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Citation for published version:

MacQueen, H & Garland, C 2015, 'Signatures in Scots Law: Form, Effect and Burden of Proof', *Juridical Review*, pp. 107-34.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Juridical Review

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Signatures in Scots Law:

Form, Effect, and Burden of Proof

Hector MacQueen and Charles Garland*

Introduction

The Legal Writings (Counterparts and Delivery) (Scotland) Bill (“the Bill”)¹ will, if enacted, provide new ways for paper documents to be brought into legal effect. It will be competent, as explained below, for the granter to deliver an electronic version of the executed signature page. This brings to the fore a number of questions about signature pages, and signatures in general, some of which this paper seeks to address.

By way of brief background, the Bill recognises the validity of counterpart execution of mutual documents (i.e. each party to the document signs its own copy and then delivers that copy to the other party or parties or their mutually appointed nominee, with the text of the document being thereafter legally effective between the parties). The Bill also allows delivery of a counterpart or any other paper document to be constituted by way of electronic transmission of the document, for example as a PDF attached to an email, or as a fax. It further enables parties to arrange that such delivery can be achieved by transmitting, not the whole document, but a signature page duly signed by the party concerned, so long as it is clear in all the circumstances that the signature was indeed applied to the document in question. Thus under the Bill the result in the English case where an already-signed signature page from one document was attached to a later and different draft of the document was held to be invalid should also be reached in Scotland.² The same result

* The authors are respectively the Commissioner and Project Manager responsible for the Review of Contract Law undertaken by the Scottish Law Commission from 2010. An earlier version of this paper was submitted by the Commission as written evidence to the Delegated Powers and Law Reform Committee of the Scottish Parliament in August 2014 during the Committee’s Stage 1 consideration of the Bill (see http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/2014-08-19_Scottish_Law_Commission.pdf). Unlike such SLC documents as *Discussion Papers and Reports*, the paper was prepared without the benefit of consultation with others with relevant knowledge and practical experience such as solicitors and financial service providers. It is thus entirely the product of the Commission’s own internal resources. Every effort has been made however to ensure the accuracy and comprehensiveness of the analysis contained in the paper.

¹ The Bill is based on the draft legislation in the Scottish Law Commission’s Report on Formation of Contract: Execution in Counterpart (SLC No 231, 2013). For information on the Bill, see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/76414.aspx>; and, for a discussion of the new parliamentary procedure, see Malcolm McMillan, “Law Reform in the Scottish Parliament: A new process – a new era?” (2014) 2 *The Scottish Parliamentary Review*, 1, 95. The text of the present article was completed as the Bill awaited Stage 3 of its Scottish Parliamentary progress.

² *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin). See also *Garguilo v Gershinon* [2012] EWLandRA 2011_0377 (6 January 2012), available at http://www.bailii.org/ew/cases/EWLandRA/2012/2011_0377.html. For another case finding that a signed signature page did not belong to the document to which it was attached, see below, text accompanying notes 102-103.

should apply in the situation where the signature page of a document is signed and subsequently another page or pages from the document are replaced with different ones.³

The Bill nonetheless gives limited recognition to the possibility that electronic transmission of a suitably identified signature page might be enough to make a document legally effective. This understandably raised concerns in the Delegated Powers and Law Reform Committee of the Scottish Parliament during its Stage 1 consideration of the Bill in 2014. Were the Bill's provisions opening an avenue to fraudulent mis-use of pre-signed signature pages? The Committee eventually accepted that the Bill did nothing to increase the possibility of fraud.⁴ This paper argues in effect that the law has long recognised the possibility of effective signing of documents by advance authorisation, or subsequent approval, of not only the attachment to documents by others of genuine signatures, but also, outside the context of formal documents, the use of facsimile and even, in at least some cases, forged signatures. There are however strong protections already in place in the civil law against fraud having effect when detected. The limits of the law are unclear, and there may be a case for further law reform activity in the area, not least in the light of the growing use of electronic signatures. We do not explore that issue in any depth, however, our concern here being primarily to determine what the law is at present.

Form

Paper (traditional) documents

We begin with the question of what constitutes signature in Scots law in the context of traditional paper documents? Although “signature” derives from the Latin *signum*, meaning “sign, mark or seal”, today it usually involves the application of some version of a party's name to the document by that party.⁵ In general, signature is a voluntary act of a party in relation to a document by which it becomes an expression of that party's wishes and intentions. Signatures are of course used in contexts where their legal effect is at best evidential: e.g. to make a claim of ownership of a book on its flyleaf; or to declare one's presence at a particular place, as in a visitor's book; or to take responsibility for the contents of a manuscript, as in an examination script book; or to send personal greetings to another

³ See *Pocock's Trustee v Skene Investments (Aberdeen) Ltd* [2012] CSIH 61 (disposition fraudulently altered before registration by 'slipping' page held void). Note also judicial disapproval of an unauthorised and unratified 'slipping' of pages in a previously subscribed document in *Hawthornes v Anderson* [2014] CSOH 65 paras 86-87 (Lord Woolman).

⁴ See the DPLRC Stage 1 Report, especially paras 106-129 (available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/83660.aspx>).

⁵ Advanced electronic signatures (for which see below, text accompanying notes 44-46) involve the application to an electronic document, not of a name, but of a unique electronic identifier of the owner of the signature.

elsewhere, as in birthday, Christmas, retirement or get-well cards. But they can have a greater legal effect where the intention is to create legally enforceable rights and duties (whether immediately or in the future) through the document being signed, as for example in a contract, a will or a disposition of heritable property.⁶ It is with the effectiveness of signatures in this sort of documentary context that this paper is concerned. It should be noted, however, that signature is not necessarily enough by itself to make a document legally effective: in a multi-party document it may not come into effect before all parties have signed, while a unilateral document may require delivery to its beneficiary and/or an equivalent, such as registration in a public register, to become effective.

The requirement of voluntariness just mentioned implies the absence of external controls on the signatory's signing mechanism. So it has been held that there was no signature when an illiterate person simply copied his name over lines made on the paper with a pin by another.⁷ Taking account of technological developments in the ways in which documents may be created and by which people may indicate on documents the "authenticating intention" which they believed to be the defining characteristic of a signature for the purposes of the law, however, the Law Commission for England & Wales suggested in 2001 that "what is required therefore is something which is not purely oral and which evidences that authenticating intention."⁸

An account of the present Scots law on signatures may begin (but not end) with the Requirements of Writing (Scotland) Act 1995 ("RoWSA" or "the 1995 Act"). This has two main aspects in the present context. The first is to require the use of a certain form of writing in a limited number of transactions (including contracts for the sale of land, and wills), with the main feature being a subscription or subscriptions (that is, a signature by the party or parties to be bound by the document applied at the foot of the document's final page (excluding annexes and the like) and, if necessary, in further subsequent "signature pages").⁹ The second is to provide an optional facility whereby a subscription to any

⁶ Robert Rennie and Stewart Brymer, *Conveyancing in the Electronic Age* (2008), para 2.09; John M Halliday and Iain J S Talman, *Conveyancing Law and Practice* (2nd edn, SULI 1996), para 3.08.

⁷ *Crosbie and Pickens v Pickens* (1749) Mor 16814. It is however no objection to a signature that the signatory has gone over his or her original signature and reinforced it because it was too faint: *Stirling Stuart v Stirling Crawford's Trustees* (1885) 12 R 610.

⁸ Law Commission, *Electronic Commerce: Formal Requirements in Electronic Transactions: Advice from the Law Commission* (December 2001), para 3.28. Note also the very wide definition of document in Civil Evidence (Scotland) Act 1988, s 9.

⁹ The etymology of subscription is Latin *subscriptio* (something written underneath). Superscription, i.e. signing above – *super* – the text, is competent only for the monarch (see RoWSA ss 9, 13), because she does not have time to read the documents she signs (Stair, *Institutions* IV, 42, 3; although cf Alan Bennett, *The Uncommon Reader* (2012)). In any case, when signing as head of state, the monarch is generally performing an act which

document, including ones where formal writing is required, may be made probative, or self-proving, by having certain characteristics, and being made before or acknowledged to, a witness who also signs the document in that capacity.¹⁰

Commonly in the highly formal documents which are made probative the text will design the parties by their full names (e.g. Thomas Broun Smith). But for that party's subscription to be probative it need only include the signer's forename and/or initial followed by surname (e.g. Thomas B Smith), while an abbreviated or familiar form of a forename may be used as part of this (e.g. Tom Smith).¹¹ It is thought by some that the signature must also be legible, since probativity requires that the document "bears" to have been subscribed by the grantor.¹² On the other hand, if the witness is to be taken as either seeing the signature being applied, or receiving the signatory's acknowledgement of the signature, it may be that his or her attestation on the document can overcome any illegibility of the main subscription.¹³ It is not required that the subscription be the signer's usual signature. It is however not permissible to reverse the usual order of forename followed by surname, or to sign with a name not one's own, whether in whole or in part.¹⁴ It would definitely not do to subscribe in a name which bore no relation to that set out in the document: for example, "Flora MacDonald" when the document text spoke of "Charles Edward Stuart". While persons of full capacity are free to call themselves what they wish in Scots law, "provided that any change is made with publicity, good faith, and the absence of any improper object",¹⁵ that freedom does not extend to a freedom of signature in formal documents in the sense of allowing absolute inconsistency between text and subscription.

sounds in public law and is not entering into the sort of voluntary arrangement, governed by private law, with which this paper is principally concerned.

¹⁰ For the characteristics of a self-proving subscription, see further below text accompanying notes 10-15, 99-100. For wills of more than one page to be probative every sheet must be signed by the testator (but this need not be by way of subscription): RoWSA, s 3(2). For examples in the case law of parties agreeing to put their contract in probative form see *WS Karoulias SA v Drambuie Liqueur Co Ltd (No.2)* 2005 SLT 813; *Gyle Shopping Centre General Partners Ltd v Marks and Spencer Plc* [2014] CSOH 59.

¹¹ Section 7(2). This is however without prejudice to any other rule of law relating to the subscription or signing of documents by members of the Royal Family, by peers or by the wives or the eldest sons of peers (s 7(6)). See further George L Gretton and Kenneth G C Reid, *Conveyancing* (4th edn, 2011), para 17.04 (p 296).

¹² Gretton and Reid, *Conveyancing*, para 17.04 (p 297); Rennie and Brymer, *Conveyancing in the Electronic Age*, para 2.09. Cf Halliday and Talman, *Conveyancing*, vol 1, paras 3.07, 3.104.

¹³ For what is required of the witness as such, see RoWSA s 3(7).

¹⁴ Gretton and Reid, *Conveyancing*, para 17.04 (pp 296-7).

¹⁵ Thomas Innes, Advocate, "Name and Change of Name", *Encyclopaedia of the Laws of Scotland*, vol 10 (1930), paras 289, 290 and 305; Stair Memorial Encyclopaedia, Child and Family Law Reissue, para 222 (focused on parents' freedom of choice in naming child). For changes of names in the Registers of Births Deaths and Marriages see Stair Memorial Encyclopaedia, Registration of Births, Deaths, Marriages, etc Reissue, paras 36-39.

The 1995 Act is more liberal in allowing the following also to be a valid subscription where only formal validity is necessary:

- a name which is not the signatory's full name (e.g. the forename Tom standing without a surname; a stand-alone surname would not however be enough,¹⁶ nor would a name which was not that of the signatory as designed in the document),
- a description (e.g. Mum),¹⁷
- an initial (e.g. TBS),¹⁸ or
- a mark (e.g. X).¹⁹

But these must each be the person's usual method of signing, whether generally or only for documents of the kind in question, or if the person intended it to be a subscription of the document.²⁰ Since the document so signed is not probative, the party's usual method of signing or the intention to subscribe may have to be proved before it can take effect. Legibility does not seem to be even implicitly required, however. It again follows from the 1995 Act's definitions that if the subscription "Flora MacDonald" is put to a document otherwise running in the name of "Charles Edward Stuart", it lacks formal validity, being not the party's name, nor a description, initials or mark of that party.

The 1995 Act does not expressly limit a signature for any of the above purposes to the application of pen and ink to paper by the hand of the signatory. So can it be in pencil, for example? There may be a question whether a pencilled and so relatively easily erased signature can really manifest the signatory's final commitment to the document; but the answer may be that it is for the other party to show that lack of final intention, not for the signatory to prove its existence.²¹ *Jollie v Lennie* concerned a purported will handwritten and

¹⁶ Cf the pre-1995 Act case of *American Express Europe Ltd v Royal Bank of Scotland plc (No 2)* 1989 SLT 650, OH, where signing with a surname only was held to be enough under the then law.

¹⁷ See *Rhodes v Peterson* 1971 SC 56. Note also *Draper v Thomason* 1954 SC 136 ("Connie" enough).

¹⁸ In the law as it stood before RoWSA came into force (1 August 1995) there were special rules for what were known as writs *in re mercatoria*. While the rules on this subject had become very unclear in their effect by 1995, leading to their abolition by the 1995 Act, a governing principle was that the requirements of formality were relaxed for documents being deployed in business transactions. Thus where subscription might have been required under the previous law, a party's initials, if proved or admitted to be genuine and the person's accustomed mode of signing, would suffice to make a writ *in re mercatoria* binding. See Halliday and Talman, *Conveyancing Law and Practice*, vol 1, paras 3.73-3.77. The 1995 Act does not limit this relaxation of formality to business documents, however.

¹⁹ See *Crosbie v Wilson* (1865) 3 M 870 (where it was held that a will which was attested but at the end bore only the testator's name with, in words only, the statement "her mark" was ineffective); *Donald v McGregor* 1926 SLT 103, OH (in which the ill testator was too weak to sign her dictated will in full, and so signed only "Mary T McG" and added her cross as her mark; held the will was invalid).

²⁰ RoWSA, s 7(2)(c).

²¹ The position would be different, however, if the issue was whether or not a party's pencilled subscription had subsequently been erased so that as it stood the document appeared to be unsubscribed. On its face the document could not then be probative in relation to that party even if attested.

subscribed on each side of a single sheet of A5 paper by the testator before a witness who also signed, all in pencil. The will was held to be effective but the fact that it was written in pencil throughout was not a point put in issue against this conclusion at any stage of the proceedings.²²

Under the pre-1995 law the application of an embossed stamp bearing a facsimile of a party's signature and of a cyclostyled print of a party's signature could not be subscriptions to formal deeds.²³ The modern courts have however held that faxes of subscribed missives are by themselves insufficient to meet the requirements of the 1995 Act, although there has been uncertainty as to whether such a fax might be sufficient communication that a subscribed acceptance missive existed, so concluding a contract.²⁴

Where probativity is not sought or formal validity not required for a document, all the forms of signature recognised in the 1995 Act must nonetheless also be valid in relation to that document, and the question is whether there are other forms that might be valid as well. So for example need a signature be a subscription (i.e. appear at the end of the document) to be binding? What if it appears at the top or in the middle of the document, or along the margin of a page, or on the backing? In pre-1995 Act cases about wills, however, it was held that such signatures were ineffective to make a valid testamentary document,²⁵ and that would still clearly be the result in that particular case today, since the 1995 Act requires wills to be subscribed. But wills may be a special case in which it is essential to be as certain as possible that the testator intended the whole of the document to have legal effect. It is not uncommon, however, to find in contexts other than wills the use of pre-printed documents with marked places for the application of signatures which are not at the foot of the page, and it may be that since these are places clearly intended for effective signings the result is indeed to bind the signatory to whatever the legal effect of the document may be. Again,

²² *Jollie v Lennie* [2014] CSOH 45. The rule requiring all sheets of a will to be signed to make it probative (above note 10) was met because there was only one sheet of paper, albeit written on both sides thereof; but it was not probative because the document does not seem to have borne the name and address of the witness apart from her signature, nor a testing clause or equivalent.

²³ *Stirling Stuart v Stirling Crawford's Trustees* (1885) 12 R 610 (embossed stamp); *Whyte v Watt* (1893) 21 R 165 (cyclostyle). Halliday and Talman, *Conveyancing Law and Practice*, vol 1, paras 3.08, 3.105, regard these cases as still authoritative in relation to the 1995 Act but they are not cited in this context by Gretton and Reid, *Conveyancing*, or Rennie and Brymer, *Conveyancing in the Electronic Age*, or David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004).

²⁴ See *EAE (RT) Ltd v EAE Property Ltd* 1994 SLT 627; *Signet Group plc v C & J Clark Retail Properties Ltd* 1996 SC 444; *Merrick Homes v Duff* 1996 SC 497; *McIntosh v Alam* 1997 SCLR 1171, 1998 SLT (Sh Ct) 19; *Park Petitioner (No 2)* 2009 SLT 871 (OH).

²⁵ See *McLay v Farrell* 1950 SC 149 (mid-document); *Robbie v Carr* 1959 SLT (Notes) 16 (margin); *Boyd v Buchanan* 1964 SLT (Notes) 108 (backing).

suppose a handwritten document in which the writer begins “I, AB, hereby contract to supply goods to CD”; can AB be taken to have “signed” this document if it bears no subscription?

In an informal document intended to have binding effect only upon signature by the party to be bound, that party typing his or her name at the end of a writing might, it is thought, be capable of being a signature if it was so intended by the typist. This could be shown, for example, by a statement to that effect in the body of the text, or perhaps by a word or phrase immediately before the alleged signature, such as “Signature” or “Signed”, whether or not also placed there by the signatory. Another possibility might be a statement from the party to whom the typist was to be liable under the document that a typed signature was acceptable.

Do the nineteenth-century cases holding that the use of an embossed stamp or a cyclostyle did not constitute signature for formal deeds²⁶ also govern the twenty-first century possibility of inserting into a word-processed informal document a file containing a scanned handwritten signature in a similar context, with a result which can then be printed out, whether by the creator of the document or another person?²⁷ Might a PDF and a fax including a facsimile of a handwritten signature applied to a writing by the signatory also be treated as signed so as to confirm the signatory’s intention to be bound by the writing?

Whyte v Watt, the case about cyclostyled signatures, is of considerable interest in regard to this question, because the decision was actually about whether a notice of objection to the retention of another person’s name on the Register of Voters under section 4 of the Burgh Voters Act 1856 had been “signed by the person objecting” as the section required.²⁸ The method by which the cyclostyled signature was produced is set out in some detail in the report of the case:

“Hugh Watt did, with a certain instrument called a stencil-pen, perforate the letters forming his signature upon a prepared waxed skin stretched on a frame. He then placed the notice under the waxed skin, and passed an inked roller over the said waxed skin perforated as aforesaid, and the ink from the roller passing through the perforations in the waxed skin produced the signature on the notice. The signature was formed entirely by Hugh Watt; no other person was employed in the operation,

²⁶ Above, note 23.

²⁷ See Rennie and Brymer, *Conveyancing in the Electronic Age*, para 2.09: “A signature must be in handwriting and not printed, typed or otherwise artificially created.” This however applies only to formal documents.

²⁸ *Whyte v Watt* (1893) 21 R 165.

and no use was made by Hugh Watt of any stamp, die, or engraved plate in forming his signature.”²⁹

His reason for performing this complicated process is also explained:

“When letters or words have been formed on the said waxed skin by the stencil-pen, sheets of paper to the number of 100 or more can be placed successively under the waxed skin, and upon the inked roller being passed over the waxed skin the letters or words are produced on the sheet of paper immediately under the waxed skin.”³⁰

He could thus be spared the effort of physically writing his signature for as long as the cyclostyle continued to work.

The sheriff’s decision that Mr Watt had indeed signed the notice was upheld by an unanimous Division of the Court of Session, the opinion of which was delivered by Lord Kinnear:

“The word “signed” is not a technical word but a word of ordinary language. Subscription is a method of signing. It is not the only method. We are therefore to consider whether the method of authentication described in the case can properly be called “signing.” Now, upon that question, we have the advantage of a decision of the Court of Common Pleas, in the construction of a similar provision in the 6th of the Queen, chapter 18, which requires that a “notice of objection shall be signed by the objector.” In *Bennett v. Brumfitt*, L. R., 3 C. P. 28, the Court held that this requirement was satisfied although the objector had not subscribed the notice but had affixed his name to it by means of a stamp on which was engraved a facsimile of his ordinary signature. I cannot suppose that when the Legislature has employed the same language in a Scots Act as in a previous English Act, it intended to prescribe one method of authentication in England and another in Scotland, and I should be very slow to differ from the learned Judges in England as to the meaning of an ordinary word in the English language.

I see no reason why the word “signed,” in this statute we are considering, should be construed differently from the same word in England, and I am therefore of opinion that the mode of authentication described in the special case is a sufficient compliance with the statute.”³¹

Elsewhere in his opinion Lord Kinnear expressed the view for which the case is commonly cited, i.e. that this mode of signature would not do for a formal subscription;³² but the judgement is actually a strong authority for a wider approach to the concept of signature where formal documents are not involved.

²⁹ Ibid, 165-6.

³⁰ Ibid, 166.

³¹ Ibid, 166-7.

³² Ibid, 166.

The matter of facsimile signatures produced by scanning methods has also been addressed thus in an English case by Laddie J:

"[I]t is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporate within it the author's signature which has been scanned into the computer and is stored in electronic form, and to send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only hard copy of the document. It seems to me that such a document has been 'signed' by the author."³³

What is crucial to the judge's conclusion here, however, is that the application of the copy of the signature to the document is by its author. The same conclusion would presumably be reached if the copy signature was applied by an appropriately authorised person, or if an unauthorised application was subsequently ratified by the author; but not otherwise.³⁴ We deal below with the possibility that the situation described by Laddie J gives rise to an electronic signature where the document completed on computer or on-line is in fact never printed and has only an electronic existence. But, given the approach to be found in *Whyte v Watt*, we think that in hard copy form the signature produced by means of a scanning and printing process could be valid in relation to a document not requiring formality for its legal effectiveness to be achieved.

Electronic signatures

The Scottish Law Commission's Discussion Paper on Formation of Contract reviewed the law on electronic signatures.³⁵ These are legally defined in the Electronic Communications Act 2000 as:

"... so much of anything in electronic form as

(a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and

(b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both."³⁶

³³ *Inland Revenue Commissioners v Conbeer* [1996] BCC 189, 194.

³⁴ See further *Ramsay v Love* [2015] EWHC 65 (Ch), especially at paras 7 and 74-82, for a decision that the signature of a guarantor applied to a guarantee in the guarantor's absence by an authorised third party's use of a suitably set-up signature-writing machine (the "Ghostwriter Manual Feed Signature Machine") was effective to bind the guarantor under English law.

³⁵ Review of Contract Law: Formation of Contract (Discussion Paper No 154, 2012), paras 7.30-7.37.

³⁶ Electronic Communications Act 2000, s 7(2) (implementing Directive on a Community framework for electronic signatures [1999] OJ L 013/12).

This makes it clear that only an electronic document can have an electronic signature. The signature indicates that the document comes from a particular person and is to be treated as a whole.

Under the 2000 Act there are essentially two levels of electronic signature, the first designated as “*simple*”, the second as “*advanced*”. The former merely meets the definition just given. It is therefore satisfied by the typing of a name into an email or a document created on a computer, or by the insertion into such a document of an electronic facsimile of a “wet ink” signature which is then transmitted electronically by way of faxes or scanned versions in PDFs attached to emails.³⁷ But it has been held (correctly, we think) that an email address including the sender’s name automatically inserted by the internet service provider upon transmission of an email is not an electronic signature when that name does not appear in the body of the email.³⁸

In 2001 the Law Commission for England & Wales suggested that clicking a website icon may amount to an electronic signature in appropriate circumstances.³⁹ This view has since been borne out in the first-instance decision of *Bassano v Toft*,⁴⁰ where it was held that the requirement in section 61 of the Consumer Credit Act 1974 that a consumer credit agreement had to be signed “in the prescribed form” was satisfied by the consumer clicking an “I Accept” button on a defined part of the computer screen upon which the loan agreement was also presented. The form was prescribed in The Consumer Credit (Agreements) Regulations 2010, which lays down that the consumer’s signature must be in a space indicated in the document for the purpose and dated, and also recognises that the agreement may be concluded electronically and that the document may contain “information about the process or means of providing, communicating or verifying the signature to be made by [the consumer]”. Mr Justice Popplewell commented that he could “see no reasons of policy why a signature should not be capable of being affixed and communicated

³⁷ *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 2 All ER (Comm) 978, para 32. See this conclusion also being reached by the Supreme Court of Appeal in South Africa with regard to an email signature: *Spring Forest Trading v Wilberry* [2014] ZASCA 178 (referring to the provisions of the Electronic Communications and Transactions Act, No 25 of 2002). For other cases of contracts being concluded by simple electronic signatures on emails see *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSIH 95; *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552; *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89; *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch); *Bieber v Teathers Ltd (In Liquidation)* 2014 EWHC 4205 (Ch). We do not think that the signature produced by the signature-writing machine in *Ramsay v Love* [2015] EWHC 65 (Ch) (above note 34) is an electronic signature despite it resulting from the electronic operation of a machine accessed by the use of a PIN, since it produces signatures on paper only (see para 75).

³⁸ *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543.

³⁹ Law Commission, *Electronic Commerce: Formal Requirements in Electronic Transactions*, paras 3.36-3.38.

⁴⁰ *Bassano v Toft* [2014] EWHC 377 (QB). See especially paras 39-46.

electronically to an agreement regulated by the Act, just as it can for other documents which are required to be signed."⁴¹ The signature in this case is a simple electronic one.

There also arose in *Bassano v Toft* another aspect of the question raised earlier about places marked for signature in a document.⁴² Mr Justice Popplewell summarised the issue and his decision upon it thus:

"There arises a further question whether the location of such signature is in the form prescribed by Regulation 4(3)(a) which requires it to be in "the space in the document indicated for the purpose". The words "I accept" appear in such a space, but Mrs Bassano's name appears on the previous page. In my view the statutory regulation is fulfilled. A signature need not consist of a name, but may be of a letter by way of mark, even where the party executing the mark can write ...The signature may consist of a description of the signatory if sufficiently unambiguous, such as "Your loving mother" or "Servant to Mr Sperling" ... In the Borro Loan Agreement, the signature is made by the electronic communication of the words "I Accept" which are in the space designated for a signature. They constitute a good signature because the word "I" can be treated as being the mark which is unambiguously that of Mrs Bassano affixed for the purposes of authenticating and agreeing to be bound by the terms of the document. The signature is therefore in the designated space by reason of the words "I Accept" being in that space. The name on page one is of relevance because it is evidence that "I" is Mrs Bassano's mark, if any were needed in addition to the evidence that it was she who clicked the button; but it is the words "I Accept" which constitute the signature, not the name on the previous page."⁴³

The *advanced electronic signature* is differentiated from the simple one just discussed by a process of external certification making the signature one that is uniquely linked to and capable of identifying the signatory, using means which can be maintained under the signatory's sole control and linked to the data into which it is incorporated or otherwise logically associated in such a way that any subsequent change in that data is detectable.⁴⁴ The process of certification involves satisfying the certificate provider of one's identity and receiving thereafter the electronic signature which is uniquely linked with that person. It takes the form of a "pair of keys", one "private", the other "public". Each of these is a unique string of prime numbers expressed in binary digits and paired with each other. The signatory applies the private key to the document it wishes to sign, which thereafter can only be opened and read by another party who has been issued with and applies to the document the public key. The advanced electronic signature is thus a strong confirmation of both the

⁴¹ Ibid, para 43.

⁴² See above, text accompanying note 25.

⁴³ *Bassano v Toft*, para 45 (references omitted).

⁴⁴ Electronic Communications Act 2000, s 7(3).

authenticity and integrity of the document, in that it is possible to be reasonably certain of who produced the document and that it is the document produced by that person.

The “smart card” which the Law Society of Scotland is now producing for its members will be capable of applying an advanced electronic signature to electronic documents produced by them.⁴⁵ In particular this will enable solicitors to make use of electronic documents throughout the entirety of conveyancing transactions, from the completion of missives through the preparation of dispositions and on to the registration of title. The Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83) state that an advanced electronic signature is required for both the formal validity and probativity of an electronic document, with additional requirements for probativity being issue of the signature under a qualified certificate by a qualified certification provider as defined under the Electronic Signatures Regulations 2002 (SI 2002/318). The 2014 Regulations thus match the 1995 Act in imposing higher requirements of formality for probative documents than for those for which formal validity only is required. The Law Society “smart card” will enable solicitors to meet the requirements for probativity, and it will therefore also be capable of use when only formal validity is needed. Simple electronic signatures, however, cannot be even formally valid subscriptions of electronic documents.

The 1995 Act as amended makes clear that for an electronic document to be formally valid the advanced electronic signature must be applied by the granter of the document (a matter which may need to be proved if challenged), while to make the document probative it must “bear” to have been authenticated by the granter.⁴⁶

Effect

While there are some exceptions, for example in the Requirements of Writing (Scotland) Act 1995 as amended and a number of consumer protection statutes such as the Consumer Credit Act, the law does not impose any requirement of signature to make a document provable, binding on the parties to it, and enforceable. A document may become binding if, for example, the parties manifest an intention to be bound by it by appropriate reference to it at the relevant time (e.g. when forming a contract), or simply through a regular course of

⁴⁵ See <http://www.lawscot.org.uk/members/member-services/smartcard/>, and A Pérez, “Smartcards - the lawyer's friend” (2014) 59 JLSS 8, 42, at <http://www.journalonline.co.uk/Magazine/59-8/1014343.aspx>.

⁴⁶ RoWSA, ss 9B and 9C.

dealing between them.⁴⁷ But subscribing a document which on its face is intended to have legal effect, for example as a contract, a will, a form of payment such as a cheque, a transfer of property such as a disposition of a home, a receipt of goods delivered, or an admission of liability such as an IOU, is generally well understood as committing the signer to whatever the legal effects of the document may be. This is so whether or not the document has been read or understood by the signer.⁴⁸ “The fiction is that if a party signs at the foot of a page that party must have read everything above the signature.”⁴⁹ The inherent individual distinctiveness of a hand-written (or holograph) signature is important here as a strong manifestation of a particular person’s intention to be bound by the document.

When signing doesn’t bind

There are some important qualifications to the generalisation that to sign is to become bound by a document.⁵⁰ For example, it is accepted that a party who signs a document is not bound by it if that party can prove (on the balance of probabilities) that the document signed was completely different from that which the party thought he or she was signing. Examples include the party signing the document thought to be an administrative act in the winding up of an estate but which was actually a discharge of the party’s rights in that estate, signing a disposition of land thinking that it was only a will, or the rather improbable case of a party signing a cheque believing it to be a visitors’ book.⁵¹ In the most recent case the pursuer had thought she was signing a loan document when she was actually executing a disposition of half of her house.⁵² Successful pleas of this kind are however extremely rare unless the error was induced by representations of the other party to the document.⁵³ So where a party

⁴⁷ See generally W W McBryde, *The Law of Contract in Scotland* (3rd edn, SULI 2007), chapter 7.

⁴⁸ Leading Scottish cases on this are *Young v Clydesdale Bank Ltd* (1889) 17 R 231; *Laing v Provincial Homes Investment Co* 1909 SC 812. Note also *McCutcheon v MacBrayne* 1964 SC (HL) 28.

⁴⁹ Rennie and Brymer, *Conveyancing in the Electronic Age*, para 2.08

⁵⁰ A unilateral document will also need delivery to its beneficiary before it becomes binding on the grantor, as will a counterpart once the Legal Writings (Counterparts and Delivery) (Scotland) Bill mentioned at the outset of this paper comes into force.

⁵¹ *Hannah v Hannah* (1869) 6 SLR 329, 330 (discharge of rights in estate thought by signatory to be merely an administrative step in winding up estate in effective); McBryde, *Contract*, para 15.18; *Ellis v Lochgelly Iron and Coal Co Ltd* 1909 SC 1278, 1282 (discharge of claims signed in belief it was receipt for past payments of compensation held ineffective). In *Gillespie v City of Glasgow Bank* (1879) 6 R 813 G had without his knowledge been assumed as a trustee, with one consequence being that his name was registered as a shareholder in a bank for shares held by the trust. The only proof that G had agreed to this was his signature on a mandate to pay dividends to law agents. By a majority the court accepted G’s evidence that he had signed the mandate in the belief that it referred to another trust of which he was a trustee and held that he had never agreed to become a shareholder and was therefore not liable as a contributory in the bank’s liquidation. A contrasting case arising from the same bank failure is *Roberts v City of Glasgow Bank* (1879) 6 R 805.

⁵² *Edgar v Edgar* [2014] CSOH 60.

⁵³ *Fletcher v Lord Advocate* 1923 SC 27 (document represented to be agreement to arbitrate on all points in issue between shipbuilders and government in fact excluded certain elements). For unsuccessful cases see McBryde, *Contract*, paras 15.40-15.42. In *Edgar v Edgar* (above note 52) the transaction was gratuitous and the pursuer did not have to show that her error had been induced.

signed a contract without reading it over but then discovered that a material alteration had been made to it compared with the previous draft, about which he had not been told, it was held nonetheless binding upon him.⁵⁴

Montgomery Litho Ltd v Maxwell is a rather special case in which a company director signed in that capacity a standard form contract with a supplier which not only bound his company but also contained a clause under which the signatory provided a personal guarantee of the company's indebtedness to the supplier under the contract.⁵⁵ It was held that the director was not bound by the guarantee, on the basis that the supplier had not drawn his specific attention to any unusual or special condition which might be regarded as something more than the normal ancillary terms of a contract. The question of how surprising such a personal guarantee is within a commercial contract between two companies is perhaps moot.⁵⁶ The decision might be better explained by the lack of evidence that the signatory intended his signature to have any effect beyond binding his company, which was undisputedly its primary legal effect. The "unfair surprise" excuse, if it exists outside misrepresentation, is probably best confined to cases where the issue is one of the incorporation of terms from a document other than the parties' actual agreement rather than applied to terms within a document actually signed.⁵⁷

A party is of course not bound by a document signed as the result of fraud, force and fear or undue influence by the other party.⁵⁸ The scenario which arose in an English case where a party signed a document knowing what it was (a hire agreement) but mistaken about the use to which the other party fraudulently intended to put it (not, as the first party thought, for the purpose of a credit check, but to implement the hire itself) might be dealt with in Scotland as fraud rather than error.⁵⁹ A document may also not be binding where force is exerted by a

⁵⁴ *Selkirk v Ferguson* 1908 SC 26.

⁵⁵ *Montgomery Litho Ltd v Maxwell* 2000 SC 56. The case follows the English Court of Appeal decision in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

⁵⁶ See further for such a clause being upheld in the nineteenth century *Young v Schuler* (1883) 11 QBD 651; also, more recently, *VSH Limited v VKS Transport Limited and Stevens* [1964] 1 Lloyds List Reports 460; *Manches LLP v Freer* [2006] EWHC 991 (QB); also *Ramsay v Love* [2015] EWHC 65 (Ch) where the personal guarantee was contained within a commercial lease between the guarantor's company and a corporate landlord. Contrast *Elpis Maritime Co Ltd v Marti Chartering Co Ltd* [1992] 1 AC 21 which however concerned the enforceability of an admitted contract of guarantee under section 4 of the Statute of Frauds.

⁵⁷ On incorporation of terms see McBryde, *Contract*, chapter 7.

⁵⁸ See e.g. *Earl of Orkney v Vinfra* (1606) Mor 16481 (party signed after being threatened with a "whinger" [sword]); *Hogg v Campbell* (1864) 2 M 848 (fraudulent representations about document's contents); *Gray v Binny* (1879) 7 R 332 (son's document consenting to disentail because of undue influence upon him of mother and her solicitor).

⁵⁹ See *CF Asset Finance Ltd v Okonji, Siaw and Ishirosoft Ltd* [2014] EWCA Civ 870, where Patten LJ thought the plea of *non est factum* could not apply but the Master of the Rolls and Sullivan LJ preferred to reach no concluded view.

third party, as in the cases where under improper pressure from husbands seeking loans from banks in respect of their business indebtedness wives signed guarantees and securities in favour of the banks.⁶⁰ If the hand of the writer is guided by another person, the signature is invalid.⁶¹

Signing by way of a third party

A third party's signature may be treated as equivalent to a person's signature to make the document so signed binding on the latter person in certain circumstances. This is an example of the general law whereby one person may represent and bind another in the latter's legal affairs if appropriately authorised to do so. For example, a person may grant a power of attorney authorising a third person to sign a document on the former's behalf.⁶² But, while a power of attorney is itself a document requiring signature by the authorising party to make it effective, there is nothing in the law that requires such writing to authorise a third person to sign on one's behalf. An oral mandate may be enough, as may be holding out by conduct.⁶³ The third party actually signing should however ensure that the signature is indeed clearly given as another's agent or representative, for example by a statement in the text of the document or immediately before the signature that it is given "for and on behalf of" or "*per procuracionem*" [p.p.] that other person.⁶⁴ Otherwise there is a substantial risk that the third party will be found to have undertaken personal responsibility under the document.⁶⁵ Merely adding after the signature a designation showing a representative capacity (e.g. Director, Partner, Secretary, Agent, Trustee) will not generally be enough.⁶⁶

⁶⁰ *Trustee Savings Bank v Balloch* 1983 SLT 240. In the line of cases beginning with *Smith v Bank of Scotland* 1997 SC (HL) 111 the ground of challenge to the guarantee or security is the bank's failure to take steps to have the wife independently advised, which is contrary to good faith where the bank has reason to think that her consent may have been vitiated by the husband's misrepresentation, undue influence or other wrongful act. For a successful claim of this kind see *Cooper v Bank of Scotland plc* [2014] CSOH 16. Third party fraud also generally does not constitute a ground of avoidance but there are exceptions: McBryde, *Contract*, para 14.44.

⁶¹ *Moncrieff v Monypenny* (1710) Mor 15936; *Clark's Executor v Cameron* 1982 SLT 68. It is permissible to have the hand supported by the wrist: *Noble v Noble* (1875) 3 R 74.

⁶² Gretton and Reid, *Conveyancing*, para 17.14. Powers of attorney may also be used in other contexts involving the handling of another person's affairs (e.g. if a person is absent or incapable of acting). See especially the Adults with Incapacity (Scotland) Act 2000, Part 2 (as amended by the Adult Support and Protection (Scotland) Act 2007), and note *Great Stuart Trs v Public Guardian* [2014] CSIH 114.

⁶³ On "apparent authority" arising from the principal's conduct see Elspeth C Reid and John W G Blackie, *Personal Bar* (SULI, 2006), ch 13(I); Laura J Macgregor, *The Law of Agency in Scotland* (SULI, 2013), chapter 11(I). For an example of a person being authorised to sign using the name of the authoriser see *Dodd v Southern Pacific Insurance Co Ltd* [2007] CSOH 93 (Lord Bracadale).

⁶⁴ See for an example *Digby Brown & Co v Lyall* 1995 SLT 932.

⁶⁵ See Macgregor, *Agency*, paras 12.06-12.07; Report on Trust Law (Scot Law Com No 239, 2014), para 13.2.

⁶⁶ Macgregor, *Agency*, para 12.07. For an example of a signature in a representative capacity being held not to amount, in addition, to a signature in a personal capacity, see *Montgomery Litho Ltd v Maxwell* 2000 SC 56 (above, notes 55-57).

Section 9 of the Requirements of Writing (Scotland) Act 1995 makes provision for subscriptions by authorised third parties of paper documents (including wills) on behalf of granters who are blind or unable to write, although nothing in this prevents a blind person subscribing or signing the document him- or herself. The inability to write may arise from physical disability as well as illiteracy, so section 9 would today provide the solution for persons whose illness made it difficult for them to sign documents.⁶⁷ It is thought that the person who is unable to write as a result of illiteracy may also subscribe a document so as to make it formally valid by making a mark upon it at the appropriate place provided that the mark is that person's usual method of signing or the mark is intended to be the person's signature.⁶⁸

If a person can be authorised to sign in his or her own name so as to bind another person to a document, there seems no reason in principle why a person cannot be authorised to attach a signature page pre-signed by another person to a document so as to bind the latter to that document. The authority to do so will have to be capable of proof, so should ideally be in writing; and its scope should be clear. But the legitimacy of providing such authority seems indisputable.

Forgery

A forged signature, i.e. a third person purporting to provide another's actual signature, is generally ineffective for the purpose of making the document so signed effective in law against the party whose signature has been forged.⁶⁹ The general rule is probably most amply illustrated in the context of unilateral documentation such as negotiable instruments (bills of exchange, cheques and promissory notes).⁷⁰ In *MacLeod v Kerr*, for example, a rogue Galloway had possession of a chequebook which had been stolen from the account-holder Craig. In buying a car from Kerr, Galloway paid with a cheque from the stolen chequebook, signing the cheque in the name of Craig. The bank holding Craig's account was not liable to pay Kerr.⁷¹ But the principle is found in operation in other kinds of unilateral

⁶⁷ As in *Stirling Stuart v Stirling Crawford's Trustees* (1885) 12 R 610 (where the party used a stamp embossed with a facsimile of his signature because he suffered from scrivener's palsy) and *Donald v McGregor* 1926 SLT 103, OH, (where the dying testator dictated her will to a third party but was too weak to complete her subscription in full and concluded it by making a cross as her mark). In this context note the exceptional legislation passed in 1830 (11 Geo IV & 1 Will IV c 23) to allow King George IV's signature (or 'sign manual') to be effected by way of stamp; this was due to the King's "severe indisposition which renders it painful and inconvenient" to sign by hand.

⁶⁸ See RoWSA, s 7(2)(c). See further text accompanying notes 16-20 above.

⁶⁹ See e.g. Bills of Exchange Act 1882, s 24; Partnership Act 1890, s 6.

⁷⁰ See e.g. Gloag & Henderson, *The Law of Scotland* (13th edn, 2012), paras 19.34, 46.18.

⁷¹ *MacLeod v Kerr* 1965 SC 253. The issue in the case was the ownership of the car: did that remain with Kerr or had it passed to Gibson, a good faith sub-buyer for value from Galloway? The court held for Gibson.

document: for instance, a forged signature on a heritable security was held to be ineffective and not binding on the estate of the now deceased victim of the forgery.⁷² More recently, in *McLeod v Cedar Holdings Ltd*, a husband forged his wife's signature on documents bearing to grant a standard security by them over their jointly owned matrimonial home. The security was held to be subject to partial reduction in so far as it affected the wife's one-half *pro indiviso* share in the home.⁷³

The courts are also quick to prevent even innocent third parties benefiting from another's fraud such as forgery of a signature. In *Clydesdale Bank v Paul* a stockbroker's clerk entered into a transaction in the stockbroker's name without the latter's knowledge. In order to meet a balance due, the clerk forged a cheque in the stockbroker's name (along with another's – the Dixon Brothers who were the Clydesdale's customer) which was cashed. The bank thereafter sought to recover the amount from the stockbroker as the clerk could not be found. The court held that the stockbroker was bound to repay the amount to the bank as it had been obtained by the fraud of his representative and the stockbroker was benefited by the fraud to the amount of the balance that had been met by way of the forged cheque.⁷⁴

An exceptional case is the decision of Lord Boyd of Duncansby in *Chalmers v Chalmers* that a registered disposition bearing the forged signature of the disponent did not fall to be reduced at the instance of the disponent. The facts were as follows. A married couple conducted a business together as a partnership, renting out properties in Glasgow. Apparently acting in the course of the partnership business, the husband purchased a property at 38 Hotspur Street, Glasgow, and took title in the name of the wife; she knew nothing of this. The property was not administered as partnership property, but solely for the husband's benefit. In 2006 a gratuitous disposition, purporting to be by the wife, and bearing her forged subscription, was granted to the couple's son; although he did not know of the forgery, he colluded with the father to ensure the latter continued to receive the rental income. The partnership and the marriage were dissolved in 2012 and 2013 respectively, the latter by a minute of agreement which both parties signed. The wife knew of the forgery prior to the dissolutions but chose not to raise her action of reduction until afterwards,

⁷² *Muir's Executors v Craig's Trustees* 1913 SC 349. For other more recent examples of forged documents which had been registered see *Santander plc v The Keeper* [2013] CSOH 24 and *McVicar v GED and Ors* [2014] CSOH 61 (but nothing turned on the forgery in either case, it being accepted that the forged deed was a nullity).

⁷³ *McLeod v Cedar Holdings Ltd* 1989 SLT 620. The security thus continued to affect the husband's one-half *pro indiviso* share of the house but the court was satisfied that this would not in fact prejudice the wife's position.

⁷⁴ *Clydesdale Bank v Paul* (1877) 4 R 626. See also *McVicar v GED and Ors* [2014] CSOH 61.

thereby avoiding the Hotspur Street property becoming available as either matrimonial or partnership property which would then have to be shared by the parties. By the time of the action the son was in occupation of the property as his home. A successful action of reduction would have the effect of expelling him from that home and restoring his mother's real right therein as registered proprietor. "In all the circumstances," said Lord Boyd, "particularly having regard to the fact that it was never intended that the pursuer should have any beneficial interest in the property, that she delayed raising this action beyond the signing of the minute of agreement and that the defender did not participate in any fraud on the pursuer, I ... refuse to grant decree of reduction."⁷⁵

In neither *Chalmers* nor *McLeod v Cedar Holdings Ltd* (mentioned previously) does the court seem to have considered the nature of the invalidity arising from forgery of a document. While reduction was the remedy sought in each case, that does not mean that the document was merely voidable rather than wholly void or null.⁷⁶ If the latter, as we tend to think,⁷⁷ then both decisions must be somewhat doubtful. Lord Boyd in *Chalmers* also noted that the grant of reduction was a matter of discretion while noting that this did not make it "wholly dependent on what might be seen as the equities in the case".⁷⁸ The extent to which reduction is an equitable remedy subject in any degree to judicial discretion seems unclear outside its use as a means of reviewing decrees of courts, tribunals and other decision-makers.⁷⁹ Preventing Mrs Chalmers from benefiting through another's fraud might have been better achieved by a plea of *mora* (delay), or taciturnity.⁸⁰ Whether equity or judicial discretion should be able to cure or steer round fundamental nullities is highly debatable, however.

Alterations

If an initially genuinely signed document is fraudulently altered in some way by a rogue, the document in its altered form does not bind the party liable on it as a result of its signature. So in *Royal Bank of Scotland v Watt* a cheque drawn on the bank by a law firm for £631 was fraudulently altered by the payee to one for £18,631. It was held that the bank, having paid out £18,631 in cash to an innocent third party who had acquired the cheque from the payee

⁷⁵ *Chalmers v Chalmers* [2014] CSOH 161, para 93. Correctly, in our view, it was not argued that the pursuer had adopted her forged signature, as this would have required a positive act on her part: *Muir's Executors v Craig's Trustees* 1913 SC 349.

⁷⁶ *Laws of Scotland: Stair Memorial Encyclopedia*, vol 13/5 (Corrective Remedies), paras 35, 56, 57.

⁷⁷ See e.g. *Pocock's Trustee v Skene Investments (Aberdeen) Ltd* [2012] CSIH 61 (above, note 3).

⁷⁸ *Chalmers v Chalmers* [2014] CSOH 161, para 86.

⁷⁹ *Laws of Scotland: Stair Memorial Encyclopedia*, vol 13/5 (Corrective Remedies), para 25.

⁸⁰ *Ibid*, para 60. See Reid and Blackie, *Personal Bar*, paras 3.06-3.07; also *Pocock's Trustee v Skene Investments (Aberdeen) Ltd* [2012] CSIH 61, concerning a disposition which had been fraudulently altered before registration, in which pleas of *mora* (delay), taciturnity and acquiescence were considered.

for its apparent face value, could not debit the law firm's account with that amount and had its remedy only against the third party.⁸¹

What if the alteration to the document is not fraudulent but simply a correction of a mistake in its text such as the mis-spelling of a name, a wrong date or a grammatical error? The Requirements of Writing (Scotland) Act 1995 contains rules about the steps that need to be taken to make valid alterations to traditional documents that are to be subscribed for the purposes of formal validity or probativity.⁸² A document may be altered *before* any subscriptions have been applied, in which case the alteration is part of the document as subscribed (whether or not the subscriber realises that there has been an alteration⁸³). Or the document may be altered *after* subscription, in which case the alteration must be separately signed by the party to be binding upon him or her. In the case of formally valid documents, the party's initials or mark at the relevant point will suffice; but if an alteration is to be probative it must be signed with the party's name and attested, with the alterations also being described in a testing clause. It may be a matter for proof whether an alteration was made before or after subscription of the document.⁸⁴

The rules just stated would be those which would apply in any Scottish equivalent to the important English case of *Koenigsblatt v Sweet*.⁸⁵ It concerned a sale of land by S to K and his wife where after S had signed the contract, K only signed on his side and S's solicitor then without S's authority deleted all references to K's wife in the contract. The contract was held binding on S by the Court of Appeal because it found that he had ratified his solicitor's action before later attempting to withdraw. In current Scots law, S would have to have signed all the alterations for them to be effective. Homologation (or ratification) is no longer allowed to make good defects of formality in contracts where, as in the sale of land, that is required under the 1995 Act.⁸⁶ Instead the statutory personal bar would have to be applicable, i.e. K, as the party seeking to enforce the contract, would have to show that he

⁸¹ *Royal Bank of Scotland v Watt* 1991 SC 48. See also *Pocock's Trustee* (previous note).

⁸² RoWSA, s 5 and Sch 1. Section 9E of the Act enables the Scottish Ministers to make regulations as to the effectiveness or formal validity of or presumptions to be made with regard to alterations made to electronic documents whether before or after authentication; but no such regulations have yet been made. It is to be recalled that if an advanced electronic signature is applied to an electronic document one effect is that any subsequent change to that document will become automatically apparent (see above, text accompanying note 44).

⁸³ *Selkirk v Ferguson* 1908 SC 26.

⁸⁴ Note that there are special rules about the alteration of wills, under which the testator may revoke the will in part by deletion or erasure without authentication. The testator can also revoke the whole will in various informal ways. See further Gloag & Henderson, paras 39.09-39.11.

⁸⁵ *Koenigsblatt v Sweet* [1923] 2 Ch 314 (CA).

⁸⁶ RoWSA, s 1(5). See further below, text accompanying notes 90-97.

had acted or refrained from acting in reliance on the contract with the knowledge and acquiescence of S, *and* that he, K, had been affected to a material extent by so acting and would also be adversely affected to a material extent if S was allowed to withdraw.⁸⁷

There are no statutory rules for the alteration of informal traditional documents, but where these are, or are to be, subscribed it helps to make the position clear if the techniques given by the 1995 Act are used. It will otherwise be a matter for evidence if necessary to show, on the balance of probabilities, whether or not any alterations were made pre- or post-subscription, or, in the latter case, whether or not the alterations were authorised in advance or subsequently ratified by the party subscribing. We discuss subsequent ratification further below.⁸⁸

Where a document has more than one page, it is factually possible to substitute (or 'slip') a page or pages in the document, and since normally only the last page is subscribed it will not be immediately apparent that there has been any change to the document post-subscription. The document shown to have been so amended will not bind the subscriber unless he or she has either authorised or ratified the change.⁸⁹ Such authorisation or ratification might be shown by use of the techniques described above in relation to the substitute page.

Homologation, ratification and adoption

Homologation occurs when a party has expressly or impliedly by conduct recognised the validity of an obligation which that party has the right to challenge. Its effect is to prevent the party exercising that right of challenge. "The law of homologation proceeds on the principle of presumed consent by the party who does the acts, to pass from grounds of challenge known to him to exist, and *sciens et prudens* [with knowledge and understanding] to adopt the challengeable deed as his own."⁹⁰ It is retrospective in effect and fully validates the obligation in question.⁹¹ It is not however to be inferred from the mere silence or inactivity of a party.⁹²

⁸⁷ RoWSA, s 1(3), (4).

⁸⁸ See text accompanying notes 90-97.

⁸⁹ For authorisation see above text accompanying notes 62-68; for ratification see below text accompanying notes 90-97.

⁹⁰ *Gardner v Gardner* (1830) 9 S 138, 140.

⁹¹ On homologation in general see Gloag, *Contract*, 544-6; Gloag & Henderson, para 7.07; Reid and Blackie, *Personal Bar*, paras 1.11-1.15, 7.01-7.03; Macgregor, *Agency*, ch 11(II).

⁹² See *British Linen Co v Cowan* (1906) 13 SLT 941.

The doctrine has had three major areas of application. The first was in relation to documents defective in their required form but this has now been abolished by the 1995 Act, as already noted. The two other major areas remain part of the law, however. The first relates to voidable transactions, that is, transactions which can be challenged because they were brought about by wrongful acts of another party such as fraud, facility and circumvention, undue influence, or misrepresentation. If the victim homologates the transaction despite the possibility of challenge, then it remains binding. The last major area is in the law of agency, where a party (A) acts on behalf of another (P) without having P's authority to do so. P may however homologate (or ratify, as it is more usually put in this branch of the law) so that the transaction entered by A becomes binding on P.

Ratification has even been said to be applicable in the case of forgery, in a House of Lords case about a bill of exchange bearing to have been accepted by Mackenzie whose signature had however been forged by Fraser. Lord Blackburn said in the course of his speech finding (with the rest of the court) that Mackenzie was not liable on the bill:

[I]t would still be enough to make Mackenzie liable if, knowing that his name had been signed without his authority, he ratified the unauthorised act. Then the maxim *omnis ratihabitio retrotrahitur et mandato priori equiparatur* would apply.⁹³

Lord Blackburn continued:

I wish to guard against being supposed to say that, if a document with an unauthorised signature was uttered in such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act even though known to be a crime he makes himself civilly responsible just as if he had originally authorised it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another.⁹⁴

It has however been argued since that "ratification" is an inapt term when what the actor has done is a complete nullity, as in the case of a forged signature and, perhaps, the unauthorised act of an agent. The word "adoption" is to be preferred in such cases: "a man may adopt an obligation on which he had originally no liability, and in certain cases adoption may be inferred without any express contract to that effect."⁹⁵ It may be that adoption is not

⁹³ *Mackenzie v British Linen Co* (1881) 8 R (HL) 8, 14, per Lord Blackburn.

⁹⁴ *Ibid.* In the context of bills of exchange statutory provision under which certain parties to a bill are "precluded" from challenging forged signatures upon it in certain circumstances should also be noted (Bills of Exchange Act 1882, ss 24, 54, 55). See further Gloag & Henderson, para 19.34; Reid and Blackie, *Personal Bar*, paras 17.01-17.12. For an example see *Alexander Beith Ltd v Allan* 1961 SLT (Notes) 80.

⁹⁵ Gloag, *Contract*, 546. See further Gloag & Henderson, paras 7.07-7.08; Reid and Blackie, *Personal Bar*, paras 1.30-1.32; Macgregor, *Agency*, para 11.33 (pp 296-7); and *Dodd v Southern Pacific Insurance Co Ltd* [2007] CSOH 93 (Lord Bracadale).

generally retrospective in effect, unlike homologation; that is, the adopter's liability exists only from the time of adoption.⁹⁶ But the other conditions for homologation, particularly that of the adopter's knowledge and understanding of the step being taken, seem applicable also in adoption cases.⁹⁷

Outside the areas where formal documents are required, therefore, it would seem perfectly consistent with the principles just outlined to say that a party may homologate, ratify or adopt a document to which the party's genuine signature has been attached without prior authority or which has been altered in some way since the signature was initially applied, again without prior authority, always provided that the homologating, ratifying or adopting party knew and understood what had happened in the sense of being aware that a possible right of challenge was being given up.

Proof⁹⁸

The question of proving that a signature is genuine can best be understood by first considering the concept of the probative, or self-proving, subscription as set out in the Requirements of Writing (Scotland) Act 1995.⁹⁹ The basic point is that a subscription in the correct form will be *presumed* to be that of the party whose subscription it purports to be, and to have been applied on the date and at the place stated in the document (if there is any such statement). The signature of the witness to the subscription, coupled with the inclusion in the document of a testing clause or equivalent stating the name and address of the witness and also (optionally) the date and place of subscription, provides the proof of the subscription. The reduction of the requirement of two witnesses to one by the 1995 Act reflected the abolition of corroboration in civil cases in 1988.¹⁰⁰ The 1995 Act of course

⁹⁶ Gloag, *Contract*, 546.

⁹⁷ In the forged signature case of *Muir's Executors v Craig's Trustees* 1913 SC 349 it was held that constructive knowledge, arising because the victim's agent knew of the forgery (but did not tell his principal about it), was insufficient for a finding that the document (a heritable security) had been adopted by the victim. In *Dodd v Southern Pacific Personal Loans Ltd* [2007] CSOH 93 para 100 it is suggested, applying dicta by Lord Blackburn in *Mackenzie v British Linen Co* (1881) 8 R (HL) 8, 14, that a party can authorise in advance the application to a document of an imitation of his or her signature by another party. This however raises difficult questions of principle, in our view. Note also Financial Ombudsman Service, *Ombudsman News* (July 2005), (available at http://www.financial-ombudsman.org.uk/publications/ombudsman-news/47/47_forged_signatures.htm), especially Case Study 47/1 where a complaint by a bank customer that family members had forged his signature on his cheques was rejected by the Ombudsman because the customer had, for a long time, tolerated this practice.

⁹⁸ See generally Margaret L Ross and James Chalmers, *Walker and Walker The Law of Evidence in Scotland* (3rd edn, 2009), chapter 2.

⁹⁹ RoWSA, ss 3, 4 and 7.

¹⁰⁰ Civil Evidence (Scotland) Act 1988, s 1.

recognises that the genuineness of the subscription may be challenged, as also the validity of the attestation process; but the burden of proof is on the person making that challenge.

With non-probative subscriptions and signatures, on the other hand, the authenticity of the writing as that of the signatory has to be established by appropriate proof before the document can be treated as a basis for any legal rights or duties that party may have under it. Thus in *South of Scotland Electricity Board v Robertson*, for example, an action for payment for the supply of electricity failed because no evidence was led that the signature to a form applying for the electrical supply was the defender's.¹⁰¹ As His Honour Judge Richard Seymour QC put it in a recent case in England, "It was for the claimants to satisfy me on a balance of probability that the Alleged Agreement was what it purported to be and that the signature page apparently part of it had not been taken from another document."¹⁰² In that case, the signature page was apparently the third and final page of a document the text of which appeared on the first two pages only. The signatures were admitted to be genuine; there was an "original" of the agreement and some photocopies. But while the photocopies appeared to be of a stapled version, the original itself appeared to have been stapled and re-stapled several times, and the judge found that "it was not possible to be confident that the third, signature, page had always been associated with the other two pages of the Original".¹⁰³ He concluded that the claimants had failed to discharge the burden of proving that the document before the court was genuine.

Authorisation, homologation, ratification and adoption would also be matters for proof by the party claiming that one or the other had occurred. Since they may all be made by way of express oral or written statement, or arise from a party's conduct, any form of evidence may be led. The proof on these and any other questions about the authenticity of a document has to be to the civil standard of balance of probabilities, which "applies to every substantive issue which is necessary to prove the case".¹⁰⁴ Even although the conduct in question may also give rise to criminal charges, the evidence has to be assessed on the balance of probabilities rather than beyond reasonable doubt. But "the court has acknowledged that the more serious or unusual the allegation made in civil proceedings the more cogent, clear, or careful and precise will be the evidence needed to satisfy the civil standard."¹⁰⁵

¹⁰¹ *South of Scotland Electricity Board v Robertson* 1968 SLT (Sh Ct) 3.

¹⁰² *Gopaul v Naidoo* [2014] EWHC 2684 (QB), para 65.

¹⁰³ *Ibid*, paras 47, 48.

¹⁰⁴ Ross and Chalmers, *Evidence*, para 4.2.1.

¹⁰⁵ *Ibid*, para 4.3.1.

The limits of what may be led as evidence depend on relevancy (connection to the case subject-matter) and admissibility (rules, generally exclusionary in nature, imposed to constrain what may be taken as evidence, usually for policy reasons).¹⁰⁶ In litigation, of course, there may be no issue over whether the party actually signed, and no need to prove it because it is an admitted fact. The question may rather be that the signature was procured by improper pressure from the other party, or that the signatory thought that that the document being signed was something completely different from what it actually was. But in contexts other than litigation there may also be a need to prove that a signature is what it purports to be even although there is no challenger. So wills that are simply subscribed and not attested must be “set up”, that is, proved to be what they appear to be, before they can be used to found the process of confirmation (appointment) of executors in the sheriff court. The process involves a summary application to the sheriff with evidence that the will was indeed subscribed by the testator. But if the subscription is attested so that it is self-proving, an application for confirmation as executor can proceed straightaway.¹⁰⁷

The courts have to deal with questions about the genuineness of signatures and documents not infrequently. The judges scrutinise documents with a sceptical eye, especially where what they purport to be cuts across other credible evidence in the case. Thus for example in *Sutherland v Bank of Scotland plc* Lord Tyre refused to accept the evidence of a note of a meeting made in a party’s diary when there was other evidence that the matters noted had not been discussed at the meeting held on the date in question: “I do not require to go so far as to find that the pursuer’s purpose in writing the calculation in his diary was to fabricate evidence to support his case at proof; it is enough for me to say that, having regard to the whole circumstances, I am satisfied that this part of the diary entry was not made during a meeting with Mr MacDonald on or about 18 May 2006, and that the pursuer’s evidence that it was so made was not true.”¹⁰⁸ In another case Lord Hodge declined to accept a document listing properties belonging to a group of brothers as evidence that they had formed a partnership with regard to the development of some of these properties; it was later in date than the alleged formation of the partnership by five or six years, and included properties acquired after that date; and the compiler and purpose of the document remained

¹⁰⁶ Ibid, chapter 1.

¹⁰⁷ Gloag & Henderson, para 39.06.

¹⁰⁸ *Sutherland v Bank of Scotland plc* [2014] CSOH 113.

unknown.¹⁰⁹ In *A Ltd v F*, Lord Doherty held that what bore to be a “soul and conscience” certification of a party’s medical unfitness to attend court was not so. The document appeared to be written in manuscript on scanned or photocopied paper headed with the address of an NHS therapy team, and the signature was illegible, while the NHS team in question had indicated that the party was not one of their patients and that the document did not emanate from any of their clinicians.¹¹⁰ In *Jollie v Lennie*, on the other hand, where the dispute was over a purported will handwritten and subscribed on each side of a single sheet of paper by the testator before a witness who also signed, all in pencil, the document was held to be an effective will, after minute analysis by the same judge (Lord Doherty) of its physical condition, content, and consistency with the evidence of witnesses about its writing.¹¹¹

Expert evidence is often used in the context of allegations of forgery in civil cases. In *Young v Archibald*, for example, there were allegations that the pursuer’s signature on a disposition of a property he had co-owned with the defender had been forged and was thus not binding upon him. After hearing from two concurring handwriting expert witnesses led by the defender without reply from the pursuer, the court decided on the balance of probabilities that the signature had not been forged.¹¹² In *Dodd v Southern Pacific Insurance Co Ltd*, on the other hand, the pursuer claimed that his apparent signatures on various loan and related documents and on an application for internet banking facilities with the first defender had been forged by the second defender (his estranged wife). A handwriting expert gave evidence that such forgery was highly probable and was not contradicted by any evidence led for the defenders. The judge accepted that the signatures were not those of the pursuer. He noted also that there was evidence that the second defender had perhaps signed in the pursuer’s name other documents not directly in issue in the case.¹¹³ The case may illustrate the delicacy with which judges approach the balance of probability of allegations of forgery in civil cases: had the second defender been subject to a criminal charge, stronger evidence might have been needed to find that she was guilty beyond reasonable doubt, but it was enough for the decision of the case in hand to conclude that the pursuer was not the signatory.

¹⁰⁹ *Gillespie v Gillespies* [2011] CSOH 188;

¹¹⁰ *A Ltd v F* [2014] CSOH 169.

¹¹¹ *Jollie v Lennie* [2014] CSOH 45. All this was despite the virtually probative form of the document (above, text accompanying note 22).

¹¹² *Young v Archibald* 1999 GWD 4-205; accessible in full text at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=899987a6-8980-69d2-b500-ff0000d74aa7>. For another case involving an allegation of a forged signature on a disposition, although being decided on other issues, see *Kaur v Singh* 1999 SC 180.

¹¹³ *Dodd v Southern Pacific Insurance Co Ltd* [2007] CSOH 93 (Lord Bracadale).

Conclusion

It has been observed that the law stated in the Requirements of Writing (Scotland) Act 1995 does leave open opportunities for fraud:

The grantor's signature could be forged. Or the grantor could be persuaded to sign by misrepresentation, or by force and fear, or by the application of undue influence. Another approach would be to allow the grantor to sign normally, but then to alter what has been signed. Since the grantor only signs at the end (except in the case of probative wills), it would be possible to substitute some of the earlier pages. If the document is too short to have earlier pages, it would still be possible to add text into the space reserved for the testing clause, or to make alterations elsewhere in the deed which are then declared in the testing clause (falsely) to have been added before subscription.¹¹⁴

One could now add electronic documents to the possibilities: the forging of a simple electronic signature, for example, or the application of any electronic signature, simple or advanced, by somebody other than the person who is entitled to use it.¹¹⁵

Safeguards against such fraud exist although they are limited. With probative subscriptions, the signing witness must "know" the grantor.¹¹⁶ In practice this often means that an introduction between the persons involved took place, with the grantor perhaps providing proof of identity such as a passport or driving licence, just before the grantor subscribed the document;¹¹⁷ and it can also be the case that the witness is told by the grantor that the subscription already on the document is indeed his or hers before the former signs.¹¹⁸ Transactions where formally valid documents are required are usually handled by solicitors

¹¹⁴ Gretton and Reid, *Conveyancing*, para 17.25. See also George L Gretton and Andrew J M Steven, *Property, Trusts and Succession* (2nd edn, 2013), para 30.11: "The Scottish rules about execution of deeds are undemanding; some would say not demanding enough."

¹¹⁵ The fear of fraud in relation to new procedures is particularly natural. We have already noted (above, text accompanying note 4) that this was such a concern in relation to the Legal Writings Bill. See the robust response by Professor Robert Rennie on 30 September 2014: "On the point about fraud generally, in 1970, when an act of Parliament was passed to allow ordinary conveyancing documents to be signed on the last page only, there was a terrible kerfuffle among the legal profession about what was going to happen. "My goodness!", it was said. "People will take out the pages in front of the signature, put in other pages to change the whole sense of the document, and it will be the end of western civilisation as we have known it." I defy anybody to produce any evidence to the effect that anything like that has happened since 1970." (at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9560>). Similarly, during the Parliamentary scrutiny in 1830 of the legislation mentioned above (note 67) there were calls for statutory protection against forgery: see e.g. the speech of Sir C Wetherell at HC Deb 27 May 1830 vol 24 cols 1151-53.

¹¹⁶ RoWSA, s 3(4)(c)(i).

¹¹⁷ Gretton and Reid, *Conveyancing*, para 17.05.

¹¹⁸ RoWSA, s 3(7). In *Ramsay v Love* [2015] EWHC 65 (Ch) (above, note 34), it appears that Mr Ramsay's ghost written signature was sometimes attested by a person in the building where the ghost writing machine was situated, but without either Mr Ramsay being there nor (it appears) any declaration by him to the witness that it was his signature. In other words, the witness (we assume) saw the machine in operation and can offer testimony as to that fact. But there is no link with the *signatory* in this procedure. (See especially paras 91-92.) We think that this would not be valid attestation in Scots law, and that it would also not be enough for Mr Ramsay to make a general acknowledgement or declaration that the signatures produced by the machine were his.

“who are in general trustworthy and can be relied on not to tamper”.¹¹⁹ Finally there are the rules about proof which can be applied when it is sought to enforce an apparently obligatory document by way of court action. Probative documents apart, it will be for the party who maintains that a document is genuine to prove it, which will still leave the other party free to prove its defences against the claim, all questions being determined on the balance of probabilities rather than the criminal standard of beyond reasonable doubt.

Further safeguards are conceivable:

In many countries, deeds of a certain class require to be executed in front of a notary, who is regarded as a state official. ... [But a] system which depends on execution in front of notaries is likely to be slow and expensive. The Scottish system is fast and cheap. These are important advantages, particularly in the commercial world.¹²⁰

But one could add that the adoption of a notarial or other “public” system would necessarily entail the creation of safeguards against fraudulent notaries and/or public officials. For the moment, however, the position in Scotland is settled and, while it may well be that the incidence of fraud is growing, the civil as well as the criminal law do provide means for proving it and stopping it having adverse effects upon the victims where detected and proved to the requisite standards.

¹¹⁹ Gretton and Reid, *Conveyancing*, para 17.25.

¹²⁰ *Ibid*, para 17.25.