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Citation for published version:
Reid, K 2010 'Testamentary Formalities in Scotland' University of Edinburgh, School of Law, Working Papers, SSRN.

Link:
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Testamentary Formalities in Scotland

Forthcoming in
Kenneth Reid, Reinhard Zimmerman, Marius de Waal (eds)
Testamentary Formalities (Oxford University Press, 2011)

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

Keywords
legal history, Scottish law, wills, deeds, authentication, formalism
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IV. FORM AND FORMALISM

1. Introduction

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

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

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

2. Heritable property: transmission by de praesenti conveyance

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

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

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3 Stair (n 2) III, 4, 23.
6 Bankton (n 4) III, 4, 7.
7 The feudal system of land tenure was abolished on 28 November 2004: see Abolition of Feudal Tenure etc (Scotland) Act 2000 s 1.
8 The Civil Partnership Act 2004 makes provision for the registration of same-sex relationships as civil partnerships. For the purposes of the law of succession a civil partner is treated in the same way as a husband or wife.
11 The most recent study, based on a sample of 1009 adults, found that 37% had a will but that this figure rose to 69% for those aged 65 and above: see Scottish Consumer Council, *Wills and Awareness of Inheritance Rights in Scotland* (2006, available at <http://scotcons.demonweb.co.uk/publications/reports/reports06/rp10wrep.pdf>).

depositaries – she will have put her last will and testament, or rather her *mortis causa* settlement as it relates to heritage, into the hands of some safe friend.\(^\text{12}\)

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

The origins of this ‘most ancient law’ can be traced back to *Regiam Majestatem*, a work on Scots law of the fourteenth century,\(^\text{15}\) and indirectly to Glanvill’s *De Legibus et Consuetudinibus Regni Anglie*, which was written around 1200 and on which the relevant passages in *Regiam Majestatem* are based.\(^\text{16}\) Later writers, not always convincingly, attributed the exclusion of testaments to feudalism.\(^\text{17}\) A mere vassal, it was said, had no power to transmit land without the interposition of the feudal superior; nor could he breach unilaterally the provision made as to heirs in the original feudal grant. In any event, a testament did not admit of the sasine\(^\text{18}\) that was needed to complete the intended beneficiary’s title. The conclusion was inescapable: if land was to be transferred away from the heir whom the law had selected to succeed, this could only be done by an ordinary conveyance granted and completed in the ordinary way and in the lifetime of the granter. A testament would not do.\(^\text{19}\)

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

\(^\text{13}\) Erskine (n 5) III, 8, 95.

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

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


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

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

\(^\text{19}\) This conclusion was also supported by the traditional maxim that it is for God not man to make an heir: see Hume (n 14) vol V, 17; James Watson, *A Treatise on the Law of Scotland respecting Succession as depending on Deeds of Settlement* (Edinburgh, 1826) 49. The maxim can be traced to Glanvill (n 16) VII, 1. Of the equivalent rule in England, it has been argued that the true reason was not feudalism but the desire to protect the heir from deathbed gifts: see Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (2nd edn, Cambridge, 1898) vol II, 326-30.
Although the rule just described was feudal in origin, and although it was accepted more generally that ‘all succession in heritage with us is founded in the feudal customs’, the writers of the institutional period, schooled in the Corpus Iuris Civilis, found traces of Roman law wherever they looked. The attributions were of varying plausibility. ‘The law of death-bed’, wrote Bankton, ‘was introduced with us upon the same principle as the Querela inofficiosi testamenti among the Romans. The party who makes the settlement in prejudice of his heir on death-bed, is holden incapable on account of the disease; in the same manner as one, without cause, disinheriting his children by his testament, was supposed non comos by the civil law, on account of his unnatural settlement.’ According to Erskine, liege poustie – the state of health required for disposing of heritage – ‘gets its name because persons in health have the legitima potestas, or lawful power of disposing of their property at pleasure’. And in the idea that heritage could only be transmitted by de praesenti conveyance, the writers found echoes of the mancipatory will (testatum per aes et libram) of Roman law. Indeed the preservation of that rule, several centuries after it had been abandoned in England, was attributed to ‘respect to the Roman law and the feudal notions’, in that order.

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

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20 Bankton (n 4) III, 4, 4. See also Stair (n 2) III, 4, 25 (‘succession in moveables is more near to the course of natural succession, and to the civil law of the Romans, especially their ancient and middle laws; but the succession in heritable rights agreeth more to the recent feudal customs of most nations’); Erskine (n 5) III, 8, 3. 1e 1681-1839, the period of the publication of the ‘institutional’ works of Stair, Bankton, Erskine, Hume and Bell.
22 Bankton (n 4) III, 4, 32.
23 Erskine (n. 5) III, 8, 95.
24 Hume (n 14) vol V, 14; Watson (n 19) 46-7, 69-70.
26 Watson (n 19) 48.
28 Known in Scotland as a (proper) liferent.
29 Hume (n 14) vol IV, 16.
30 Cautious because, if the deed did not take effect until death, a usufruct (liferent) could never arise.
31 Thus achieving something which was not possible in England until 1837: see Pollock and Maitland (n 19) vol II, 315.
The disadvantage was that sasine was not given, meaning that this would have to be done after the grantor’s death. That was straightforward enough if, as often, the grantee was the person who would in any case be heir under the general law, but if he was not the cooperation of that person was still needed and, albeit with difficulty, could be insisted on.\(^{33}\)

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

If, however, matters had become straightforward for those with access to legal advice, the fact that the Scottish rule was out of step with the rest of Europe could make life difficult for those who owned land in Scotland but lived abroad. The law reports record a number of cases involving wills made in accordance with the law of England,\(^{39}\) Ireland\(^{40}\) or the Netherlands\(^{41}\) and which, omitting a \textit{de praesenti} conveyance, were held ineffectual to carry heritage in Scotland.

### 3. Moveable property: transmission by testament

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

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


\(^{35}\) Watson (n 19) 5.

\(^{36}\) Executors could only act in respect of moveable property: see I.3 below.

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

\(^{38}\) 28 June 1809 FC.

\(^{39}\) Crichton’s Ex. \textit{v} Crichton’s Tr (1795) Mor 4489; Robertson’s Creditors \textit{v} Mason (1795) Mor 4491.

\(^{40}\) Burgess v Stantin (1764) Mor 4484.

\(^{41}\) Crawford \textit{v} Crawford (1774) Mor 4486.

\(^{42}\) For a historical study, see A E Anton, ‘Medieval Scots Executors and the Courts Spiritual’ (1955) 67 \textit{JR} 129.

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

\(^{44}\) Bell (n 14) §§ 1862 and 1869.
For legacies writing could sometimes be avoided.\textsuperscript{45} Although the privileged wills of Roman law, such as the testamentum militare, seem never to have been adopted,\textsuperscript{46} oral legacies were allowed provided that the value of each such legacy – and there could be more than one\textsuperscript{47} – did not exceed £100 in the old Scottish currency.\textsuperscript{48} The £100 limit – attributable to a rule of the general law that prevented more valuable obligations from being proved by witnesses alone\textsuperscript{49} – was later justified on the basis that, in the agitation of a final illness, ‘the mind is too much engrossed to pay a minute attention to verbal expressions; and the real intention of the party would often be in danger of being misunderstood or misrepresented, if left entirely to the memory of interested relatives’.\textsuperscript{50} When the law was re-cast in 1995, the nuncupative will was discarded and writing became necessary in all cases.\textsuperscript{51}

\textbf{4. The fall and rise of the testament}

Today the testament is the dominant instrument for allocating property on death. But that has been true for less than a hundred years. Until as recently as 1868, testaments could not be used for heritable property at all,\textsuperscript{52} and even in respect of moveable property they were for a long time ‘scarcely to be met with in practice’.\textsuperscript{53} For the latter the main reason was financial.\textsuperscript{54} Executors, whose role was confined to the deceased’s moveable property, took title by grant of confirmation from the Commissary Court. Confirmation, however, was expensive – five per cent of the confirmed estate until 1701 and between one and three and a half per cent thereafter – and in the Confirmation Act of 1690\textsuperscript{55} a means of avoiding it was supplied. In acknowledgement of ‘the great vexation’ created by the cost of confirmation, the Act provided, in respect of moveable property, ‘that where speciall assignations and dispositions are lawfully made by the defunct, tho neither intimate nor made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruike, enjoy, pursue or defend, albeit the soumes of money or goods therein contained be not confirmed’. This was a signal to abandon the testament in favour of a de praesenti conveyance – as a ‘speciall assignation and disposition’ – and so to adopt for moveables the practice which was already in use for heritage.\textsuperscript{56} And it then made practical sense to combine the conveyances of moveables and heritage in a single deed, which came to be known as a (general) disposition and settlement. Once abandoned, the testament was slow to revive, even after the reforms of 1868.

\textsuperscript{45} A nuncupative will could not, however, appoint an executor.
\textsuperscript{46} Although, strictly, the question was left open in Stuart v Stuart 1942 SC 510. The military will was received in English law: see ch 13 above.
\textsuperscript{47} Bell (n 14) § 1868. It could also be used for a universal legacy of all moveables: see Erskine (n 5) III, 9, 7.
\textsuperscript{48} £8.33 sterling. Hume (n 14) vol. V, 193 would extend the exception to ‘wearing apparell’ without financial limit.
\textsuperscript{49} Erskine (n 5) III, 9, 7.
\textsuperscript{50} Watson (n 19) 318.
\textsuperscript{51} Requirements of Writing (Scotland) Act 1995 s 1(2)(c). This implemented a recommendation of the Scottish Law Commission: see Report on Requirements of Writing (Scot Law Com No. 112 (1998)) para 2.49.
\textsuperscript{52} The law was changed by the Titles to Land Consolidation (Scotland) Act 1868 s 20. The abolition of the law of deathbed followed three years later: see Law of Deathbed Abolition (Scotland) Act 1871.
\textsuperscript{53} Bell (n 33) vol III, 13.
\textsuperscript{54} For details, see James G Currie, Confirmation of Executors in Scotland (Edinburgh, 1884) 92-7.
\textsuperscript{55} RPS 1690/4/117.
\textsuperscript{56} It quickly came to be accepted that a special legacy, although overtly testamentary, could nonetheless qualify as a special conveyance under the 1690 Act, although it does not seem to have been much used in practice. See Erskine (n 5) III, 9, 30, citing Gordon v Campbell (1729) Mor 14384.
Evolving practice can be traced in the pages of the leading styles book of the period, *Juridical Styles*, which was published in six editions between 1794 and 1907. The (general) disposition and settlement contained a general conveyance of both heritable and moveable property and also a special conveyance, often by reference to a subsequently prepared inventory, of particular items of moveable property. Confirmation could be avoided only in respect of the latter. A variant was the trust disposition and settlement in which the property was conveyed to trustees rather than to heirs; by the fourth edition of *Juridical Styles* in 1865, this was said to be ‘now almost universally adopted where the succession is not likely to be insignificant in amount’. As both versions of the disposition and settlement were *inter vivos* deeds, they contained the usual clauses reserving a usufruct and a right of revocation and dispensing with delivery, and that remained true even of the styles given in the fifth edition of *Juridical Styles* in 1883, a full fifteen years after the pretence of a *de praesenti* conveyance had ceased to be necessary for moveables. It was only with the final edition, published in 1907, that the clauses were dropped, that, in some but not all of the styles, words of bequest (‘do hereby leave and bequeath’) replaced words of conveyance (‘assign and dispose’), and that the disposition and settlement was re-born as a *mortis causa* deed. Surprisingly, a style for the special assignation of moveables survived, despite the fact that the charges for confirmation which it was designed to avoid had been abolished almost a century before.

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

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57 Although always known as *Juridical Styles*, the proper title is *A Complete System of Conveyancing adapted to the Present Practice of Scotland ..* by the Juridical Society of Edinburgh. Bell (n 33) vol III also contains styles as well as a helpful commentary.
58 See eg *Juridical Styles* (n 57), 4th edn (Edinburgh, 1865) vol II, 558-61. A style of special assignation of moveables can be found at 556-7.
59 *Juridical Styles* (n 57) 4th edn (Edinburgh, 1865) vol II, 562-3. Styles are given on 564-72.
60 After 1858 it was possible for the grantee to complete title without the heir’s co-operation by means of a notarial instrument: see Titles to Land (Scotland) Act 1858 s 12, later replaced by the Titles to Land Consolidation (Scotland) Act 1868 s 19.
61 *Juridical Styles* (n 57), 5th edn (Edinburgh, 1883) vol II, 576-93. This was not simply a failure to update. As late as 1903, John Philip Wood, the recently retired Professor of Conveyancing at Edinburgh University, seemed unperturbed by the obsolete clauses in *Juridical Styles*, commenting merely that: ‘In name and outward appearance this deed differs from a will or testament; in substance and effect it is precisely the same’: see *Lectures delivered to the Class of Conveyancing in the University of Edinburgh* (1903) 723.
62 The use of words of bequest for immovable was an innovation expressly permitted by s 20 of the Titles to Land Consolidation (Scotland) Act 1868. They were treated as words of conveyance (‘equivalent to a General Disposition’). For the continuing use of ‘dispose’, see WPMB, ‘That Indispensable Word “Dispone”’ (1894) 10 Scottish LR 160.
63 *Juridical Styles* (n 57) 6th edn (1907) vol II, 596-611.
64 *Juridical Styles* (n 57) 6th edn (1907) vol II, 595-6. This seems likely to have been no more than editorial fatigue because Currie (n 54) 96-7, writing in 1884, said that special assignations ‘are now unknown in practice’, although the legislation on which they were based – the Confirmation Act 1690 – remains in force even today. The main charges for confirmation were abolished by s 1 of the Commissary Courts (Scotland) Act 1823.
65 Wood (n 61) 717-26.
66 See eg Archibald H Elder, *Forms of Wills in accordance with the Law of Scotland* (1947) ch XVII.
67 For styles, see eg Alan Barr et al, *Drafting Wills in Scotland* (2nd edn, 2009).
The testament’s slow and uncertain progress had implications for the rules as to authentication. For if succession was regulated mainly by *inter vivos* deed, then a separate body of law for testaments, little used and confined to moveables, would have been an unnecessary complication. Thus it was that testaments, with minor exceptions, were made subject to ‘the ordinary solemnities of other writings’ – the same rules as applied to, for example, conveyances of heritable property, contracts in relation to land, and unilateral promises – and so to rules which had rarely been formulated with testaments in mind. For the most part, therefore, an account of how wills are authenticated is an account of the authentication of all juridical acts for which writing is a constitutive requirement.\(^69\)

II. SEALS, SIGNATURES AND WITNESSES

1. Attested wills

(a) Authentication statutes

In medieval Scotland, as in many other countries at that time, a person authenticated a document by impressing on it a seal which incorporated his coat of arms or initials.\(^70\) The drawbacks were obvious and widely acknowledged: neither initials nor even coats of arms were unique to a particular person, and the seals themselves could be copied, doctored or stolen.\(^71\) To improve the security of deeds\(^72\) an Act of 1540 – the first of the ‘authentication’ statutes – required that the seal be supplemented by a signature, either of the granter of the deed, if he could write, or of a notary, if he could not. Abolished in one type of case in 1584,\(^73\) sealing soon disappeared from practice altogether.

Normally, sealing, or later signing, was carried out in the presence of witnesses, and early deeds often contain lengthy, if unreliable, witness lists.\(^75\) The witnesses, however, did not sign, and it was not until an Act of 1681 that signing became compulsory. In setting out the rules for attestation by witnesses, the Subscription of Deeds Act 1681\(^76\) laid the foundations of the modern law. Witnesses were required to sign, ‘seing writting is now so ordinary’, and the deed must ‘design’ (i.e. name and identify) the witnesses and also the person who had written out the words (the ‘writer’). Further, the witnesses must either have seen the granter sign or heard him acknowledge his signature, ‘otherways the saids witnesses shall be repute and punished as accessorie to forgerie’. Although the number of witnesses was not specified, the requirement was universally understood as being two.\(^77\) The 1681 Act, and the Acts that

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\(^{68}\) Bankton (n 4) III, 8, 2.

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


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

\(^{72}\) In Scotland ‘deed’ is not a technical term, and there is no requirement, as there is in England, that certain types of juridical act must be accomplished by deed.

\(^{73}\) Subscription of Deeds Act 1540 (RPS 1540/12/92).

\(^{74}\) Act of 1584 (RPS 1584/5/85).


\(^{76}\) RPS 1681/7/27.

\(^{77}\) A requirement of two witnesses for wills can be traced as far back as the *Regiam Majestatem* (n 15) II, 38, 1.
preceded it, remained in force until 1995 when, as we will see, the law was fundamentally re-cast.

(b) Applicability to wills

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

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

(c) Provenance

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

\(^{78}\) (1802) Mor 15952.

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

\(^{80}\) *Frank v Frank* (1795) Mor 16824, 16825.

\(^{81}\) Act of 1579 (RPS 1579/10/33).

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

\(^{83}\) *Conveyancing and Feudal Reform (Scotland)* Act 1970 s 44. The modern law is, in effect, the same: see Requirements of Writing (Scotland) Act 1995 s 3(2).
so was due to ‘the low state into which the order of notaries fell in this country’ to which might be added that notaries did not exist in significant numbers until around 1400. Instead, Scotland favoured private deeds, as in England, although Bell did not argue for direct influence. Within the realm of private deeds some Roman influence might be detected, at least by those who wished to find it. Later one judge was to make the implausible claim that the 1681 Act was ‘almost a literal transcript’ of Novel 73.

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

(d) Constitution or proof?

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

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84 See Bell (n 70) 26. See in similar vein, Craig (n 17) II, 7, 7 (‘the capacity for wickedness’); Stair (n 2) II, 3, 19.
86 That the principal statutes in the two jurisdictions – the (English) Statute of Frauds of 1677 and the (Scottish) Subscription of Deeds Act 1681 – were so close in time is of interest but there is no sign of mutual influence. For the interest in solemnities in the seventeenth century, see Ernst Rabel, ‘The Statute of Frauds and Comparative Legal History’ (1947) 63 LQR 174.
87 Eg McBeath’s Trs v McBeath 1935 SC 471, 491 (Lord Murray) (‘founded on the civil law’).
88 Duff v Earl of Fife (1826) 2 W & S 166, 176 (Lord Alloway). Novel 73 is discussed (though not by name) in Bell (n 70) 10-11. The point of resemblance is perhaps merely that it sought to support comparatio literarum with the evidence of (three) witnesses.
89 But see Bankton (n 4) III, 8, 2 which draws a parallel between Scots law and Canon law in respect of the number of testamentary witnesses (‘the canon law .. requires two witnesses for testaments, whereas by the civil law, seven were necessary’).
90 Bell (n 70) 4.
91 Under the Statute of Frauds. The difference between this rule in the two jurisdictions was emphasised in Frank v Frank (1809) 5 Pat 278, 283 (LP Campbell). The modern law in England is the same: see Wills Act 1837 s 9.
92 That indeed was the rule for testaments under Canon law: see ch 2.
suggesting that a deed might be valid even if a witness had neither seen the granter sign nor heard him acknowledge his signature. That particular idea was squashed by decision of the House of Lords in 1826, and in 1915 the House of Lords settled the matter beyond doubt by holding that attestation was a matter of solemnity, not merely of evidence. Yet in the long run, as we shall see, this approach has not prevailed.

2. Holograph wills

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

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

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93 Hume (n 14) vol VI, 14. Read literally, the 1681 Act did not provide for nullity in respect of this particular shortcoming.
94 Duff v Earl of Fife (1826) 2 W & S 166. The opinions of the judges of the Court of Session, given in full, are of great value.
95 Walker v Whitwell, 1916 SC (HL) 75 especially at 79-82 (Lord Dunedin). In this case the second witness to a will had signed after the testator’s death. The will was held to be void.
96 ‘It is impossible to say when holograph writings came first to be recognised in the law of Scotland’: McBeath’s Trs v McBeath 1935 SC 471, 480 (LJC Aitchison). Their privileged status arose ‘by usage’: see George Joseph Bell, Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence (7th edn, by John McLaren, Edinburgh, 1870) vol I, 341. In Titill (1610) Mor 16959 a holograph will was found to be ‘a solemn and lawful testament’. Oddly, it was unsigned. The imposition of a reduced prescriptive period in respect of ‘hollograph missive letters and hollograph bands’ by an Act of 1669 (RPS 1669/10/27) shows that by then the holograph deed was well established.
97 Stair (n 2) III, 8, 34; Watson (n 19) 336-42.
98 For the arguments, which were partly founded on the civil law, see Pennycuick v Campbell (1709) Mor 16970. Scotland thus avoided the difficulties over missing or pre-printed dates and places encountered by countries such as Germany; see ch 8 above.
99 Bankton (n 4) I, 9, 33; Macdonald v Cuthbertson (1890) 18 R 101, 107 (Lord McLaren).
100 Erskine (n 5) III, 2, 22; Callander v Callander’s Trs (1863) 2 M 291, 301 (Lord Cowan).
101 Stair (n 2) IV, 42, 5.
102 Stair (n 2) IV, 42, 6: ‘Writs are accounted holograph, where large sentences are written with the party’s hand, though not the whole writ’.
designed for the English market) in a shop and filled in the blanks in their own handwriting.\(^{103}\)

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

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

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

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

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

3. Probativity

\(^{103}\) See eg *Gillies v Glasgow Royal Infirmary* 1960 SC 438.

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

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

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

\(^{107}\) At 485 (Lord Anderson).

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

\(^{109}\) At 485 (Lord Anderson).

\(^{110}\) *Harvey v Smith* (1904) 6 F 511, 521.

\(^{111}\) 1935 SC 471, 492 (Lord Murray).

\(^{112}\) *McBeath’s Trs v McBeath* 1935 SC 471, 493 (Lord Murray).
The suspicion of oral testimony was indeed long-standing. ‘In other nations’, Stair noted, ‘writs are not fully probative by the subscription of parties’. In Scotland, however, the position was different for, by requiring witnesses at the time of the signing, the 1681 Act was thought to have made them unnecessary later on. And in the course of the eighteenth century this thought ripened into the formal presumption that a deed which appeared to comply with the Act, by being apparently signed by the granter and by two (designed) witnesses, was taken to be ‘a genuine and authentic writing’. At one stage the law threatened to go even further, for if no evidence was needed to support an attested deed, then it might be that no evidence was competent at all. The issue came to a head in the mid-1790s in the great litigation concerning the settlement of Charles Frank. Mr Frank had signed while ill in bed. One of the witnesses, a servant, had ‘from modesty, stood near to the door’. Although he signed the deed as a witness, the servant was later to claim that he had neither seen Frank sign nor heard him acknowledge his signature. In an action to reduce the settlement, the question arose whether this evidence might be admitted. The unanimous view of the Court of Session was that it might.

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

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

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113 Stair (n 2) IV, 42, 7.
114 Hume (n 14) vol VI, 28. And see also Erskine (n 5) III, 2, 20; Bell (n 96) vol I, 341.
115 Frank v Frank (1795) Mor 16824 affd (1809) 5 Pat 278.
116 Decision of 9 July 1793. An account of the opinions of individual judges is given in Bell (n 70) 235-9 and, in summary form, in (1809) 5 Pat 278, 281.
117 Hume (n 14) vol. VI, 15.
118 Frank v Frank (1809) 5 Pat 278, 282 (LP Campbell).
119 Decision of 2 December 1794. An account of the opinions of individual judges is given in Bell (n 70) 256-71 and, in summary form, in (1809) 5 Pat 278, 282. LJC Braxfield is reported by Bell as saying (at 257): ‘In balancing two testimonies, the one arising from the deliberate attestation of the witness in writing, the other from his deposition, I would rather suppose a failure of memory on the part of the witness, than that he was guilty of a criminal act’ (ie false witnessing under the 1681 Act)
120 See eg: Cleland v Cleland (1838) 1 D 254; Baird’s Trs v Murray (1883) 11 R 153; Sutherland v. W M Low & Co Ltd (1901) 8 SLT 395. For a case in which the presumption of validity was overcome, see Young v Paton 1910 SC 63.
121 Stair (n 2) IV, 42, 19.
written by the granter, but during the nineteenth century the position came to be doubted, with authorities supporting both sides. The matter was not finally resolved until 1937 when the Court of Session decided that a holograph but unwitnessed deed could not be probative and that, unless its authenticity was admitted or otherwise not at issue, the onus of showing validity rested on the person seeking to rely on it.

III. THE MODERN LAW

1. Introduction

When the rules of authentication came to be re-examined by the Scottish Law Commission in the late 1980s, they had remained largely unchanged for 300 years. Two types of deed – the attested and the holograph – were available for wills, as for other juridical acts for which writing was needed. The first was signed by the granter and attested by two witnesses in accordance with the authentication statutes and in particular the Subscription of Deeds Act 1681. The second was signed by the granter and either substantially written out by him or containing in his hand the words ‘adopted as holograph’. Only the first was ‘probative’ in the sense of being self-proving; in respect of the second, it was necessary to prove that the writing and signature were those of the granter. These rules, the Scottish Law Commission concluded, were ‘most unsatisfactory’.

The law rested on ancient legislation supplemented by an ‘encrustation of case law’. In places it was obscure or illogical or plain out-of-date. And it was overly formalistic. There was, the Commission thought, little merit in formality for its own sake:

Our general approach to this question is to favour the reduction of formal requirements to a safe and acceptable minimum. It is, we think, an affront to people’s sense of justice if genuine writings are denied effect because of unnecessary technical requirements.

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

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

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122 Erskine (n 5) III, 2, 22, relying on Earl of Rothes v Leslie (1635) Mor 12605; Bell (n 96) vol I, 341. Bell explained the special status on the basis of compliance with the requirement, first imposed by an Act of 1593 (RPS 1593/4/44) and later confirmed by the 1681 Act, that the writer of a deed be named and designed.
123 The last clear authority in favour of probativity was Robertson v Ogilvie’s Trs (1844) 7 D 236. A different view was suggested in Anderson v Gill (1858) 3 Macq 180 and Cranston Ptrs (1890) 17 R 410. Hume (n 15) vol VI, 28 thought that holograph deeds were improbative.
124 Harper v Green, 1938 SC 198. Even so, one judge (Lord Carmont at 205) was willing to cede probative status if (i) the authenticity of the signature was proved or admitted and (ii) the deed contained the statement that it was written ‘by my hand’ or equivalent. This was an attempt to reconcile the previous authorities.
125 Report on Requirements of Writing (n 51) para 4.12.
126 Report, para 4.10.
127 Report, para 4.1.
128 Report, para 4.16.
and could readily be dispensed with. But if this were to be done, the only requirement left would be the granter’s signature. In the Commission’s view, there was much to be said in favour of such a reduced requirement – of a rule that a deed is valid simply by being signed. On the one hand, no one could be surprised by the idea that they were bound by things that they signed. On the other hand, the proposed rule was simple, elegant, and unlikely to cause trouble in practice.

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

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

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

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

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

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129 Report, para 4.19.
130 Report, paras 5.1, 5.2, 5.9.
131 1997 SC 94.
132 As only one witness is now needed, it would be probative as well.
Commission. But while conceding that it was not ‘an easy question’, the Commission decided against any such exemption. To have ‘different requirements for different classes of writings’, contrary to the long tradition in Scotland, would be confusing and lead to error. And if it was desirable to allow people to make wills on their own, without legal advice, as the Commission thought it was, then it must follow that the rules should be as simple as possible.

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

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

2. Formal validity: the subscribed will

The United Kingdom has yet to ratify the Washington Convention on the Form of an International Will (1973) although framework legislation has been in place since 1982. Consequently, the entire law of testamentary formalities in Scotland is contained in the Requirements of Writing (Scotland) Act 1995. The Act makes only two requirements of a will: it must be in a ‘written document’ and the document must be subscribed by the testator. Nothing else, the Act explains, ‘shall be required’. So it does not matter whether the document is handwritten or typed or written in some other way, and there is no need for witnesses or for a statement of the date or place of signing.

(a) A ‘written document’

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

The normal method of signing is by a combination of forename (or forenames) and surname, although an initial will do instead of a forename, and familiar forms of forenames are permitted.\(^{141}\) The Act also allows informal signatures, as in many other countries, provided they can be shown to be the testator’s usual way of signing or are otherwise intended as a signature. So, especially in cases where testamentary provisions are found in a letter to a relative or friend, a person can sign by forename alone (‘Connie’)\(^{142}\) by description (‘lots of love, Mum’)\(^{143}\) or even by initial or mark.\(^{144}\) Usually a signature is written by pen, but it is sufficient to sign by pencil or other less permanent materials such as chalk.\(^{145}\) However, the signature must be written, and it is not permitted to use words which have been typed, cyclostyled, affixed by stamp or ‘drawn’ on a computer screen.\(^{146}\) Digital signatures are not recognised.\(^{147}\) The writing need not be by hand, and person may sign using a foot or mouth or in some other way.\(^{148}\) There is no requirement that a signature be legible.\(^{149}\) A blind person can sign although the will may be open to challenge on the ground that the testator was misled as to what was being signed\(^{150}\) and it is usually better to use a ‘notarial’ signature in the manner described below.\(^{151}\)

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

(c) Place of signature

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

\(^{142}\) Draper v Thomason 1954 SC 136.

\(^{143}\) Rhodes v Peterson 1971 SC 56.

\(^{144}\) 1995 Act s 7(2)(c).

\(^{145}\) Stirling Stuart v Stirling Crawfurd’s Trs (1885) 12 R 610, 617 (Lord McLaren).

\(^{146}\) Stirling Stuart v Stirling Crawfurd’s Trs (1885) 12 R 610; Whyte v Watt (1893) 21 R 165; McBeath’s Trs v McBeath 1935 SC 471.

\(^{147}\) Noble v Noble (1875) 5 R 74.

\(^{148}\) Bankton (n 4), I, 11, 38; Crosbie v Picken (1749) Mor 16814.

\(^{149}\) Watson (n 19) 323. The case is Wilson v Raeburn (1800) Hume 912.
Unlike some other countries, Scotland has persevered with the requirement that the testator subscribe, i.e. sign at the end, as evidence of ‘deliberate and final testamentary intention’. The statutory phrase is that the testator must sign ‘at the end of the last page’, by which seems to be meant on the same page as and underneath the final lines of the will. Perhaps uncharacteristically, the courts have approached this requirement with formalistic zeal. Thus on the one hand, words will be disregarded if they appear underneath the signature; on the other, the whole will is invalid if the signature is on a different page. In the unexpectedly common case of a person putting an unsigned will into an envelope but signing the envelope, usually accompanied by words such as ‘my last will’, the courts have repeatedly refused to uphold the will. The position might possibly be different if the envelope contained words which could plausibly be viewed as a continuation of the will, or if the words on the envelope could be regarded as the will into which the unsigned deed had somehow been incorporated.

(d) Signature where testator blind or unable to write

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

(e) Alterations, incorporation, and enfranchising clauses

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

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156 Eg Australia: see ch 14 above.
157 McLay v Farrell 1950 SC 149, 152 (Lord Birnam). As has been observed, to sign at the end is no more than ‘ordinary human practice’: see Ashbel G Gulliver and Catherine J Tilson, ‘Classification of Gratuitous Transfers’ (1941) 51 Yale LJ 1, 5.
158 Requirements of Writing (Scotland) Act 1995 s 7(1).
159 McLay v Farrell 1950 SC 149.
160 Baird’s Trs v Baird 1955 SC 286.
161 See eg Stenhouse v Stenhouse 1921 SLT. The cases are collected and discussed in James G Currie, The Confirmation of Executors in Scotland (8th edn by Eilidh M Scobbie, 1995) para 3.69. In Germany the courts have been more indulgent: see ch 8 above.
162 Ferguson 1959 SC 56 (concerning an additional page).
163 For incorporation, see III.2(e) below.
165 1995 Act s 9(4). This is a considerable improvement on the previous law, which was that the entire will fell.
166 1995 Act s 5(1).
contrary is shown; but as changes are rarely made to attested wills this is of little help in practice. More important is the rule for subscribed wills, which is that an alteration is not counted unless it can be proved to have been added before subscription – often an impossible task given that the person who is most likely to know (i.e. the testator) is dead.

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

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

3. Probativity: the attested will

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

(a) Formal requirements

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

The witness must be at least sixteen and of full mental capacity. There is no requirement of good character. A bar on female witnesses was removed in 1868. The question of

168 1995 Act s 5(4), (5).
169 1995 Act s 5(6).
170 At III. (2)(c) above.
171 See eg Inglis v Harper (1831) 5 W & S 785; Fraser’s Exx v Fraser’s CB 1931 SC 536.
172 Compare Watson’s Trs v St. Giles Boys’ Club 1943 SC 369 with Baird v Jaap (1856) 18 D 1246 and Crosbie v Wilson (1865) 3 M 870.
173 Requirements of Writing (Scotland) Act 1995 s 3(2). The requirement is to sign rather than to subscribe.
174 1995 Act s 3(4)(c).
175 Hume (n 14) vol VI, 18 had doubted whether ‘an infamous person’ could be a witness.
whether a beneficiary can be a witness remained controversial for several centuries and was only finally settled, in the affirmative, by a seven-judge decision in 1883, in which Roman law was invoked on behalf of the winning side.

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

(b) Conferral of probativity

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

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

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176 Titles to Land Consolidation (Scotland) Act 1868 s 139. Hume (n 14) vol VI, 17-18 had thought women disqualified ‘on account of their ignorance of business’.
177 Simsons v Simsons (1883) 10 R 1247, 1250: ‘By the Roman law the heir or any other interested party could be a witness, and Cicero stated in his oration Pro Milone that he himself had taken an interest under a will which he had signed as a witness’. The authorities cited were Gai II, 108; J Inst II, 10, 10; and Marcianus D. 34, 5, 14.
178 1995 Act s 3(4)(e), (7).
179 For gestural acknowledgement, see Lindsay v Milne 1995 SLT 487.
180 A purely informal signature is not allowed: see 1995 Act s 7(5).
181 The 1995 Act s 3(4)(e) requires that the witness’s signature is ‘one continuous process’ with the testator’s signature or acknowledgement. For a case where a delay of 45 minutes was allowed, see Thomson v Clarkson’s Trs (1892) 20 R 59.
182 Hume (n 14) vol VI, 17; Ferguson 1959 SC 56, 61 (Lord Mackintosh).
183 1995 Act s 7(5).
184 1995 Act s 3(1)(b). This can be done later: see s 3(3).
185 Compare the position under the Uniform Probate Code (USA) § 2-504 which requires additional affidavits, whether prepared at the time of execution or later.
186 Scottish Law Commission, Report on Requirements of Writing (n 51) para 5.4.
187 1995 Act s 3(1).
repeatedly been said, is heavy. There are two separate routes to rebuttal. One is to prove that the testator did not subscribe; the other is to prove that the witnessing was defective. The consequences of success are not the same in each case: in the first the will is cast down as a forgery, in the second the will survives, at least for the time being, but ceases to be probative so that the onus of proof passes to those who would propose its validity.

4. Internal formalities

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

5. Practicalities

(a) Making a will

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

188 Cleland v Cleland (1838) 1 D 254; Baird’s Trs v Murray (1883) 11 R 153; Sutherland v W M Low & Co Ltd. (1901) 8 SLT 395. And see II. 3 above.
189 1995 Act s 3(4) (‘then for the purposes of those proceedings, there shall be no presumption that the document has been subscribed by that granter’).
190 See I. 2 above.
191 See I. 3 above.
192 Titles to Land Consolidation (Scotland) Act 1860 s 20. Admittedly, s 20 makes its own internal requirement, only allowing wills of heritage if they purport to ‘convey or bequeath lands’ at least in the sense of using words which would be sufficient to legate moveables. But the requirement is so easily satisfied – see John McLaren, The Law of Wills and Succession as Administered in Scotland (3rd edn, Edinburgh, 1894) vol 1, ch 17 – that it is rarely referred to in the modern law.
193 See I. 3 above.
194 Bankton (n 4) III, 8, 2. See also McLaren (n 192) vol 1, para 508.
195 Colvin v Hutchison (1885) 12 R 947, 955 (LP Inglis).
196 For a review of the main cases, see Macdonald (n 9) paras 8.36-8.39.
197 For a solicitor’s perspective on the process, see Barr et al (n 67) ch 9.
discount or in exchange for a legacy to a charity or even free of charge. And a person consulting a solicitor for some other reason – house purchase, for example, or divorce – may be treated to a homily on the importance of providing for one’s family and the value of tax planning.

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

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

(b) Finding a will

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

(c) Confirmation of executors

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

198 Legal Services (Scotland) Act 2010 Pt 3 ch 2.
199 For example, Scotwills (<http://www.scotwills.co.uk>) offers the opportunity to make one’s own will ‘using our interactive, expert system, designed by a Solicitor’. The advertisement continues: ‘The fee is fixed at £45 – there are no hidden extras. Compare that with the cost of a Solicitor-made Will which usually costs between £90 and £150 and can cost much more!’
200 This is part of the Confirmation process discussed in the next section.
202 See generally: Currie (n 161); Macdonald (n 9) paras 13.29 ff.
203 Succession (Scotland) Act 1964 s 21A. Confirmation is the equivalent of probate in England.
signature’ of the deceased, has ‘seen and examined the signature on the will’, and confirms that it is the deceased’s signature.\footnote{Requirements of Writing (Scotland) Act 1995 s 4(1), (3); Act of Sederunt (Requirements of Writing) 1996, SI 1996/1534 para 4, sch, form 1.} If the signature is an informal one (such as ‘Mum’), the witness must also confirm that it was the deceased’s normal way of signing a writing of the type in question (such as a letter).\footnote{1995 Act s 7(2)(c). See further Currie (n 161) para 4.103. For informal signatures, see III.2(b) above.} As it is highly unusual for affidavits to be questioned by the court or for further inquiry to be made, an improbative will is scarcely more troublesome in practice than one which has been fastidiously witnessed.

\section*{IV. FORM AND FORMALISM}

What formalities, then, should be required for wills? In Scotland, as in most other countries, two at least have usually been regarded as indispensable. In the first place, the will should be in writing.\footnote{With the trivial exception, now abolished, of wills of up to £100 Scots. It can, of course, be argued that an insistence on writing is increasingly old-fashioned in view of the prevalence and reliability of other media. See James Lindgren, ‘The Fall of Formalism’ (1991-2) \textit{Albany LR} 1009, 1020-24, advocating video-wills in particular.} And in the second place it should be signed by the testator or, if he is unable to write, by some responsible person acting on the testator’s behalf. The justifications are well-known and hardly controversial. Writing explains what is to happen to the testator’s property when he is no longer there to give directions for himself. And a signature serves both to connect the testator to the writing – to adopt its contents as his final wishes – and also to demonstrate the authenticity of the juridical act. Although these justifications can be characterised in different ways, their primary purpose is evidential: the deceased’s estate can safely be distributed according to the written instructions precisely because there is a reasonable assurance that that is what the deceased intended.\footnote{In the influential terminology used by Gulliver and Tilson (1941) 51 \textit{Yale LJ} 6-9, this is known as the ‘evidentiary’ function.}

The difficult question is whether more than writing and subscription are needed. There are at least two reasons why this might be so: to protect the testator against himself, and to protect him against others. Both were perfectly familiar to the jurists of eighteenth-century Scotland. The first, said Erskine, is so that parties are not ‘catched by rash expressions’ which they might later regret, while the second, according to Bankton, is ‘for the greater security of men’s rights against falsehood’.\footnote{Erskine (n 5) III, 2, 2; Bankton (n 4) I, 11, 27. In the terminology of Gulliver and Tilson (1941) 51 \textit{Yale LJ} 5-13, these functions are known respectively as the ‘ritual’ (or sometimes ‘cautionary’) and as the ‘protective’.} But of course the choice is not a neutral one, for the more a testator is protected by increased requirements of form, the greater the danger that his testamentary intentions are defeated by ignorance or technical error in attempting compliance. To protect testators may also be to injure them: that is the eternal dilemma of form.

In Scotland the avoidance of injury has seemed the paramount virtue. What is to be avoided, wrote Robert Bell in 1795, is ‘a superfluity of form, which renders the execution of it dangerous, uneasy, and often almost impossible’.\footnote{Bell (n 70) 27.} And certainly there has been little interest in the protection of testators from themselves. Indeed in a country where intestacy rates approach 50%, the problem has not been too many ‘rash expressions’ but too few.
Protection against others is a different matter. The introduction of attestation in 1681 was designed, among other things, to discourage ‘unfair attempts on the weak or ignorant’. But today there is a tendency to dismiss this sort of approach as a ‘historical anachronism’. Whatever the position may once have been, we are told, ‘the makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or unearned, they are likely to be among the more capable and dominant members of our society’. But even if this is true, it is hardly the whole story. Today, as in the seventeenth century, wills continue to be made by the old, the sick and the enfeebled, who are or may be vulnerable to the pressure, or even the fraud, of relatives, friends and carers. Increasing longevity seems likely to add to the problem. And while it may be the case, as has been argued, that most wills are executed by people in the prime of their lives and with appropriate legal and financial advice, the fact remains that no will is final until death and that an earlier and considered will can be displaced by a last-minute change of mind. Yet if the problem of fraud and undue influence remains, it seems doubtful that attestation provides much in the way of a solution. In Scotland, at least, the role of a witness is a modest one. He need not see the actual signature or the circumstances leading up to it; he need not know that the document is a will; and he can be a beneficiary – perhaps indeed the very person who is most likely to put pressure on the testator. Only a more demanding signing regime, such as signature before a notary, would be likely to make much difference. But given Scotland’s long history of informality, it seems doubtful if even an optional notarial procedure would command support.

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

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210 Hume (n 14) vol VI, 25.
211 John H Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88 Harvard LR 489, 496.
212 Gulliver and Tilson (1941) 51 Yale LJ 9.
213 See eg J C Sonnekus, ‘Freedom of Testation and the Ageing Testator’, in Reid, De Waal and Zimmermann (n 1) 78.
214 Gulliver and Tilson (1941) 51 Yale LJ 10.
215 See Scottish Law Commission, Report on Requirements of Writing (n 51) para 4.13: ‘Someone who needs protection against foolishly signing also needs protection against foolishly signing in front of witnesses’.
217 The Scottish Law Commission referred to notarial execution as an ‘extreme requirement’ where ‘the cost and inconvenience would be disproportionate to the advantages gained’: see Report on Requirements of Writing (n 51) para 4.13. For arguments in favour of an optional notarial system, see Lloyd Bonfield, ‘Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past’ (1995-6) 70 Tulane LR 1893, 1918-20. In the USA an optional notarial system was introduced to the Uniform Probate Code by amendment in 2008: see § 2-503(a)(3)(B).
218 For a discussion, see Celia Wasserstein Fassberg, ‘Form and Formalism: A Case Study’ (1983) AJCL 627.
Scotland and England.\textsuperscript{220} But there is also another way. Instead of excusing a failure in attestation or in the preparation of a holograph will, the requirement that a will be attested or holograph could itself be dropped. A discretion, in other words, could be replaced by a fixed rule. Perhaps characteristically, this is the solution which has been adopted in Scotland.\textsuperscript{221} Since 1995 a will has been valid in respect of formalities provided it is in writing and subscribed.\textsuperscript{222} The solution to formalism is, more or less, the abandonment of form.


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

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