end of section 6 there shall be added the following subsection—

"(2) This section shall have effect in relation to Scotland as if for the words from "given" to "attested" there were substituted the words "subscribed by the person not under disability in accordance with section 12 of the Requirements of Writing (Scotland) Act 1988.".

EXPLANATORY NOTES

The Colonial Stock Act 1892 (c.35)

26. At the end of section 2 there shall be added the following subsection—

"(3) This section shall have effect in relation to Scotland as if—

(*a*) in subsection (1) for the words from "deed according" to "parties" there were substituted the words "a document in the form set out in the Schedule to this Act or to the like effect and the document as executed";

(*b*) in subsection (2) for the words "by deed" there were substituted the words "under this section".

27. In the Schedule—

(*a*) after the words "held the same" there shall be inserted the words "If the document is granted under the law of England and Wales or Northern Ireland insert";

(*b*) at the end there shall be added the words "If the document is granted under the law of Scotland insert "Testing clause +"

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The National Galleries of Scotland Act 1906 (c.50)

28. In the Schedule, in paragraph 7(1) for the words from "the chairman" to the end there shall be substituted the words "the signature of—

(*a*) the chairman;

(*b*) another member of the Board;

(*c*) the person for the time being acting as secretary of the Board; or

(*d*) any other person authorised to sign the document on behalf of the Board.".

The Feudal Casualties (Scotland) Act 1914 (c.48)

29. In the forms in each of Schedules B and C—

(*a*) for the words "In witness whereof" there shall be substituted the words "Testing clause"; and

(*b*) at the end of the Note there shall be added the words "Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Trusts (Scotland) Act 1921 (c.58)

30. In Schedule A—

(*a*) in the form for the words "(To be attested)" there shall be substituted the words "Testing clause +";

(*b*) at the end there shall be added—

"+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

31. In the form in Schedule B for the words "(To be attested)" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter or granters of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

32. In Schedule B—

(*a*) in forms nos. 1 to 6 for the words "[To be attested]" there shall be substituted the words "Testing clause +";

(*b*) at the end of the Notes there shall be added—

"+ Note 8—Subscription of the document by the notary public (or law agent) on behalf of the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

33. In Schedule E for the words "[To be attested]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

34. In Schedules G and H for the words "[to be attested]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988)".

35. In Schedule K—

(*a*) in forms nos 1 to 7 for the words "[To be attested]" there shall be substituted the words "Testing clause +";

(*b*) at the end of the notes there shall be added—

"+ Note 5—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

36. In Schedule L, in form 4 for the words "[To be attested]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the notary public or law agent on behalf of the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

37. In Schedule N for the words "[To be attested]" there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Long Leases (Scotland) Act 1954 (c.49)

38. In Schedule 4—

(*a*) for the words "[To be attested]" there shall be substituted the words— "Testing clause +";

(*b*) at the end of the Notes there shall be added—

"+ 4 Subscription of the feu contract by the parties to it will be sufficient for the contract to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Crofters (Scotland) Act 1955 (c.21)

39. In Schedule 1—

(*a*) in paragraph 13 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the Commission;

(*b*) the person for the time being acting as secretary of the Commission; or

(*c*) any other person authorised to sign the document on behalf of the Commission.";

(*b*) in paragraph 14 for the words "attested" there shall be substituted the word "authenticated".

The Deer (Scotland) Act 1959 (c.40)

40. In Schedule 1—

(*a*) in paragraph 12 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the Commission;

(*b*) the person for the time being acting as secretary of the Commission; or

(*c*) any other person authorised to sign the document on behalf of the Commission.";

(*b*) in paragraph 13 for the word "attested" there shall be substituted the word "authenticated".

The Succession (Scotland) Act 1964 (c.41)

41. At the end of section 21 there shall be added the following subsection—

"(2) This section shall not apply to a testamentary document executed after the commencement of the Requirements of Writing (Scotland) Act 1988.".

42. After section 21 there shall be inserted the following section—

"Evidence as to testamentary documents in commissary proceedings.

21A. Confirmation of an executor to property disposed of in a testamentary document executed after the commencement of the Requirements of Writing (Scotland) Act 1988 shall not be granted unless the formal validity of the document is governed—

(*a*) by Scots law and the document is presumed under section 5 or 7 of that Act to have been subscribed by the granter so disposing of that property; or

(*b*) by a law other than Scots law and the court is satisfied that the document is formally valid according to the law governing such validity.".

The Crofters (Scotland) Act 1955

Paragraph 13 of Schedule 1 presently provides that the application of the seal of the Crofters Commission to any document shall be attested by at least one member of the Commission and by the person for the time being acting as its secretary. The provision does not say when the seal must be used—that is left to the background law. The Bill clarifies the status of a seal. Under our recommendations, use of a seal becomes an alternative to attestation by a witness. The Crofters Commission is a body corporate and so is covered by clause 18 and Schedule 5. The amendment to paragraph 13 removes inappropriate terminology (e.g. "attested") and reduces the number of signatures required to one, in lines with clause 18 of the Bill, so as to avoid confusion. (See para. 6.59 of the Report.)

The Deer (Scotland) Act 1959

This amendment is to the same effect, for the Red Deer Commission, as that made to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

The Succession (Scotland) Act 1964

Section 21 is discussed at para. 5.56 of the Report. See para. 5.57 for the amendment to section 32.

43. For section 32 there shall be substituted the following section—

"Certain testamentary dispositions to be formally valid.

32.—(1) For the purpose of any question arising as to entitlement, by virtue of a testamentary disposition, to any relevant property or to any interest therein, the disposition shall be treated as valid in respect of the formalities of execution:

Provided that this subsection is without prejudice to any right to challenge the validity of the disposition on the ground of forgery or on any other ground of essential invalidity.

(2) In this section "relevant property" means property disposed of in the testamentary disposition in respect of which—

(*a*) confirmation has been granted; or

(*b*) probate, letters of administration or other grant of representation—

(i) has been issued, and has noted the domicile of the deceased to be, in England and Wales or Northern Ireland; or

(ii) has been issued outwith the United Kingdom and had been sealed in Scotland under section 2 of the Colonial Probates Act 1892.".

44. In Schedule 1, in the form of docket for the words "[To be attested by two witnesses] [signature of A B] there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Industrial and Provident Societies Act 1965 (c.12)

45. In Schedule 3, in each of Forms C, D and E for the words from "Signed" to the end there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

46. In Schedule 4, in Form C for the words from "Signed" to the end there shall be substituted the words "Testing clause +

+ Note—Subscription of the document by the cautioner will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Highlands and Islands Development (Scotland) Act 1965 (c.46)

47. In Schedule 1—

(*a*) in paragraph 15 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the Board;

(*b*) the person for the time being acting as secretary of the Board; or

(*c*) any other person authorised to sign the document on behalf of the Board.";

(*b*) in paragraph 16 for the word "attested" there shall be substituted the word "authenticated".

The Industrial and Provident Societies Act 1965

These amendments are explained at paras. 7.5 and 7.6 of the Report. (See also the repeal in Schedule 8.)

The Highlands and Islands Development (Scotland) Act 1965

This amendment is to the same effect, for the Highlands and Islands Development Board, as that to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

The Forestry Act 1967 (c.10)

48. In section 39(5) for the words from "section" to "1939" there shall be substituted the words "section 1(9) of the Reorganisation of Offices (Scotland) Act 1939 and section 19 of the Requirements of Writing (Scotland) Act 1988".

The Countryside (Scotland) Act 1967 (c.86)

49. In Schedule 1—

(*a*) in paragraph 9 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the Commission;

(*b*) the person for the time being acting as secretary of the Commission; or

(*c*) any other person authorised to sign the document on behalf of the Commission.";

(*b*) in paragraph 10 for the word "attested" there shall be substituted the word "authenticated".

The Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

50. In Schedule 2—

(*a*) in forms A and B for the words "[To be attested]" there shall be substituted the words "Testing clause +";

(*b*) at the end of the Notes there shall be added—

"+ Note 8—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

51. In Schedule 4—

(*a*) in form A and forms C to F for the words "[To be attested]" there shall be substituted the words "Testing clause +";

(*b*) at the end of the Notes there shall be added—

"+ Note 7—Subscription of the document by the granter of it, or in the case of form E the granter and the consenter to the variation, will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

52. In form D in Schedule 5—

(*a*) in nos 1 and 2 for the words "[To be attested]" there shall be substituted the words "Testing clause +";

(*b*) at the end there shall be added—

"+ Note—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

53. In Schedule 9—

(*a*) for the words "[To be attested]" there shall be substituted the words "Testing clause +";

(*b*) at the end of the Notes there shall be added—

"+ Note 4—Subscription of the document by the granter of it will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1988).".

The Countryside (Scotland) Act 1967

This amendment is to the same effect, for the Countryside Commission for Scotland, as the amendment to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

The Prescription and Limitation (Scotland) Act 1973 (c.52)

54. In Schedule 1, paragraphs 2(c), 3 and 4(b) shall cease to have effect.

The Local Government (Scotland) Act 1973 (c.65)

55. In Schedule 8, in paragraph 5(1) for the words from "signatures" to the end there shall be substituted the words "signature of—

(*a*) a member of the Commission;

(*b*) the person for the time being acting as secretary of the Commission; or

(*c*) any other person authorised to sign the document on behalf of the Commission.".

The Scottish Development Agency Act 1975 (c.69)

56. In Schedule 1—

(*a*) in paragraph 16 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the Agency;

(*b*) the person for the time being acting as secretary of the Agency; or

(*c*) any other person authorised to sign the document on behalf of the Agency.";

(*b*) in paragraph 17 for the word "attested" there shall be substituted the word "authenticated".

The Petroleum and Submarine Pipe-lines Act 1975 (c.74)

57. At the end of section 18(5)(*b*) there shall be added the words "or, as respects Scotland, by an instrument subscribed by the Secretary of State and the licensee in accordance with the Requirements of Writing (Scotland) Act 1988.".

The Patents Act 1977 (c.37)

58. In section 31(6) for the words from "probative" to the end there shall be substituted the words "subscribed in accordance with the Requirements of Writing (Scotland) Act 1988.".

The National Health Service (Scotland) Act 1978 (c.29)

59. In section 79(1A) for the words from "section" to "1939" there shall be substituted the words "section 1(9) of the Reorganisation of Offices (Scotland) Act 1939 and section 19 of the Requirements of Writing (Scotland) Act 1988.".

60. In Schedule 1—

(*a*) in paragraph 9 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the Board;

(*b*) the person for the time being acting as general manager, secretary or treasurer of the Board; or

(*c*) any other person authorised to sign the document on behalf of the Board.";

(*b*) in paragraph 10 for the word "attested" there shall be substituted the word "authenticated".

The Local Government (Scotland) Act 1973

This amendment is to the same effect, for the Commission for Local Authority Accounts in Scotland, as the amendment to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

The Scottish Development Agency Act 1975

This amendment is to the same effect, for the Scottish Development Agency, as the amendment to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

The Patents Act 1977

This amendment is explained at para. 7.10 of the Report.

The National Health Service (Scotland) Act 1978

These amendments are to the same effect for Health Boards and the Common Services Agency, as the amendment to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

Sch. 7

61. In Schedule 5—

(*a*) in paragraph 10 for the words from "attested" to the end there shall be substituted the words "authenticated by the signature of—

(*a*) a member of the management committee;

(*b*) the person for the time being acting as general manager, secretary or treasurer of the Agency; or

(*c*) any other person authorised to sign the document on behalf of the management committee.";

(*b*) in paragraph 11 for the word "attested" there shall be substituted the word "authenticated".

The Oil and Gas (Enterprise) Act 1982 (c.23)

62. At the end of section 19(2) there shall be added the words "or, as respects Scotland, by an instrument subscribed by the Secretary of State and the licensee in accordance with the Requirements of Writing (Scotland) Act 1988.".

The Companies Act 1985 (c.6)

63. In section 36—

(*a*) subsection (3) shall cease to have effect;

(*b*) at the end there shall be added the following subsection—

"(5) This section does not extend to Scotland.".

64. After section 36 there shall be inserted the following section—

"Entering contracts or undertaking obligations under Scots law.

36A.—(1) A contract may be entered into, or an obligation may be undertaken, on behalf of a company by any person acting under its authority, express or implied.

(2) Where a contract or obligation purports to be entered into or undertaken by a company, or by a person as agent for a company, at a time when the company has not been formed, then, subject to any agreement to the contrary, the contract or obligation has effect as one entered into or undertaken by the person purporting to act for the company or as agent for it, and he is personally liable on the contract or obligation accordingly.

(3) This section extends to Scotland only.".

65. In section 38(1) after the word "seal" there shall be inserted the words "or as respects Scotland by writing subscribed in accordance with sections 12 and 16 of the Requirements of Writing (Scotland) Act 1988.".

66. In section 39(3) after the words "common seal" there shall be inserted the words "or as respects Scotland by writing subscribed in accordance with sections 12 and 16 of the Requirements of Writing (Scotland) Act 1988".

67. In section 462(2)—

(*a*) the words "under the seal of the company" shall cease to have effect;

(*b*) at the end there shall be added the words ", subscribed in accordance with sections 12 and 16 of the Requirements of Writing (Scotland) Act 1988.".

68. In section 466(2) for the words from "is executed" to the end of paragraph (*a*) there shall be substituted the words "is subscribed—

(*a*) in the case of a company, in accordance with sections 12 and 16 of the Requirements of Writing (Scotland) Act 1988;".

The Companies Act 1985

These amendments are explained at paras. 6.41 to 6.50 and 7.11 to 7.13 of the Report. See also Recommendation 38.

Sch. 7

69. In section 469—

(*a*) in subsection (1) for the words "a validly executed instrument in writing" there shall be substituted the words "an instrument subscribed in accordance with the Requirements of Writing (Scotland) Act 1988";

(*b*) for subsection (4) there shall be substituted the following subsection—

"(4) If the receiver is to be appointed by the holders of a series of secured debentures, the instrument of appointment may be executed on behalf of the holders of the floating charge by any person authorised by resolution of the debenture-holders to execute the instrument.".

The National Heritage (Scotland) Act 1985 (c.16)

70. In Schedule 1—

(*a*) in paragraph 8(1) for the words from "the Chairman" to the end there shall be substituted the words "the signature of—

(*a*) the chairman;

(*b*) another member of the Board;

(*c*) the person for the time being acting as secretary of the Board; or

(*d*) any other person authorised to sign the document on behalf of the Board";

(*b*) in paragraph 19(1) for the words from "signature of" to the end there shall be substituted the words "signature of—

(*a*) the chairman;

(*b*) another member of the Board;

(*c*) the person for the time being acting as secretary of the Board; or

(*d*) any other person authorised to sign the document on behalf of the Board";

The Legal Aid (Scotland) Act 1986 (c.47)

71. In Schedule 1, in paragraph 14(1) for the words from "the Chairman" to the end there shall be substituted the words "the signature of—

(*a*) the chairman;

(*b*) another member of the Board;

(*c*) the person for the time being acting as secretary of the Board; or

(*d*) any other person authorised to sign the document on behalf of the Board.".

The Housing (Scotland) Act 1987 (c.26)

72. In section 53(1) for the words from "probative" to the end there shall be substituted the words "subscribed by the parties in accordance with the Requirements of Writing (Scotland) Act 1988.".

73. In section 54(6) for the words "probative or holograph of the parties" there shall be substituted the words "subscribed by the parties in accordance with the Requirements of Writing (Scotland) Act 1988.".

The National Heritage (Scotland) Act 1985

These amendments are to the same effect, for the Board of Trustees of the National Museums of Scotland and the Board of Trustees of the Royal Botanic Garden, Edinburgh, as the amendment to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955. For a similar amendment for the Board of Trustees of the National Galleries of Scotland, see para. 28 above (The National Galleries of Scotland Act 1906, as amended by The National Heritage (Scotland) Act 1985).

The Legal Aid (Scotland) Act 1986

This amendment is to the same effect, for the Scottish Legal Aid Board, as the amendment to paragraph 13 of Schedule 1 to the Crofters (Scotland) Act 1955.

The Housing (Scotland) Act 1987

For discussion of these amendments, see para. 7.14 of the Report.

SCHEDULE 8

Section 26(2).

ENACTMENTS REPEALED

Chapter	*Short title*	*Extent of repeal*
1540 c.37	The Subscription of Deeds Act 1540	The whole Act.
1579 c.18	The Subscription of Deeds Act 1579	The whole Act.
1672 c.47	The Lyon King of Arms Act 1672	The words from "And his Maiestie with consent" to "contraveiners heirof".
1681 c.5	The Subscription of Deeds Act 1681	The whole Act.
1696 c.15	The Deeds Act 1696	The whole Act.
1696 c.25	The Blank Bonds and Trusts Act 1696	The whole Act.
1698 c.4	The Registration Act 1698	The whole Act.
10 & 11 Vict. c.16	The Commissioners Clauses Act 1847	In section 56, the words from "(that is to say,)" to "discharge the same" where they first occur.
11 & 12 Vict. c.36	The Entail Amendment Act 1848	In the form in the Schedule the words "and of the witnesses subscribing".
19 & 20 Vict. c.60	The Mercantile Law Amendment Act, Scotland 1856	Section 6.
31 & 32 Vict. c.101	The Titles to Land Consolidation (Scotland) Act 1868	Sections 139 and 149.
37 & 38 Vict. c.94	The Conveyancing (Scotland) Act 1874	Sections 38 to 41 Schedule 1.
7 Edw. 7 c.51	The Sheriff Courts (Scotland) Act 1907	In section 35 the words "either holograph or attested by one witness". In Schedule 1, paragraph 67 and in the Appendix in Form M the words from "If not holograph" to the end of the form.
4 & 5 Geo. 5 c.48	The Feudal Casualties (Scotland) Act 1914	In section 8 the words "which need not be tested or holograph".
14 & 15 Geo. 5 c.27	The Conveyancing (Scotland) Act 1924	Section 18. Schedule 1.
23 & 24 Geo. 5 c.44	The Church of Scotland (Property and Endowments) Amendment Act 1933	Section 13.

Schedule 8

General. A number of the repeals in this Schedule follow from Recommendation 12 which relates to repeal of the authentication statutes and related provisions. Others follow from our recommendation that subscription by the granter should be the only requirement for the formal validity of documents covered by clause 4 (see Recommendation 13(*a*) to (*d*)). They remove therefore additional requirements, such as use of a seal or attestation by a witness.

The Lyon King of Arms Act 1672

This Act permitted noblemen to subscribe by their titles. Repeal of the words in question is consequential upon Recommendation 33(*d*) and clause 12(6). (See also paras. 6.7 and 6.14 of the Report.)

The Blank Bonds and Trusts Act 1696

For discussion of this repeal, see para. 7.2 of the Report.

The Registration Act 1698

For discussion of this repeal, see para. 7.3 of the Report.

The Mercantile Law Amendment Act Scotland 1856

For discussion of this repeal, see para. 2.12 of the Report and Recommendation 2.

The Titles to Land Consolidation (Scotland) Act 1868

Section 139, dealing with the minimum age of witnesses to a deed and providing that witnesses must not be subject to any legal incapacity, is superseded by our scheme—see Recommendation 17(vi) and clause 5(4)(*c*). Its repeal is also recommended in our report on the Legal Capacity and Responsibility of Minors and Pupils (SLC No. 110)—see Schedule 2 of the Bill accompanying that report.

Section 149, which provides that certain documents may be partly written and partly printed, engraved or lithographed, provided the testing clause contains certain information, is superseded by our scheme.

The Conveyancing (Scotland) Act 1874

Repeal of these provisions is in part implementation of the following recommendations—

Section 38—Recommendation 19 and clause 5(3) (see para. 5.11 of the Report);

Section 39—Recommendation 26 and clause 7 (see para. 5.30 of the Report);

Section 40—Recommendation 24 and clause 6(3) (see para. 5.27 of the Report);

Section 41—Recommendation 36 and clause 14 and Schedule 2 (see paras. 6.25 to 6.37 of the Report).

The Sheriff Courts (Scotland) Act 1907

For discussion of these repeals, see para. 7.4 of the Report.

The Conveyancing (Scotland) Act 1924

Section 18 and Schedule 1 relate to the execution of a document by a notary or other specified person on behalf of someone who is blind or unable to write. Their repeal is in part implementation of Recommendation 36—see also Clause 14 and Schedule 1 of the Bill.

The Church of Scotland (Property and Endowments) Amendment Act 1933

Section 13 extended section 18 of the Conveyancing (Scotland) Act 1924 by permitting Church of Scotland Ministers to act outwith their own parish in relation to the notarial execution of wills. Its repeal follows that of section 18 of the 1924 Act.

Sch. 8

Chapter	*Short title*	*Extent of repeal*
2 & 3 Geo. 6 c.20	The Reorganisation of Offices (Scotland) Act 1939	In section 1(8) the words from "and any such" to the end.
1963 c.18	The Stock Transfer Act 1963	Section 2(4).
1965 c.12	The Industrial and Provident Societies Act 1965	In section 34(5)(*a*), in the definition of "receipt" the words from "signed by two members" to "as such". Section 36.
1968 c.16	The New Towns (Scotland) Act 1968	In Schedule 2, paragraphs 10 and 11.
1970 c.35	The Conveyancing and Feudal Reform (Scotland) Act 1970	Section 44.
1973 c.52	The Prescription and Limitation (Scotland) Act 1973	Section 5(2). In Schedule 1, paragraphs 2(*c*), 3 and 4(*b*).
1973 c.65	The Local Government (Scotland) Act 1973	Section 194(1).
1980 c.46	The Solicitors (Scotland) Act 1980	In Schedule 1, paragraph 12.
1985 c.6	The Companies Act 1985	In section 2(6) the words from "and that" to the end. In section 7(3)(*c*) the words "("which attestation" to the end. Section 36(3). In section 462, in subsection (2) the words "under the seal of the company" and subsection (3). In section 466(2) the words from "or" at the end of paragraph (*c*) to the end of paragraph (*d*). Section 469(3).

The Reorganisation of Offices (Scotland) Act 1939

This repeal is discussed at para. 6.72 of the Report.

The New Towns (Scotland) Act 1968

Paragraphs 10 and 11 deal with the authentication of the seal of New Town Development Corporations. These bodies are covered by clause 18 and Schedule 5 of the Bill (see Recommendation 41). The provisions are therefore unnecessary.

The Prescription and Limitation (Scotland) Act 1973

Repeal of section 5(2) is discussed at para. 7.7 of the Report. For Schedule 1, paragraphs 2(*c*), 3 and 4(*b*), see paras. 5.36 to 5.44 of the Report.

The Local Government (Scotland) Act 1973

Section 194(1), which regulates the execution of deeds by local authorites, is superseded by clause 17 and Schedule 4 of the Bill, and so falls to be repealed.

The Solicitors (Scotland) Act 1980

Paragraph 12 of Schedule 1, which regulates the execution of deeds by the Law Society of Scotland, is superseded by clause 18 and Schedule 5 of the Bill and so falls to be repealed.

The Companies Act 1985

The repeals relating to sections 462 (execution of floating charges), 466 (alteration of floating charges) and 469 (appointment of receiver) are discussed at para. 7.13 of the Report.

Appendix B

Model forms of testing clause

General notes

1. These forms are intended to be optional. (See clause 20 of draft Bill.) Any other form may be used provided the information required (see clauses 5, 6, 9 and 13 to 20 of draft Bill) is clearly stated. In the case of some simple, one-page documents, shorter forms could be used, omitting everything before "*Signature*". In complicated cases longer forms may be necessary. The model forms are designed so that in many ordinary cases they can be typed or printed on the document in advance of subscription. This is particularly advisable where alterations are declared in the testing clause as otherwise there is no identifiable person who is making the declaration.

2. In the forms the words in square brackets should be deleted or modified as necessary. It is not necessary, but may be considered advisable, to refer to the number of pages, any annexures, and the date and place of execution.

3. Where the same person is witness to more than one granter's subscription, he may sign separately in respect of each, in this case his name and address need not be stated again: "*as above*" is sufficient. If the witness does not sign separately in respect of each granter the forms should be adapted to ensure that each granter's subscription bears to be witnessed—e.g. by adding after "*Signature of witness*" words such as "*to first and second granters' subscriptions*".

Form 1—for use in relation to subscription by individual. (Section 5.)

(a) Where individual signs personally

THIS DOCUMENT [consisting of this and the three preceding pages] [and the inventory annexed and signed as relative hereto] [under declaration that the following alterations (*here specify or identify alterations*) were made before subscription] is SIGNED AND WITNESSED as shown below—

Signature of witness	Signature of [first] granter
Name of witness	
Address of witness	Date Place

(b) Where attorney signs on behalf of individual

THIS DOCUMENT [etc. as in Form (a)] is SIGNED AND WITNESSED as shown below—

Signature of witness	Signature on behalf of [first] granter
Name of witness	Name of person signing
Address of witness	Capacity in which signs
	Date Place

Notes to Form 1(b)

1. The statement of the capacity in which the subscriber signs should be e.g. "*Attorney under Power of Attorney dated* ."

2. The attorney should sign his own name and not that of the granter.

Form 2—for use in relation to subscription on behalf of granter who is blind or unable to write (Section 14)

(a) Where document is read over to granter

THIS DOCUMENT [etc. as in Form 1(a)] has been read over to the said AB by me RS, solicitor, (address) and is SIGNED by me for and with the authority of, and in the presence of, the said AB, who has declared that he is blind [or unable to write], and WITNESSED as shown below—

Signature of witness	Signature on behalf of granter
Name of witness	
Address of witness	Date Place

(b) Where granter declares that he does not wish document to be read over to him

THIS DOCUMENT [etc. as in Form 1(a)] is SIGNED by me RS, solicitor, (address) for and with the authority of, and in the presence of, the said AB who has declared that he is blind [or unable to write] and that he does not wish the document to be read over to him, and WITNESSED as shown below—

[etc. as in Form 2(a)].

Notes to Form 2

1. The form should run on from the end of the document. The solicitor and witness need sign only at the end of the form and are not required also to sign between the end of the document and the beginning of the form.

2. Where the document is executed outwith Scotland, not by a solicitor who has in force a practising certificate issued by the Law Society of Scotland, but by a notary public or other person with official authority under the law of the place of execution to execute documents on behalf of persons who are blind or unable to write, this should be indicated in the form.

3. The statement of the address of the solicitor, etc, who subscribes on behalf of the granter is not required, but may be considered advisable.

Form 3—for use in relation to subscription on behalf of a partnership (Section 15)

THIS DOCUMENT [etc. as in Form 1(a)] is SIGNED AND WITNESSED as shown below—

Signature of witness	Signature on behalf of [first] granter
Name of witness	Name of person signing
Address of witness	Capacity in which signs
	Date Place

Notes to Form 3

1. The partner or authorised signatory may, if he chooses, sign the firm name instead of his own name. In such a case, the form should be modified accordingly.

2. The statement of the capacity in which the subscriber signs may be either "Partner" or "Authorised signatory". In the latter case, if there is express written authority, this may usefully be mentioned—e.g. "*under letter of authority dated* ".

Form 4—for use in relation to subscription on behalf of a company (Section 16), a local authority (Section 17), any other body corporate (Section 18), or a Minister of the Crown (Section 19)

(a) Where the subscription is attested by a witness

THIS DOCUMENT [etc. as in Form 1(a)] is SIGNED AND WITNESSED as shown below—

Signature of witness	Signature on behalf of [first] granter
Name of witness	Name of person signing
Address of witness	Capacity in which signs
	Date Place

(b) Where the subscription is attested by the seal

THIS DOCUMENT [etc. as in Form 1(a)] is SIGNED AND SEALED as shown below—

Common seal	Signature on behalf of [first] granter
	Name of person signing
	Capacity in which signs
	Date Place

Notes to Form 4

1. The statement of the capacity in which the subscriber signs might be—Director, Secretary, or authorised signatory [in the case of a company], title of Proper Officer—e.g. Chief Executive, Director of Administration, Regional Solicitor, etc. [in the case of a local authority], Chairman, Board etc. Member, Member, Secretary or authorised signatory [in the case of other bodies corporate], title of authorised officer—e.g. Assistant Secretary [in the case of a Minister of the Crown]. Where an authorised signatory is signing under express written authority this may usefully be mentioned—e.g. "*under Board resolution dated* ".

2. In the case of a Minister of the Crown "Official seal" should be substituted for "Common seal". The form should be appropriately modified if the Minister is signing personally.

Appendix C

List of those who submitted written comments on the memorandum or who assisted with comments in the course of preparation of the Report

(Note: in the case of some of the organisations listed below, the views expressed were those of individuals, or groups of individuals, within the organisation in question and were not necessarily the views of the organisation itself.)

D S Allan, Depute Director of Administration, Fife Regional Council
Association of British Insurers
Association of Directors of Social Work
Building Societies Association
Board of Trustees of the National Museums of Scotland
A R Boyd, Irvine Development Corporation
A A Brown, Regional Sheriff Clerk, North Strathclyde
Church of Scotland General Assembly, Board of Practice and Procedure
E Clucas, East Kilbride Development Corporation
Commission for Local Authority Accounts in Scotland
Committee of Scottish Clearing Bankers
Convention of Scottish Local Authorities
Countryside Commission for Scotland
Court of Session Judges, Working Party
Crofters Commission
J M Davidson WS, Edinburgh
Department of the Registers of Scotland
J S Doig, Regional Sheriff Clerk, Grampian, Highlands and Islands
Faculty of Advocates
H Findlay, Regional Sheriff Clerk, South Strathclyde, Dumfries and Galloway
G L Gretton WS, Edinburgh University
Glasgow Chamber of Commerce
Professor W M Gordon, Glasgow University
Sheriff G H Gordon QC
Professor J M Halliday CBE
Professor G L F Henry
Highlands and Islands Development Board
Professor J A M Inglis CBE, Glasgow University
Institute of Chartered Accountants of Scotland
Law Society of Scotland
Life Association of Scotland
Professor P N Love CBE, Aberdeen University
McCosh and Gardiner, Solicitors, Ayr
Professor Emeritus A J McDonald WS, Dundee
C McLay, Regional Sheriff Clerk, Glasgow and Strathkelvin
Dr H L MacQueen, Edinburgh University
W Millar, Edinburgh
The Rt Hon Lord Murray PC
Red Deer Commission
K G C Reid, Edinburgh University
J Ritchie, Livingston Development Corporation
Ross, Strachan and Co, Solicitors, Dundee
Royal Faculty of Procurators in Glasgow
Scottish Consumer Council
Scottish Development Agency

Scottish Health Service, Central Legal Office
Scottish Legal Aid Board
Scottish Life
Scottish Record Office
Scottish Special Housing Association
Sheriffs' Association
Professor Emeritus Sir T B Smith QC
Society of Directors of Administration in Scotland
Society of Writers to H M Signet
I Swinney, Glasgow University
Professor D M Walker QC, Glasgow University
A D Ward, Solicitor, Barrhead
A S Weatherhead OBE, Solicitor, Glasgow
D B White, Regional Sheriff Clerk, Lothian and Borders
B C T Wood, Solicitor, Kirkcaldy
S Woolman, Edinburgh
B J Young, Regional Sheriff Clerk, Tayside, Central and Fife.

Printed by HMSO, Edinburgh Press
Dd 0287182 C13 7/88 (257341)

HMSO BOOKS

HMSO publications are available from:

HMSO Bookshops
71 Lothian Road, Edinburgh EH3 9AZ (031) 228 4181
49 High Holborn, London WC1V 6HB (01) 211 5656 (Counter service only)
258 Broad Street, Birmingham B1 2HE (021) 643 3740
Southey House, 33 Wine Street, Bristol BS1 2BQ (0272) 264306
9–21 Princess Street, Manchester M60 8AS (061) 834 7201
80 Chichester Street, Belfast BT1 4JY (0232) 238451

HMSO Publications Centre
(Mail and telephone orders only)
PO Box 276, London SW8 5DT
Telephone orders (01) 622 3316
General enquiries (01) 211 5656
(queuing system in operation for both numbers)

HMSO's Accredited Agents
(see Yellow Pages)

And through good booksellers

ISBN 0 10 255188 X