Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 70

The Making and Revocation of Wills

SEPTEMBER 1986

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The Commission would be grateful if comments on this Consultative Memorandum were submitted by 31 January 1987. All correspondence should be addressed to:-

Dr David Nichols
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR
Telephone: 031-668 2131

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

CONTENTS

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PART I - INTRODUCTION

Purpose of memorandum

1.1. The purpose of this consultative memorandum is to seek comments on possible reforms of the law on certain aspects of the making and revocation of wills.

Background to memorandum

1.2. This memorandum is one of three memoranda on succession law which are being published simultaneously. The others are Intestate Succession and Legal Rights and Some Miscellaneous Topics in the Law of Succession. The three are to some extent interrelated and the response to some of the options set out in this memorandum may be affected by what is decided on subjects, such as legal rights, dealt with in the other memoranda. We have, however, tried to write this memorandum in such a way that it is as self-contained as possible. The subject matter of this memorandum also overlaps to some extent with that of our recent consultative memorandum on the Constitution and Proof of Obligations and the Authentication of Writings where we discuss, among other things, the normal requirements for the valid execution of wills.

Scope of memorandum

1.3. The topics discussed in this memorandum are (a) whether there is any way of cutting down the number of cases where admittedly or obviously genuine wills have to be held invalid because of technical defects (b) whether the law should make provision for judicial rectification of clerical, and other similar, errors in wills (c) whether the law should provide a procedure whereby a will could be made by someone else on behalf of a person lacking the mental capacity to make a will on his or her own behalf (d) the effect on a will of the testator's subsequent marriage (e) the effect on a will of the testator's subsequent divorce (f) the effect on a will of the subsequent birth of a child of the testator and (g) revocation of a will by the testator. Although, for convenience, we refer to "wills" throughout this memorandum we intend that expression to cover any testamentary writing.

PART II - INVALIDATION FOR TECHNICAL DEFECTS

2.1. The problem. Under the present law a will, to be formally valid, must be subscribed (i.e. signed at the end) by the testator and (1) attested by two witnesses in accordance with the strict requirements of the law or (2) holograph (i.e. written by the testator in his own hand) or (3) adopted as holograph (which can be done by the testator's writing "adopted as holograph" above his signature).[1] It can quite easily happen that a will which is genuine and above suspicion fails to receive effect because of a technical defect. For example, the testator may type it himself and subscribe it but might forget to add the words "adopted as holograph" above his signature. Or he might type it, subscribe it and have it witnessed by one witness, instead of the necessary two. Or he might sign it in the wrong place - for example, at the top or the side instead of at the bottom. In a recent consultative memorandum[2] we have suggested that the only requirement for formal validity of wills and most other legal writings should be subscription by the grantor. If approved and implemented this would greatly reduce the number of cases where a will might fail to receive effect because of technical defects. It would not, however, provide any relief in those cases where the testator signs in the wrong place or, because of some obvious technical slip, fails to sign at all. To deal with this kind of problem a number of Commonwealth jurisdictions have introduced, or have recommended the introduction of, provisions enabling the

courts to hold wills valid in spite of technical defects. These provisions take various forms and it will be useful to examine some of them.

Some possible solutions

2.2. South Australia. In 1975, on the recommendation of the Law Reform Committee of South Australia,[3] the law was amended to provide that:

> "A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."[4]

The recommendation of the Committee was designed to avoid the invalidity of a will where there was a "technical failure" to comply with the Wills Act or where the testator could not reasonably obtain witnesses for his will.[5] To achieve this object, however, the Supreme Court has been given a power to dispense with the formalities of the governing statute altogether. Rather than being framed in terms of "substantial compliance", the provision enables the court to uphold a testamentary writing even where the deceased has apparently made no attempt to comply with the formalities.

2.3. The courts have given the section a broad interpretation. Thus in In the Estate of Graham, Deceased[6] failure to comply with a requirement that the testator must make or acknowledge his signature in the presence of at least two witnesses present at the same

time, was held not to invalidate the will. The testatrix had signed the will and then asked her nephew to "get it witnessed". The nephew had then taken the will to two neighbours who signed as witnesses but not in the presence of the testatrix. Jacobs J. stated "I have not the slightest doubt that the deceased intended the document which is before me to constitute her will.". The document was deemed to be the will of the deceased. In In the Estate of Kelly, Deceased, (Duggan v. Hallion)[7] an unwitnessed will was admitted to probate. A medical practitioner, who had previously made several informally executed testamentary documents, handed a female employee a notebook shortly before his death. He directed the employee to use the book for note taking. After his death, the notebook was found to contain two pages of the deceased's handwriting. It began with "My last will and testament", provided for the appointment of two executors, contained several bequests, and ended with the deceased's signature, the date, and the words "Written as I have considerable cardiac pain and irregularity at this time." The signature was unwitnessed and holograph wills are not valid in South Australia. The court held that there was no reasonable doubt that the testator had intended this document to constitute his will. In In the Estate of Blakely, Deceased[8] and in In the Estate of Williams, Deceased[9] wills not signed by the testator were held to be validated by section 12(2). In the former case a solicitor had drawn up similar wills for a husband and wife. Due to error, however, the husband signed the wife's will and the wife the husband's. On the husband's death probate was sought for his will despite the fact it was signed by the wife. The document was

deemed to be his will. In the latter case the testatrix and her husband were preparing to embark upon a long journey. They each wrote out a will and asked neighbours to witness them. The witnesses signed both wills and the husband subscribed his will. On the wife's death, however, it was realised that she had omitted to sign her will. Again, since there was no reasonable doubt that the wife intended the document to be her will the court ordered that it be admitted to probate.

2.4 The South Australian provision is thus extremely wide in scope. It is limited, however, by the need to adduce evidence to satisfy the court of the deceased's intention beyond all reasonable doubt. The standard of proof generally used in matters of succession is the normal civil standard of "balance of probabilities". However as the court said in In the Estate of Blakely, Deceased: "The brake against a flood of fraudulent or unmeritorious applications is the very high standard of proof required by section 12(2)".[10] Section 12(2) has also been applied to defects in alterations to a will,[11] but it has not yet been decided whether it applies to a document intended merely to revoke a prior will.

2.5. Manitoba. The Manitoba Law Reform Commission recommended the enactment of a provision similar to that adopted by South Australia. They considered that this wide approach was the one which best achieves the goal of a remedial provision.[12] They were of the opinion that:

> "It is futile to try and foresee every type of mistake and every type of formality that testators might employ in the making of a will. The variety of human beings and their transactions is too great. The provision instituted should be broad enough to encompass all such possibilities. Limitations only weaken the provision's ability to do so. The only control necessary on such a remedial provision is already provided for in the wisdom of the courts."[13]

They recommended, however, several modifications to the South Australian provision.

(1) The standard of proof should be the normal civil standard of proof on the balance of probabilities rather than the higher standard usually found in criminal law. They considered that the use of the civil standard of proof was quite sufficient in the light of their conclusion that limitations on the doctrine's application are unnecessary.

(2) The wording "...if the Supreme Court...is satisfied" was inappropriate if the standard of proof beyond reasonable doubt was removed. They suggested this should be replaced by "...be deemed to be a will of the deceased person if it is proved upon application for admission of the document to probate as the last will of the deceased, that the deceased intended the document to constitute his will". This, they believed, was a more objective standard.

(3) The remedial provision should be clearly worded to encompass defects of revocation and alteration as well as those of execution.

The Commission's recommendations have now been implemented.

2.6. Israel. Section 25 of the Succession Law 1965 enables the courts to admit to probate a will which has not been executed in compliance with the required formalities. It provides:

> "Where the court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in sections 20 to 23 or the capacity of the witnesses."[14]

The Law Reform Commission of British Columbia made inquiries about the working of this provision. They were advised that there are few reported cases concerning the application of the section.[15] However the leading case of Briel v. The Attorney-General[16] illustrates firstly that the court must be convinced "beyond all doubt" that it is faced with a genuine will and secondly that:

> "the discretion granted to the Court by section 25 is a very wide one, and if there is no doubt as to the veracity of the will, there are three things only that cannot be remedied by Section 25: the testator, two witnesses, and a document in writing.".[17]

The section has been found to be useful. One Israeli judge is quoted in the British Columbia Report as saying:

> "The provisions of section 25 do not tend to 'increase litigation, expense and delay'. On the very contrary it has been my experience that advocates are gradually attaching less and less importance to defects in the form of a will since they are aware of the court's approach, and will not oppose probate merely on the grounds of such defects. I am, therefore, of the opinion that section 25 actually prevents a great deal of unnecessary litigation and saves time and expense...."[18]

2.7. British Columbia. The Law Reform Commission of British Columbia has recently recommended that the Supreme Court of British Columbia should be given the power to admit a document to probate notwithstanding that no attempt has been made by the testator to comply with the Wills Act provided that:

(1) the document is in writing and signed by or on behalf of the deceased; and

(2) the court is satisfied that the testator knew of and approved of the contents of the will and intended it to have testamentary effect.

The word "satisfied" is intended to indicate the normal standard of proof on the balance of probabilities. They further recommended that any such provision should only apply to documents signed by a testator who died after the legislation implementing the recommendation came into force.[19] Under the British Columbia approach the threshold requirements (writing and signature) are explicit rather than implicit. The Law Reform Commission was of the opinion that:

> "Certain forms of testamentary dispositions are so inherently suspicious that the benefits which might be derived from admitting them to probate are clearly outweighed by the inevitability of litigation and the probability of confusion."

They therefore opted for a recommendation which concentrated on the substantial questions which concern a court on an application for probate viz. the authorship of the will and testamentary intent, rather than the "sterile question of compliance with form".[20] In relation to the threshold requirements, the Manitoba Law Reform Commission pointed out that circumstances can still be envisaged where strict adherence to even these

minimum formalities could defeat a testator's intention. They gave the example of a testator who is about to sign a will in front of witnesses when an "interloper's bullet or a coronary seizure fells him"[21] and added that the inclusion of such threshold requirements does not conform with the functional analysis on which the remedial provision is based.[22] The British Columbia Law Reform Commission in reply to this comment stated that the possibility of an interloper's bullet, and other similar unlikely possibilities, did not warrant the deletion of the threshold requirements. They considered that the case of a testator who has left several unsigned alternative drafts but who eventually had decided not to alter his will was a situation which was far more likely to occur and which would lead to litigation and uncertainty if the requirement for a signature was relaxed.

2.8. Queensland. The remedial provision found in section 9 of the Queensland Succession Act 1981-1983[23] adheres to the "substantial compliance" doctrine rather than conferring on the court a "dispensing power". This provision reads as follows:

> "the court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expresses the testamentary intention of the testator."

This provision was recommended by the Queensland Law Reform Commission to give effect to the "substantial compliance" doctrine proposed by Professor Langbein in his article "Substantial Compliance with the Wills Act".[24] It has been pointed out, however, that although

the enactment is beneficial in that it covers most of the common technical defects encountered, it may well lead to difficulties of interpretation for the court and for legal advisers.[25] The scope of the provision is unclear. "Substantial compliance" suggests that some attempt must have been made by the testator to comply with the required formalities. However Professor Langbein used the word "substantial" in the sense of complying in substance rather than form.[26] Thus as the Law Reform Commission of Western Australia points out:

> "It is not clear whether the court's power is confined to cases of minor deviations from the prescribed formalities or whether emphasis is to be placed on the purposes served by those formalities, so that even major deviations may be sanctioned provided those purposes are served in the particular case.".[27]

Thus it is not clear whether the provision covers subscription by only one witness instead of two, or failure by the testator to sign the document in question.

2.9. Tasmania. The Law Reform Commission of Tasmania has also recommended the enactment of a "substantial compliance" provision. They have recommended that:

> "...the court should be granted a general power to declare an otherwise defectively executed will to be valid, if it can be shown that the defects are inconsequential and do not detract from the overall purpose of the Wills Act; and that the testator had at least attempted to comply with those formalities.".[28]

They further suggest that:

> "the phrase 'by mistake, accident or other reasonable cause' should appropriately convey the circumstances in which the testator's defectively executed intentions might be upheld in what is otherwise a purportedly formal will.".[29]

In formulating this recommendation the Commission rejected the alternative solution of a general dispensing power conferred on the court to pronounce a will valid if the court was satisfied that it represented a genuine attempt to express the testator's wishes, regardless of the absence of formalities and irrespective of whether the deceased attempted to comply with the required formalities. The reason for this rejection was that such a provision had given rise to difficulty in South Australia. They considered that their final recommendation would be more acceptable to the courts since it "preserves the spirit of the formalities, if not the letter".[30] Such a provision is extremely narrow in scope due to the limitation imposed by the requirement for attempted execution. In common with the Queensland provision difficulties of interpretation can be envisaged. The definition of an inconsequential defect and the definition of what constitutes an attempt to comply with the formalities is open to argument. This could lead to speculative litigation.

2.10. England and Wales. The Law Reform Committee of England and Wales published a consultative document in 1977 requesting views on the possibility of introducing a "dispensing power" into the Wills Act.[31] They then initiated a three-month survey of all wills submitted to probate in England and Wales. Over a 13 week period the total number of wills admitted to proof was 40,664 and the number of wills which were rejected because of failure to comply with the formalities required by the Wills Act 1837 was 93, that is, only 0.23%. The Law Reform Committee, in their 22nd Report, The Making and

Revocation of Wills, after consultation and considering the results of the survey, concluded that:

> "While the idea of a dispensing power has its attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to probate, it could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is home-made wills which most often go wrong ....We think that to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our laws of succession."[32]

As an alternative, however, the Committee recommended several reforms to relax the formalities of execution contained in the existing law. For example, they recommended that a will be valid regardless of where the testator's signature is placed, provided it is apparent on the face of the will that the testator intended his signature to validate it.[33] This recommendation has now been implemented in a slightly changed form by section 17 of the Administration of Justice Act 1982. It is no longer necessary that the testator's signature should be at the end of the will. Now the will can be signed anywhere provided that "it appears that the testator intended by his signature to give effect to the will". The new provision, it will be noted, does not require the testator's intention to be apparent on the face of the will as had been recommended by the Law Reform Committee.

Discussion

2.11. The need for a dispensing power clearly depends on the extent of the formal requirements for the valid execution of a will. If, for example, the only

requirement for formal validity were to be signature (not subscription) by the testator there would be very little justification for a dispensing power. If more were required - for example, subscription or attestation - then there would be a strong argument for a dispensing power. As the formalities required for the validity of wills are under consideration in our project on the authentication of writings it is not possible to reach a final view on this question. All we can do is to assess the arguments for and against a dispensing power, to assess the different forms which a dispensing power might take and to seek views on the question whether a suitable dispensing power should be introduced, all on the assumption that the formal requirements for wills will continue to involve more than mere signature anywhere on the will.

2.12. Case for a dispensing power. The argument for a dispensing power is that it enables effect to be given to obviously genuine wills notwithstanding technical defects. A dispensing power enables the formal requirements to be maintained at whatever level of strictness is desired for the normal case - so that there is no encouragement of lax practice as to, for example, the position of the signature - while still giving effect to the testator's intention in some cases where the requirements are not observed.

2.13. Case against a dispensing power. The Law Reform Committee (England and Wales) suggested that a remedial provision could lead to "litigation, expense and delay".[34] However in those jurisdictions where such a

provision has been in force for a considerable period, namely Israel (20 years) and South Australia (10 years) there seems to have been no significant increase in litigation. Further, as the Law Reform Committee itself pointed out[35] the validity of wills is often challenged for reasons which have no connection with the question whether the will represents the testator's true intention: the challenger merely dislikes the provisions of the will and hopes to upset it by relying on a technical defect. It is not, in any event, clear that there would be less scope for litigation under a provision like that in the current English law which makes it a condition of validity that

> "it appears that the testator intended by his signature to give effect to the will."[36]

If extrinsic evidence is admissible on this issue (and a court could have little to go on in the absence of such evidence)[37] there would seem to be as much scope for litigation as in, for example, a requirement of subscription coupled with a dispensing power. Even if there was a slight increase in litigation, it may be an acceptable price to pay, if it results in effect being given to the testator's true intentions.

Types of dispensing power

2.14. If the introduction of a remedial provision were found to be an acceptable proposition, the scope of the provision would have to be determined. As can be seen from the comparative survey of those jurisdictions which have introduced general remedial provision there are many different possible formulations. They can, however, be classified into three main types.

2.15. The wide approach. This approach confers upon the courts a power to dispense with the required formalities. The dispensing power is cast broadly so as to enable the court to validate a document in which none of the formalities has been complied with or where no attempt has been made to comply with them. Although we have not reached a definite view, we would suggest that the courts would find difficulties in the application of such a power and that the harm which may ensue from such a provision might well outweigh the benefits which may accrue. For example, the advantage of the wide approach is that it covers all conceivable defects including the absence of the testator's signature. In cases such as In the Estate of Blakely, Deceased and In the Estate of Williams, Deceased[38] this appears to be desirable. Such cases, however, are relatively rare. A far more common situation would be where a testator has drawn up several unsigned alternative drafts during his lifetime which he has eventually rejected but which are found and produced on his death, perhaps in the hope of challenging an earlier subscribed will. Under the present law, if the document is holograph, it has no force as a testamentary deed until it is subscribed.[39] As Lord Deas said in Skinner v. Forbes[40]

> "That rule puts matters of this kind beyond all question, as every man then knows that so long as he does not subscribe a testamentary deed is not completed.".

In such a case, the unsigned documents should not be given effect. If the court had a dispensing power, however, even if qualified by a high standard of proof, the possibility exists of the court upholding such a document. A further problem would be if there were a

number of undated, defective and inconsistent documents of a testamentary nature. The court would find it difficult to determine which one the deceased intended to constitute his will.[41]

2.16. The narrow approach. This approach is based on the "substantial compliance" doctrine and the intention is to give effect only to those documents of testamentary intent which contain minor or accidental departures from the required formalities. Thus the Law Reform Commission of Queensland stated:[42]

> "It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the court will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance."

Similarly the Tasmanian approach attempts to remedy defects which are "inconsequential and harmless to the purpose of the formalities" where the deceased has "at least attempted to comply" with those formalities. The problem with this approach, as indicated above, is that it is difficult to express the provision so as to give clear guidance to the courts. Thus in neither the Queensland nor the Tasmanian formulations is it clear whether the absence of one witness or indeed of two witnesses is a remediable defect. The use of the phrase "attempted to comply" is also ambiguous as this would mean

> "either that the testator knew what the formalities were but failed through mistake or inadvertence to comply with them, or...that although he had intended to make a valid will he was under a misapprehension as to what the law required and so only complied with what he thought were the requirements."[43]

It could be argued therefore that the limitations imposed by "substantial compliance" requirements or the need to prove an attempt to comply make the provision uncertain in scope and potentially too narrow to cover many common defects.

2.17. A dispensing power with threshold requirements. On this approach the court is given the power to uphold a defective testamentary document if it is satisfied that the testator meant the document to be his will. Extrinsic evidence is admissible for this purpose. However certain formalities are recognised to be so important that they are expressly stated to be irremediable. That is, they are included as a prerequisite to the application of the dispensing power. Thus the British Columbia Law Reform Commission have recommended that, at the very least, a document expressing testamentary intent must be in writing and signed by the testator. As indicated by our criticism of the "Wide Approach" we can see advantages in this formulation. It avoids the problems inherent in determining which of several unsigned drafts a testator intended to be his will and maintains the well-known rule that an unsigned will is incomplete. It still, however, allows the court to validate wills where the signature is at the side, or at the top, or in the text of the writing. It is perhaps unfortunate that genuine cases

of mistake where a signature is omitted, as in the Australian cases cited above, are not covered. However, such cases are rare and the potential uncertainty which would be caused by including such a defect may well outweigh the benefit of inclusion.

Alterations

2.18. Unauthenticated post-execution alterations to wills can give rise to difficult problems.[44] Many of these problems could be resolved (or resolved more easily)[45] if the court had a power, if satisfied that the testator intended the alteration to have effect as part of his will, to hold the alteration to be valid notwithstanding any lack or insufficiency of authentication. One type of case where this could be particularly useful is that where the testator deletes a legacy, with the intention of revoking it, and writes in a substituted legacy but fails to authenticate the new words. Under the present law the deletion may be an effective revocation but the new words may not take effect because unauthenticated.[46] In such a case the present law is that the revocation of the legacy will be deemed to be conditional on the new provision taking effect.[47]

> So, if a legacy of £1,000 to John Smith is revoked by deletion and a legacy of £2,000 to John Smith ineffectively substituted for it by interlineation, the revocation will be regarded as conditional on the new words taking effect. Accordingly, John Smith will receive £1,000.

If there is no doubt as to the genuineness of the alteration or as to the finality of the testator's

intention this is a rather unfortunate result both from the point of view of the legatee and from the point of view of giving effect to the testator's wishes. The result would be even more unfortunate from the testator's point of view, and that of the other beneficiaries, if the legacy of £1,000 were replaced by one of £10! In both cases it would clearly be much more satisfactory if the substituted legacy could receive effect as the testator intended. This could be achieved by extending the dispensing power to alterations. In relation to alterations, however, a threshold requirement of signature would not be appropriate. Very often a testator will assume that the alteration is covered by his existing signature. The main point of a dispensing power in this case would be to enable unsigned and uninitialled alterations to be validated.

Invitation for views

2.19. We would be grateful for views on the questions whether a dispensing power should be introduced and, if so, what form it should take.

1. (a) Should the court be given a power to hold a purported will valid notwithstanding failure to comply with the normal requirements for formal validity if the court is satisfied (extrinsic evidence being admissible for this purpose) that the testator intended it to take effect as his will?

   (b) If so, should there be any threshold requirement to be met before the power could be invoked?

(c) If so, should the requirement be (i) that the purported will is in writing and signed (anywhere) by the testator or (ii) something else and, if so, what?

(d) Should there be a similar dispensing power in relation to alterations to a will so as to enable improperly authenticated, or unauthenticated, alterations (including unsigned and uninitialled alterations) to be held to be part of the will if the court is satisfied that the testator intended them to take effect as part of his will?

PART III - RECTIFICATION OF WILLS

The problem

3.1. A will may be validly executed but may fail to express accurately the intention of the testator. It may be absolutely clear, for example, that because of an admitted mistake in a solicitor's office a will erroneously failed to give effect to a letter of instructions sent by the testator and was signed by the testator in the belief that it did give effect to his instructions. In the case of a non-testamentary document the court has power, under section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985, to order rectification in a case of this nature. Section 8 implements recommendations in our Report on Rectification of Contractual and Other Documents.[1] That report did not deal with testamentary writings because we thought that they might involve policy considerations of a different nature and that they would be better dealt with in the context of our work on succession law. The question for consideration now, therefore, is whether Scots law ought to make provision for the rectification of wills and, if so, what type of provision.

The solution in England and Wales

3.2. In England and Wales there is such provision in section 20 of the Administration of Justice Act 1982 which provides as follows.

> "20.--(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence--

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with repsect to the estate of the deceased is first taken out.

(3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed."

3.3. The Act implements recommendations of the Law Reform Committee.[2] The Committee noted that rectification of other documents was possible in English law (as it now also is in Scots law under section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985). They could see no reason for not allowing rectification of wills. Wills admittedly were unilateral instruments: but other unilateral instruments could be rectified. Wills admittedly required to be executed in a certain way before they

would be valid: but other documents of this nature could be rectified. A will admittedly may have been read over by, or to, the testator before he signed it: but exactly the same applied to other documents. It would admittedly be undesirable to admit general evidence of the testator's intentions: but this would also be the case in relation to other documents and in any event the type of evidence required for rectification would not be general evidence of dispositive intention but specific evidence of the precise words the will ought to have contained. The same arguments apply in Scotland and, like the Law Reform Committee, we can see no satisfactory reason for not applying the doctrine of rectification to wills. Indeed a case cited by the Law Reform Committee illustrates the desirability of making the remedy of rectification available in the case of wills. It is the case of Re Morris deceased.[3]

> A testatrix's will made provision for her housekeeper in clause 3 and left a specific bequest to the housekeeper by clause 7(iv). Clause 7 contained 19 other specific bequests each preceded by a Roman numeral in brackets. A few months after executing the will the testatrix wrote to her solicitor saying that she wished to alter the bequests to her housekeeper. The solicitor prepared a codicil accordingly, but

by mistake the clause revoking the original bequests went further than intended. It said "I revoke clauses 3 and 7 of my said will" instead of "I revoke clauses 3 and 7(iv)". The testatrix signed the codicil without noticing the error. We agree with the Law Reform Committee that the law ought to provide a remedy of rectification in cases of this nature.

Provisional conclusion

3.4. The provisions on the rectification of other documents in sections 8 and 9 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 would not all be appropriate in the case of wills. For example, there should be no special protection for those who may have acted in reliance on the expressed terms of the will during the testator's lifetime.[4] More importantly, it would probably be desirable to confine a provision on rectification of wills expressly to clerical errors and failure to give effect to the testator's instructions so as to discourage attempts to show that, having regard to the testator's views and wishes, his will cannot have expressed his intentions accurately. There would also seem to be a good case for imposing a time limit on applications for rectification of wills, so as to provide security for executors and beneficiaries and to exclude

stale claims.[5] For these reasons a provision for rectification of wills should probably take the form of a short independent provision, on the lines of the English provision, rather than a simple inclusion of wills within section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act. Our provisional conclusion is that:

2. (a) Provision should be made, on the lines of section 20 of the Administration of Justice Act 1982, for the rectification of wills which fail to express the testator's intentions because of a clerical error or a failure to carry out his instructions.

3.5. It will be noted that, whereas the English provision refers to a "failure to understand" the testator's instructions, we have referred to a failure to "carry out" his instructions. This would cover, for example, a case where a solicitor understood the testator's instructions but deliberately did not carry them out, without informing the testator. This would not be a clerical error and would not be covered by the English provision. It seems to us that it should be covered.

3.6. We have given some thought to the question whether the provision should cover an error of expression made by the testator in writing out or typing his own will. There are difficulties here. On the one hand it would seem anomalous to permit rectification if a typist in a solicitor's office misses out "iv" in a codicil, as in

the Morris case, but not to allow rectification if the testator does the same in typing his own codicil. On the other hand the testator might have had a last minute change of mind and might have intended to omit the "iv". The onus of proof would be on anyone asserting that the codicil typed by the testator did not represent his intention at the time and this would be difficult to discharge. Indeed to begin to discharge it would involve leading evidence of the testator's general dispositive intent, subsequent statements and indications of views and so on. This might not be desirable. The point about a clerical error by someone other than the testator is that there can be clear evidence as to the contrast between what the testator wanted and what the writer or typist produced. There is not likely to be such clear evidence where the testator writes or produces his own will or codicil. He is unlikely to address a written instruction to himself to, say, cancel a particular bequest. On the other hand there could be cases where the evidence did seem clear. A testator might say to relatives "I'm going to cancel the bequest to Mrs. Smith but I'm not going to alter any other terms of my will.". Even here, however, testators do not necessarily tell the truth to their relatives about what is in, or is going to be in their wills, whereas they must tell the truth about what they want to those who are expected to produce a will or codicil accordingly. We have formed no concluded view on this question but invite comments.

2. (b) Should a "clerical error" expressly include an error of expression by the testator himself in writing or typing his will?

PART IV - MAKING A WILL FOR AN INCAPAX

Introduction

4.1. A will is by definition an expression of the will of the testator. So the notion that someone else might make a valid will on behalf of a person who lacks testamentary capacity seems absurd. What such an exercise would really involve would be not the making of a will for the incapax, which is logically impossible, but the alteration of the ordinary rules of succession applying on his death. The discussion of this problem so far, however, has been in terms of making a will for an incapax and it is convenient to continue to use that terminology.

4.2. In Scotland there is no power to make a will for a person who lacks testamentary capacity. In English law the Administration of Justice Act 1969 gave the Court of Protection power, for the first time, to direct the making of a will for a mentally incapable person.[1] Before that the court had had power to direct a settlement of the property of a mental patient whose affairs it was managing and one of the main arguments for conferring a will-making power was that this would enable the results which could have been achieved by a settlement to be achieved in a way which would be simpler and which would avoid the capital gains tax and stamp duty which would have been immediately payable on a settlement.[2] In Scotland there is no power to make an inter vivos settlement of a mentally incapable person's property.

4.3. In the 1970's there was active debate in Scotland on the desirability of enabling the courts to authorise the making of a will or an inter vivos settlement for an incapacitated person. The Council of the Law Society of Scotland was sharply divided on the issue, but a change in the law was strongly supported at a symposium on the subject organised by the Society.[3] In 1977 the Scottish Courts Administration consulted on a proposal for enabling a judicial factor or curator bonis to a mentally ill person to apply to a Lord Ordinary for authority to make a will, codicil, settlement or gift for his ward. By this time, however, the main attraction of a power to make a settlement or gift - namely the avoidance of estate duty by disposing of property more than seven years before death - had disappeared: estate duty had been replaced by capital transfer tax in 1975.[4] The Council of the Law Society of Scotland reconsidered the whole question and decided by a majority that it was opposed to the proposed power. This was ratified by a vote at the Society's Annual General Meeting in 1978. Changes in the law by the Finance Bill 1986 will again affect the position in relation to inter vivos gifts and settlements.[5] That however, is beyond the scope of this memorandum although it could be dealt with in the context of our project on judicial factors.

Arguments for and against will-making power

4.4. The argument for the power is that it could avoid unfortunate results. The arguments against the power are that it is contrary to principle, that it is unnecessary, that it could lead to unseemly disputes during a person's life as to the disposal of his estate

after his death, that no satisfactory criteria can be laid down for exercising the power and that it could place curators *bonis* in an embarrassing position, particularly if the ward recovered and objected to what the curator had done. In assessing these arguments it is of interest to consider examples of cases where the power might be thought to be useful.

Example 1. The *incapax* has made a will, before the onset of his incapacity, leaving everything to his wife. His wife divorces him but the terms of the will are such that she would probably still be able to claim the whole estate under it.[6] In these circumstances his *curator bonis* might wish to apply for authority to make a new will.[7]

Comment. There would be no problem in this situation if the ex-wife was automatically excluded by divorce, a suggestion which we consider later.[8] There would still, however, be a problem if the wife did not divorce the husband but, say, just went to live with another man as husband and wife. The difficulty here is that there is no way of knowing what the incapax would have wished. He may have hoped for a reconciliation. He may have still wished to benefit his wife in recognition of many years together. Even if he did not there may well be no way of knowing whom he would wish to benefit. It is, arguably,

not the curator's, or the court's, function to exercise a moral judgment on the behaviour of beneficiaries under a will and to penalise or reward them accordingly.

Example 2. If the incapax died his property would go to his elderly brother. For tax reasons the brother and his children would prefer that it should go directly to the children.[9]

Comment. Avoidance of a double charge to Inheritance Tax (on the death of the incapax and again on the death of the brother) could be achieved by a deed of family arrangement under section 142 of the Capital Transfer Tax Act 1984 (soon to be renamed the Inheritance Tax Act 1984). This, in any event, seems a better way of achieving the desired result as there is no guarantee that the incapax would have wished to benefit his brother's children directly.

Example 3. Relatives of the incapax, or the curator bonis, think that he would wish to leave something to someone who has given him devoted service over many years.[10]

Comment. A bequest on behalf of the incapax would be based largely on speculation. There is no reason why the heirs of the incapax, if they wish to benefit his devoted

housekeeper or employee, should not do so directly.

Example 4. There is some ambiguity or formal defect in the existing will of the incapax which, it is thought, might give rise to litigation on his death.[11]

Comment. Other proposals in this memorandum and in our memorandum on The Constitution and Proof of Voluntary Obligations and the Authentication of Writings would deal with formal defects. If ambiguities were likely to provoke litigation after death they would be equally likely to provoke resistance to the application to make a new will.

Example 5. A very wealthy woman of 92, mentally incapable by reason of severe senile dementia and physically very weak, marries a 48 year old attendant in the nursing home where she lives. Let us suppose that (unlike the position in Scots law at present) marriage revokes previous wills.[12] She has made a will leaving most of her estate to relatives. They would like a new will made in their favour, as a matter of urgency, as the old woman is likely to die within days.[13]

Comment. The obvious remedy in this case is to have the marriage declared void on the ground of

mental incapacity.[14] Making a new will would not be an adequate remedy in this situation if the law gives the surviving spouse legal rights.

Example 6. An old woman has made a will leaving everything to two charities. After the appointment of a curator bonis, and while obviously incapable of making a will, she is heard to express a wish to benefit two nephews. The nephews would like a will made, on behalf of the incapax, in their favour.

Comment. Of course they would. But how can it be known that the wishes of someone who, ex hypothesi, lacked the capacity to make a will represented a settled testamentary intention? If there is testamentary capacity a will can be made in the normal way. If there is not, it seems unwise and unprincipled to allow a will to be made in an abnormal way. Is it, in any event, desirable to encourage a dispute between the nephews and the charities as to what testamentary provisions an old woman should be making?

On the other hand these are rather abstract arguments of principle. There are no doubt cases where a will-making power would be regarded as useful by those responsible for the affairs of an incapax.[15] He may, for example, have inherited a substantial fortune from one side of his

family and it may seem reasonable that a will should be made to keep it in that side of the family. Given that the law already permits radical changes to a person's will or settlement to be made by deed of family arrangement or variation of trusts it may seem that allowing a will to be made for an incapax would not be such a very fundamental step. It may also be thought by some that it is undesirable that a facility for managing the estate of an incapax should be available in England but not in Scotland.

Invitation for views

4.5. We have not reached a concluded view on this question but invite comments.

3. Should a curator bonis, or a court, be empowered to make a will on behalf of a person who, because of mental illness or deficiency, lacks testamentary capacity?

PART V - REVOCATION OF WILL BY MARRIAGE, DIVORCE OR BIRTH OF CHILD

Marriage

5.1. In Scots law marriage has no effect on a will. In many other countries it results in the revocation of the will by operation of law unless it appears from the will that it was made in contemplation of marriage. There are arguments both ways on this question.[1]

5.2. In favour of the present Scots law that marriage has no effect on a will it can be argued

(a) that the spouse will have his or her legal right in any event,

(b) that the revocation of the will could prejudice the testamentary beneficiaries (for example, the children of an earlier marriage, or an invalid sister) even in cases where the spouse was wealthy or otherwise provided for,

(c) that the revocation of the will would cause provisions to fail to have effect even though (like the appointment of executors, or small bequests to close friends or charities) they might have little or no adverse effect on the surviving spouse, and

(d) that the revocation of the will could frustrate the intentions of a testator who assumed that a will once made stood until revoked by him.

5.3. In favour of a rule that marriage should have some effect on a will made without having the marriage in

contemplation it can be argued

(a) that marriage is so important an event in relation to succession that it is likely in the vast majority of cases to destroy the whole basis on which a prior will was made

(b) that most married testators would wish their estates to devolve under the rules on intestacy rather than under the terms of a will made before marriage which they had inadvertently failed to alter or revoke

(c) that the spouse's legal right would be much less valuable than his or her rights on intestacy[2]

(d) that prejudice to beneficiaries under the will is not a convincing objection as all that would be taken away would be an uncertain hope of succession, a hope that would usually have disappeared or diminished on the testator's marriage.

5.4. In England and Wales the law on revocation of a will by marriage was reformed by the Administration of Justice Act 1982 which inserted a new section 18 into the Wills Act 1837.[3] This provides as follows.

> "18.--(1)Subject to subsections (2) to (4) below, a will shall be revoked by the testator's marriage.
>
> (2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.
>
> (3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

(4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person,--

(a) that disposition shall take effect notwithstanding the marriage; and

(b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage."

The thinking behind subsection (2) is that there is no reason to revoke an appointment in a will where the revocation would not benefit the testator's family but would only benefit whoever would take the property in default of the exercise of the power. This seems reasonable, although the cases where the subsection would come into operation would probably not be very numerous. It will be noted that the subsection saves only the appointment, and not the rest of the will, from revocation. Subsection (3) seems to us to be too narrowly expressed. It would result in the revocation of a will even if the testator had made it clear in the will that, although not at the time expecting to be married to a particular person, he intended that the will should not be revoked by <u>any</u> marriage. This could happen if, for example, the testator was a widower who wished to leave property derived from his first wife to his children and who wished this bequest to stand notwithstanding <u>any</u> subsequent marriage he might enter into. The essential question is what appears from the will to have been the testator's intention. Automatic

revocation is justified only where there is nothing to show that the testator intended his will to take effect notwithstanding the marriage. Subsection (4) of the 1982 Act was inserted to overrule, in effect, the decision in Re Coleman[4] where a will was held to be revoked by marriage where it contained substantial bequests to "my fiancée" and left the residue to others. The court reasoned that even though the bequests could be said to be expressed to be made in contemplation of marriage this could not be said of the will as a whole. The need to reverse Re Coleman has led to a rather cumbersome provision. For Scottish purposes it should be sufficient to provide that a will is revoked by a marriage only to the extent that the will as a whole, or any term of it, does not indicate a contrary intention.[5] A more general question is whether a will revoked by marriage should revive if the marriage is dissolved by divorce or the death of the spouse before the testator dies. In some cases this would seem sensible. Suppose, for example, that a man makes a will leaving everything to a close friend and nothing to his nephew who would be his heir on intestacy. He marries but his wife dies shortly afterwards. He sees no reason to alter his will. In these circumstances it would seem to be reasonable to allow the will to revive. On the other hand the marriage might have lasted for forty years and the testator might have known that his will was revoked and might have had no intention that it should revive. One solution to this problem is to apply the presumption that people know so much of the law as affects their affairs. If it is known, or taken as known, that marriage revokes a will then a testator can be expected

to make a new will, rather than rely on a pre-marital will, when the marriage is dissolved. In any event, as most marriages last a long time revival of pre-marital wills would not, in general, seem to be desirable. We invite views in response to the following questions.

4. (a) Should it be provided that a will is revoked by the subsequent marriage of the testator but that any such revocation would be only to the extent that the will as a whole, or any term of the will, did not indicate a contrary intention?

(b) Should a will revoked by marriage revive on the dissolution of the marriage before the testator's death?

If the answer to (a) is in the affirmative we would envisage including an exception to preserve dispositions in a will in exercise of a power of appointment where in default of appointment the property would not fall into the testator's estate.[6] As this is a technical and, we imagine, uncontroversial matter of very limited practical importance we think it better not to complicate the issue by including it as a formal proposal.

Divorce

5.5. The case for regarding a will as affected by divorce is stronger than the case for regarding a will as affected by marriage. Most wills by married persons are in favour of spouses. Yet few divorced people, it may be supposed, would wish their estate to pass to their divorced spouse. Indeed often the divorced spouse would be the last person the deceased would have wished to take

his estate. Often, in the case of people who have property of some value, the divorce will have been accompanied by a redistribution of the couple's assets, either by agreement or by virtue of a court order.[7] If a testator dies after the divorce, having failed to get round to altering a will leaving everything to his spouse, the result would be an unintended over-provision for the former spouse.[8] Against these considerations it could be argued that most people will have had legal advice at the time of their divorce and should certainly have had their attention directed to the question of revoking their wills. In some cases they may, after consideration, wish their former spouse to continue to benefit and, in such cases, a rule of revocation would frustrate their intentions. These counter arguments are, however, somewhat weakened by the availability of do-it-yourself divorces. Where there is, after legal advice has been taken, a deliberate intention to benefit a divorced spouse notwithstanding the divorce this could easily be ensured by the making of a new will.

5.6. In England and Wales the Administration of Justice Act 1982[9] inserted a new section 18A into the Wills Act 1837 in the following terms.

> "18A.--(1) Where, after a testator has made a will, a decree of a court dissolves or annuls his marriage or declares it void,--
>
> (a) the will shall take effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted; and
>
> (b) any devise or bequest to the former spouse shall lapse, except in so far as a contrary intention appears by the will.
>
> (2) Subsection (1)(b) above is without prejudice to any right of the former spouse to apply for

financial provision under the Inheritance (Provision for Family and Dependants) Act 1975.

(3) Where--

(a) by the terms of a will an interest in remainder is subject to a life interest; and

(b) the life interest lapses by virtue of subsection (1)(b) above,

the interest in remainder shall be treated as if it had not been subject to the life interest and, if it was contingent upon the termination of the life interest, as if it had not been so contingent."

The wording of this provision has proved to be unfortunate. In the case of Re Sinclair, deceased[10] the testator left his whole estate to his wife. His will provided that "if my said wife shall predecease me or fail to survive me for the period [of one month] then I give ... the whole of my estate ... unto the Imperial Cancer Research Fund". Four years after the date of the will the marriage was dissolved by divorce. The testator died without altering the will. He was survived by his ex-wife for more than a month. It was held by the Court of Appeal that the estate fell into intestacy. The lapse of the gift to the wife did not mean that the conditions on which the Imperial Cancer Research Fund took were fulfilled. Subsection (1) did not say that on divorce the wife would be treated as if she had predeceased the testator. Indeed the fact that subsection (3) dealt specifically with this very question in relation to life interests meant that "lapse" in subsection (1) could not mean "lapse as if the former spouse had predeceased the testator". If subsection (1)

were to be read in that way subsection (3) would be wholly unnecessary. The case of Re Sinclair has revealed a serious defect in the English provision. There can be little doubt that the result of the section in that case was not what the testator would have wished.[11] What the Law Reform Committee had recommended, by a substantial majority, was that in relation to gifts to the former spouse the will should be treated as if he or she had predeceased the testator.[12] Provisions of this type are found in a number of other jurisdictions.[13] A provision which avoids the problems caused by the English provision quoted above is Section 2-508 of the Uniform Probate Code which is as follows.

> "If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse."

5.7. An alternative approach is to make the revocation of bequests and other provisions in favour of the spouse depend, not on divorce or annulment, but on the making of a property division on the breakdown of the marriage.[14] It seems to us, however, that this is a more uncertain criterion and that even in cases where there is no

property division on divorce (e.g. because the spouses' property has been evenly divided between them throughout the marriage) there is a strong argument for revocation of a will by divorce. Our preference therefore would be for something on the lines of Section 2-508 of the Uniform Probate Code. Our provisional conclusion is therefore that:

5. (a) It should be provided by statute that if a person is divorced after making a will the divorce, unless the will otherwise provides, revokes any provision in the will in favour of the former spouse (including any provision conferring a power of appointment) and any nomination of the former spouse as executor or trustee with effect as if the former spouse had predeceased the testator. A provision revoked by divorce should revive if the parties subsequently remarry each other. A decree of declarator of nullity of marriage should have the same effect as divorce for this purpose.

5.8. It is for consideration whether an appointment of the surviving spouse as tutor or curator to a child should be revoked. An appointment of the surviving spouse as tutor or curator would be unnecessary in the case of the child's own parent but might be found in cases where the spouse appointed was only the child's step-parent. It is arguable that an appointment of a step-parent as tutor or curator should not necessarily be affected by divorce. It is an aspect of the parent and

child relationship rather than the husband and wife relationship. It is by no means unlikely that a testator, while not wishing his or her property to pass to an ex-spouse, would consider it quite appropriate for that ex-spouse to act as guardian to his or her child. Moreover, if the matter is considered from the child's point of view it would seem to be advantageous that there should be a nominated tutor or curator whenever possible. We would welcome comments.

5. (b) Should a person's appointment of his or her spouse as tutor or curator to his or her child be revoked by divorce?

Birth of child

5.9. Under the present law of Scotland the birth of a child to the testator after the date of a will gives that child the right to challenge the will by invoking the so-called *conditio si testator sine liberis decesserit*.[15] This has been explained as follows.

> "When a testator dies leaving a universal settlement in which he makes no provision for children who may be, and are, born subsequent to its date, there is a presumption that his omission to do so was unintentional, and the settlement will be treated as revoked. The *conditio si testator sine liberis decesserit* will take effect. It is an equitable presumption founded on the doctrine of *pietas paterna*, and, accordingly, it may be rebutted by special circumstances..."[16]

The present law on this point gives an impression of great confusion as to the nature of the rule in question. The latin tag suggests that it is an absolute rule of revocation by operation of law which applies as if the

testator had stated in his will that the will was to take effect only if he died without children. This is not so. The conditio is not an absolute rule of revocation by the birth of a child. Moreover it applies even if the testator already has children.[17] The common description of the rule as a presumption is also misleading. It is totally unrealistic to say that there is a rebuttable presumption that the will has been revoked by the testator. The whole point of relying on the conditio is that the will has not been revoked by the testator. The presumption can only be that the testator intended to revoke the will but never got round to it. However, this is a pointless presumption because a mere intention to revoke a will achieves nothing. The truth is that the conditio, as it now applies in Scots law, is neither a rule of revocation by operation of law nor a presumption of revocation by the testator but a rule whereby an after-born child can apply to a court to have the will "treated as revoked" on the ground that there was no provision for him in it and no indication that the testator intended the will to stand notwithstanding his birth. The question for consideration here is whether there should continue to be a rule to this effect.

5.10. The conditio si testator sine liberis decesserit is not mentioned by Stair and appears to have been introduced into Scots law by the Court of Session in the eighteenth century.[18] There used to be a similar rule in English law but it was abolished by the Wills Act of 1837.[19] The history of the rule in Scotland is an interesting example of conflicting influences. A rule introduced under reference to Roman law, and given a

latin tag, came to resemble a remedy-based rule of English equity and survives in this form in Scotland long after the corresponding English rule has been abolished. There is, so far as we can determine, no corresponding rule in continental European laws.[20] The Uniform Probate Code contains a provision to the effect that a child born after the date of the will, who has not been provided for in the will, receives the share which he would have been entitled to on intestacy: this does not apply, however, if it appears from the will that the omission was intentional, or if when the will was executed the testator had a child and nonetheless left substantially all his estate to the other parent of the omitted child, or if the testator had made provision for the child in lieu of a testamentary provision.[21] It should be borne in mind, however, that this provision of the Uniform Probate Code is in the context of a system which does not provide legitim or discretionary family provision for children.

5.11. In our consultative memorandum on Intestate Succession and Legal Rights we discuss the rights of children omitted from their parent's will. Options include a revised legitim - which might be a legal right to a share of the whole estate (say, a third) - and a right to apply to a court for a discretionary provision. We do not envisage that children excluded from a parent's will would be without remedy. This being so, it may be asked whether it is necessary to preserve the conditio si testator sine liberis decesserit. Certainly, in cases where there is a surviving spouse the conditio is nowadays of very little value. In the vast majority of

cases the result of successfully invoking the conditio will be an intestacy in which the surviving spouse will take the whole estate by virtue of prior rights. Under most of the options for reform discussed in our memorandum on Intestate Succession and Legal Rights the surviving spouse would generally be in an even stronger position than under the present law. In cases not involving a surviving spouse the operation of the conditio could produce unfortunate results. Suppose, for example, that a man leaves a will in favour of the woman he has been living with as husband and wife for some years. Some time later a child is born to them. The man then dies suddenly. The effect of invoking the conditio would, under the present law, be to leave the cohabitee entirely unprovided for. Under some of the options considered in the memorandum on Intestate Succession and Legal Rights she would be able to apply to the court for a discretionary provision. The chances are, however, that the testator would have wished his will to stand. The will which leaves everything to the spouse, even where there are children, is now very common and, in the kind of case under consideration, the cohabitee is wife in all but name. It is certainly arguable that in this type of case, and indeed in other types, a better result would be achieved by letting the will stand and allowing the child to claim legitim, or family provision if that were to be introduced. Although any final conclusion on this question should await decisions on legal rights and discretionary provision our preliminary view is that it is doubtful whether the conditio si testator sine liberis decesserit

is worth preserving. We would be grateful for comments in response to the question:-

6. Should the rule that a child born to the testator after the date of the will can challenge the will by invoking the conditio si testator sine liberis decesserit be abolished?

PART VI - REVOCATION OF WILL BY TESTATOR

Present law

6.1. Express written revocation. A testator may revoke his will expressly by a subsequent writing which complies with the requirements for the formal validity of wills.[1] The most usual method is a clause in a subsequent testamentary writing revoking all prior testamentary writings, but the subsequent writing need not itself contain positive testamentary provisions.[2] An express written revocation of a will can itself be revoked and in that event the general rule is that the earlier will revives.[3] It seems, however, that there may be an exception to this rule. This was certainly the view of Lord Sands, who said:-

> "It is competent to prove that the deceased did not intend it as his will. If, for example, it were proved habili modo that on executing a second will the testator had instructed his law-agent to destroy the first will, and the law-agent, unknown to the deceased, had neglected to obtemper the instructions, the document would not be treated as the deceased's will, even though the revoking will had been cancelled or destroyed. Similarly, if a testator had given a cancelled will to an autograph-hunting friend because some great celebrity was one of the instrumentary witnesses."[4]

There are problems here which we consider later.

6.2. Revocation implied from subsequent inconsistent writing. A will is commonly said to be impliedly revoked by the execution of a later, formally valid, will which is inconsistent with it, the implied revocation taking effect only to the extent of the inconsistency.[5]

It may be, however, that this is not truly a case of revocation at all.[6] The idea of revocation is unnecessary and potentially misleading in this context and it may be better to say that there is simply a rule that if the testator leaves two inconsistent wills the later one is given effect to, and the earlier one is not, to the extent of any inconsistency. On this view it is clear that the revocation of the second will leaves the earlier will to regulate the succession.[7]

6.3. Revocation by destroying or physically cancelling will. A testator may revoke his will by destroying it with the intention of revoking it or by tearing it up with the intention of revoking it or by obliterating or cancelling the writing or the signature with the intention of revoking the will.[8] A will is probably also revoked if the testator instructs his solicitor, or some other third party, to destroy it but the instructions are not carried out.[9] Particular provisions in a will may be revoked by cutting them out physically or by cancelling or obliterating them, provided always there is the intention to revoke. The classic statement of the law on cancellations, which has been approved in subsequent decisions of the Court of Session,[10] is that of Lord McLaren in Pattison's Trs. v. University of Edinburgh[11]

> "(1) If a will or codicil is found with the signature cancelled, or with lines drawn through the dispositive or other essential clause of the instrument, then, on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held revoked; otherwise it is to be treated as a subsisting will....

(2) If a will or codicil is found with one or more of the legacies or particular provisions scored out, I should hold that this raises no case for inquiry as to the testator's intention to revoke the instrument in whole, but that a question is raised as to the intention to revoke the particular provision; and I should not hold the provision revoked unless upon evidence that the scoring was done by the testator himself or by his direction with the intention of revoking the clause. If the deletion were authenticated by the testator's initials, recognisable as his handwriting, I should hold this to be sufficient proof that the deletion was the act of the testator, the full signature being only necessary to an act of positive disposition or bequest. It is hardly necessary to give reasons for denying effect to unauthenticated and unproved deletions, because to hold the contrary would be equivalent to saying that anyone who could get access to a will might increase the interest of the residuary legatees by drawing his pen through the legacy clauses."

Again, the revocation by any of these means of a clause revoking a previous will generally has the effect of reviving the revoked will.[12]

6.4. When a will is proved to have been in the custody of the deceased, and is not proved to have left his custody, then if the will cannot be found on the deceased's death it is presumed to have been destroyed by him with the intention of revoking it.[13]

6.5. Conditional revocation. An express written revocation of a will or a revocation by destruction or cancellation could, in theory, be expressly conditional on, say, new testamentary provisions taking effect. An expressly conditional revocation of this type, is however, inherently unlikely. A testator who thinks of the risk that his new provisions may fail to take effect is likely to try to deal with the risk in, or at the time of making, his new will rather than resort to the subtle device of a revocation subject to a condition.

6.6. A more practical question is whether the law will imply a conditional revocation in certain circumstances. Suppose that a testator revokes his will on the assumption that the will is not necessary - e.g. because he has no property to leave, or because he will make a new will the next day, or because he has made a new will which is valid and effective, or because the laws of intestacy provide the result he wishes - but the assumption is wrong. Will the revocation be regarded as impliedly conditional on the assumption being correct?[14] The answer depends partly on the type of revocation, partly on rules of construction, partly on rules of evidence and partly on the facts of the particular case. The main variable is the type of revocation.

1. Express written revocation. Any provision in a legal writ must be construed in the context of the other provisions. There may be something in the context which shows that the revocation, although unqualified in its own terms, is in fact conditional.[15] In the absence of any such

indication, however, an express, unqualified, unambiguous written revocation will take effect according to its terms.[16] Extrinsic evidence of the assumptions or intentions of the testator will be inadmissible[17] and, in any event, a false assumption does not vitiate a revocation which, fairly construed, is absolute.[18] There is certainly no rule in Scots law that an express revocation clause should be construed as conditional on other provisions in the same writing taking effect.[19] Thus, in several nineteenth century cases, express revocation clauses were held still to take effect even though other provisions in the same deed were cut down under the then law on deathbed.[20]

2. Revocation by destruction or cancellation. For revocation to be effected the destruction or cancellation must be done by the testator with the intention to revoke. Extrinsic evidence of the circumstances of the destruction or cancellation and of the testator's state of mind at the time is therefore admissible. It would, in theory, be possible to imply from such evidence in a particular case that the testator's intention was to revoke his will only if some condition were satisfied. It must be said, however, that the actual formulation of such an intention in a testator's mind is unlikely. Tearing up a will is usually an unequivocal act. If the will is, in certain eventualities, to regulate the succession it is pretty stupid to tear it up. So the fair inference in most cases will probably be that revocation by destruction or cancellation was

immediate and unconditional, even if done for a mistaken reason or on the basis of an expectation that was not realised.[21] Everything, however, will depend on the view taken of the evidence. Even in the absence of extrinsic evidence it may be possible to imply from the close "coupling" of a cancellation and a substituted gift that the revocation was intended to be conditional on the new gift taking effect.[22] Indeed, where words are scored out and others inserted in their place there may be a rule to this effect. In Pattison's Trs. v. University of Edinburgh[23] Lord McLaren said

> "When the will or codicil contains words scored out and others inserted in their place, I think that the cancellation of the words in the original writing is conditional on the substituted words taking effect. Accordingly, if the substituted words are rejected on the ground that they are unsigned, the deletion is also to be rejected, and the will ought to be read in its original form.".

3. Revocation implied from later inconsistent provision. In this case the earlier will is denied effect only if, and to the extent that, the later inconsistent provisions take effect.[24] Thus, where a later testamentary writing failed to take effect in relation to heritage because it did not use the word "dispone" (as required under the then law) and where it did not contain any express revocation clause, an earlier inconsistent deed dealing with the heritage continued to govern the position.[25] This is the result which would be expected if the

situation is analysed not in terms of revocation but in terms of a rule for deciding which of two valid but inconsistent provisions takes effect.

6.7. The law on conditional revocation of wills can be summed up by saying that in the case of an express revocation clause it is mainly a matter of construction and in the case of revocation by destruction or cancellation it is mainly a matter of evidence. In neither case is there a rule that a revocation takes effect only if the assumption or expectation on the basis of which it is done turns out to be correct. In neither case, with the possible exception of words inserted in place of cancelled or deleted words, is there a rule that a revocation takes effect only if new or substituted provisions take effect. The position is different in the case of a "revocation" implied from a subsequent inconsistent will. In this situation, which is perhaps best regarded as not being a case of revocation at all, the first will is denied effect only if, and to the extent that, the new inconsistent provisions take effect.

Assessment of present law

6.8. In general, the present law on the revocation of wills seems to us to be sensible and satisfactory, although we would welcome comments from those who think otherwise. There are, however, two areas which seem to merit fuller consideration - the rules on the revival of revoked wills and the question of conditional revocation.

Revival of revoked wills

6.9. Criticism of present law. The law on this point does not seem satisfactory.[26] Indeed it is quite likely to produce effects which would not have been intended by the testator. The operation of the present rule that the revocation of a revocation revives the revoked will can be illustrated by two cases.

1. In Bruce's Judicial Factor v. Lord Advocate[27] the testator executed a will in 1945. In 1949 he executed a new will which contained a clause revoking all previous testamentary writings. He did not expressly instruct his solicitors to destroy the 1945 will and they retained it. The 1949 will was proved to have been in the testator's custody from 1955 and was not proved to have left his custody. When the testator died in 1961 the 1949 will could not be found and was therefore presumed to have been destroyed by him with the intention of revoking it. In these circumstances it was held that the 1945 will took effect.

2. In Scott's Judicial Factor v. Johnston[28] the testatrix executed a testamentary writing in 1963 ("the 1963 will"). In 1964 she executed another ("the 1964 will") which expressly revoked all previous testamentary writings. Her solicitor, however, retained the 1963 will. On her death there was found a subsequent signed holograph writing which said

> "I, Marion A. Scott cancel completely the will drawn up by Mr Gilruth and signed by me."

It was agreed that this revoked the 1964 will and it was held that the result was that the 1963 will regulated the succession.

The way in which the present law operates in this kind of case does not seem sensible. A person who expressly revokes all previous wills would, it may be supposed, normally assume that they were dead and finished with. He would not assume that they would remain in his solicitor's strong room in a state of suspended animation ready to spring into life at any time. One effect of the present law is that if a testator wishes to ensure that a prior will in the custody of his solicitor is revoked once and for all he must act with extraordinary foresight and decisiveness. He must either expressly instruct the solicitor to destroy the revoked will (which many people would not think of doing) or make sure that some clear evidence is preserved of his intention that the will should have no "suspended animation" or "potential effect"[29] (which hardly anyone would ever think of doing). If the exception for the case where the deceased did not intend the first document to be his will were given a wide effect and if it were, accordingly, permissible to show, on a balance of probabilities, that the deceased did not intend his earlier will to revive, then unfortunate results could more readily be avoided. It seems, however, that the exception is given a very narrow effect and is more or less confined to the two examples mentioned by Lord Sands and quoted in paragraph 6.1 above (i.e. the case where the deceased has ordered his solicitor to destroy the will but the instruction has not been carried out and the case where the deceased gave his will to an autograph collector or did something similar with it.)

6.10. There is one theoretical argument which has to be dealt with in relation to the revival rule. It featured prominently in the case of Bruce's Judicial Factor[30] and is to the effect that as a will speaks from death, so a revocation in a will speaks from death. Therefore such a revocation never has any effect if the revoking will is itself revoked before death. While this is true of so-called implied revocation by later inconsistent testamentary provisions, it is not true of all express revocations. An express revocation of a will need not be in a subsequent will. It could be in a separate document standing on its own and clearly intended to have immediate effect. Moreover an express revocation clause in a will may be severable[31] and may be intended to have immediate effect. The testator who says "I hereby revoke" probably means "I now hereby revoke". He cannot reasonably mean "I, as from the moment of my death, revoke all testamentary writings executed prior to my death". He is unlikely to mean "I, as from the moment of my death, revoke all testamentary writings executed prior to the date on this document". There is no rule against immediate revocation. A testator, after all, can revoke his will immediately by destroying it. This being so, it must be a matter of construction whether immediate revocation is intended. The natural construction of the words "I hereby revoke" is that they are intended to bring about immediate revocation.

6.11. Comparative law. In English law a revoked will is not revived by the revocation of the revoking instrument. The Wills Act 1837 provides that

"No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same...."[32]

The Irish Succession Act 1965 retains the same rule.[33] The English and Irish rule is, of course, the exact opposite of the general rule in Scotland.

6.12. In French law the general rule is that the earlier will revives when an express revocation of it is retracted.[34] Nevertheless it is regarded as a question of intention, to be decided on the circumstances of the case, whether in revoking a second will (which revoked an earlier will) the testator wished to revive the first or to allow the rules of intestate succession to apply.[35] The distinction which is drawn here is between a retraction of a simple express revocation standing on its own (which could have no other purpose than to revive the earlier will) and a revocation of a will containing the revocation (which could be intended either to revive the earlier will or to leave both wills revoked).

6.13. In West Germany the rule is that

"If the revocation by will of a testamentary disposition is revoked, in case of doubt the disposition is valid as if it had not been revoked."[36]

This refers to the case where the first revocation is express. If a will which impliedly revoked an earlier will by inconsistency is revoked then

"the first will becomes valid to the same extent as if it had not been revoked."[37]

6.14. There is a particularly interesting solution in the Uniform Probate Code. Section 2-509 provides as follows

> "(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts [e.g. destroying, tearing or obliterating], the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.
> (b) If a second will, which had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect."

These rules, although more flexible than the English and Irish rule, would still have led to different results in the two Scottish cases summarised above.

6.15. Options for reform. The first option would be a rule that a revoked will always revived on the revocation of the revocation. There would be no exceptions. This would be slightly more strict than the present Scots law, although the results would generally be the same. It would produce reasonable results in some cases. If, for example, the testator had a will dated 1984 in his possession, if he revoked it by an attested document saying only "I hereby, and with immediate effect, revoke my will of 1984", and if he changed his mind a few hours later and tore up the document, then the only reasonable answer would be that the earlier will revived. In other cases, however, particularly where the first will is in the custody of a third party and where the revocation of

it is in a subsequent will which is itself revoked some years later, a rule of revival will often produce results contrary to the testator's intention.

6.16. The second option would be a rule of non-revival. This is the English solution. It has the great merit of enabling revoked wills to be safely destroyed. It provides a clear and convenient solution. However, it could fail to give effect to a testator's intentions - particularly in the type of case mentioned in the last paragraph where a testator executes, but soon tears up, a separate "self-standing" revocation.

6.17. A third option would be to make it all a question of intention. The disadvantage of saying that it is all a question of intention is that there may well be no evidence of the testator's intention.

6.18. A fourth option would be a presumption of revival. On one view, this is the present Scottish rule. The only trouble is that the presumption can be rebutted only in very restricted circumstances. It would be possible, however, to say that a revoked will revived, on the revocation of the revocation, unless it could be proved that the testator at the time of the revocation of the revocation did not intend it to revive. The whole point of a presumption is, however, that it is more likely than not to correspond to the truth. It may be doubted whether in the majority of cases where a revocation is revoked the testator does in fact intend the earlier will to revive. It seems likely that a presumption in the above terms would not have led to a

different result in the two cases summarised above. In neither was there any evidence - as opposed to speculation - about the testator's intention at the time of the revocation.

6.19. A fifth option would be a presumption of non-revival. This is the solution in the Uniform Probate Code and it clearly has much to commend it. In most cases the result would be non-revival (as under a rule of non-revival) but there would be an element of flexibility which would enable effect to be given to the testator's intentions where these were made clear.

Provisional conclusion.

6.20. Our provisional conclusion is in favour of either a rule or a presumption of non-revival, in all cases where a will is expressly revoked. The position may be different in the case of so-called implied revocation by a later inconsistent will. Here the intention to effect an immediate revocation is by no means clear and it is arguable that if the second will is revoked the first simply continues to govern the situation. We would welcome views on the following questions.

7. (a) If a writing which expressly revokes a will, is itself the subject of a subsequent revocation should there be

(i) a rule that the revoked will is not thereby revived, or

(ii) a presumption that the revoked will is not thereby revived, rebuttable by proof that the testator intended it to revive (the proof in the case

of a subsequent revocation in writing being limited to the terms of that subsequent revocation)?

(b) Should the same rule apply to the subsequent revocation of a will which only impliedly revoked the first will because inconsistent with it, or in such a case should the subsequent revocation of the second will leave the first will standing?

Conditional revocation

6.21. Criticism of present law. The present law has the effect that an express revocation clause in the normal unqualified, unambiguous form takes effect according to its terms, even if the testator was labouring under some misapprehension and even if other provisions in a new will do not take effect. This seems to us to be both right and convenient. It is right because it is most likely to give effect to the actual intentions of the testator at the time, as opposed to his retrospectively reconstructed intentions. It is convenient because people know where they stand. In the case of revocation by destruction or cancellation the present law also seems generally satisfactory. If there is evidence that the testator intended only conditional revocation then the revocation will be conditional. Such evidence will, in practice, be hard to find in the case of a simple destruction or cancellation without substitution of other provisions, but that is no criticism of the law.

6.22. There may be a question about Lord McLaren's rule that a revocation by deletion in a will takes effect only if substituted words take effect. In some cases this will give effect to the probable wishes of the testor. For example, if the testator revokes a legacy of £1,000 to a friend by deletion with the intention of revoking and substitutes a legacy of £2,000 he would almost certainly, if the substituted legacy fails to take effect because of non-authentication, prefer his friend to receive £1,000 rather than nothing. Suppose, however, that he revokes, by deletion, the legacy of £1,000 and substitutes a legacy of £10. It is far from clear in this case that he would wish the friend to receive £1000 if the substituted legacy fails to take effect. Or suppose that the testator strikes out the name of a legatee, with the intention of revocation, and substitutes another name. It seems unlikely in this case that he would wish the deletion to be conditional on the substitution taking effect. A partial solution to this type of problem would be to enable the court to hold the unauthenticated addition to be a valid part of the will. We have discussed this in Part II. This would not solve all problems, however, because the court might not be satisifed that the testator intended the new words to be part of his will. There would still be cases where the substituted words would not take effect. For the reasons given above, it seems to us that there are dangers in an absolute rule that a revocation is conditional on a substituted provision taking effect, even in the limited case of words inserted in place of deleted words.

6.23. Comparative law. In English law the so-called doctrine of dependent relative revocation is well developed. It has been described as follows.[38]

> "Where the testator purports to revoke a will on the basis that a new will is valid, or that the intestacy rules make the desired provision, but the new will is not valid, or the intestacy rules do not have that effect, then the old will remains effective. The principle is extended to cover the revocation of parts of the will.
>
> At first, the doctrine applied only where the beneficiaries under the old and the new wills were the same, but, perhaps, there was some change in the amount of the benefit to be received. Thus, if the testator made a will leaving £5,000 to his wife, and later, wishing to increase her benefit, he made another will revoking the first will and leaving £10,000 to his wife, then if the second will is ineffective, the courts strive to preserve the first gift. In both cases the testator intended that beneficiary to have a benefit.[39] In Onions v. Tyrer, for example, the testator made a will containing certain devises. He later made a subsequent will altering some of the administrative provisions of the will, but not altering its dispositive effect, and destroyed the first will. The second will was not valid because it was not attested in his presence, and he was held to have revoked his first will only conditionally. The cases have not been confined to wills where the beneficiaries are the same.[40] So, in Re Middleton the testator made a will leaving a legacy to his niece. He then attempted to make a second will excluding his niece, but the second will was invalid for want of proper attestation. The first will was then destroyed. It was held that the revocation of the first will was to be conditional on the second will coming into force, so that the first will remained operative. The doctrine now applies whenever the second will ceases to have effect, and for whatever reason."

The Law Reform Committee, on the (perhaps optimistic) view that Re Jones[41]

"makes it clear that a revocation will not be held to be conditional unless there is evidence that such was the testator's intention"

made no recommendations for change in the law in this area.[42]

6.24. The doctrine of dependent relative revocation is found in other systems derived from the English common law. It is interesting to note, however, that it is not reproduced in the Uniform Probate Code.[43] It is an artificial doctrine and we have been unable to find an exact couterpart in legal systems outside the Anglo-American common law.[44]

Questions for consideration

6.25. We are not satisfied that there is a need for any major change in the law on conditional revocation. Scots law appears to have avoided the artificialities of English law in this area and we would be unwilling to introduce them. One use of the doctrine in England has been to avoid the unfortunate results of holding wills invalid because of formal defects. The doctrine has been used in such circumstances to revive an earlier will rather than leave matters to the law of intestacy. A much better approach to this type of case would be (a) to reduce the requirements for formal validity and/or (b) to provide a way of validating wills which would otherwise fail because of some technical defect. We discuss these alternative approaches in our consultative memorandum on the Constitution and Proof of Obligations and the Authentication of Writings and in Part II of this memorandum respectively. Because of Lord McLaren's

dictum in Pattison's Trs. v. University of Edinburgh[45] there may, however, be a need to provide that there is no rule that the deletion of words is conditional on substituted words taking effect. The abolition of any rule to this effect would make the law more flexible. The deletion would be treated as conditional on the substituted words taking effect only if that was the reasonable inference, on a balance of probabilities, in the circumstances. We would welcome views.

8. (a) Is there any need for change in the law on the conditional revocation of a will?

(b) In particular, should it be provided that there is no absolute rule that the deletion of words in a will is always conditional on substituted words taking effect?

PART VII - SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

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

1. (a) Should the court be given a power to hold a purported will valid notwithstanding failure to comply with the normal requirements for formal validity if the court is satisfied (extrinsic evidence being admissible for this purpose) that the testator intended it to take effect as his will?

(b) If so, should there be any threshold requirement to be met before the power could be invoked?

(c) If so, should the requirement be (i) that the purported will is in writing and signed (anywhere) by the testator or (ii) something else and, if so, what?

(d) Should there be a similar dispensing power in relation to alterations to a will so as to enable improperly authenticated, or unauthenticated, alterations (including unsigned and uninitialled alterations) to be held to be part of the will if the

court is satisfied that the testator intended them to take effect as part of his will?

(Paras. 2.1 to 2.19)

2. (a) Provision should be made, on the lines of section 20 of the Administration of Justice Act 1982, for the rectification of wills which fail to express the testator's intentions because of a clerical error or a failure to carry out his instructions.

(b) Should a "clerical error" expressly include an error of expression by the testator himself in writing or typing his will?

(Paras. 3.1 to 3.6)

3. Should a curator bonis, or a court, be empowered to make a will on behalf of a person who, because of mental illness or deficiency, lacks testamentary capcity?

(Paras. 4.1 to 4.5)

4. (a) Should it be provided that a will is revoked by the subsequent marriage of the testator, but that any such revocation would be only to the extent that the will as a whole, or any term of the will, did not indicate a contrary intention?

(b) Should a will revoked by marriage revive on the dissolution of the marriage before the testator's death?

(Paras. 5.1 to 5.4)

5. (a) It should be provided by statute that if a person is divorced after making a will the divorce, unless the will otherwise provides, revokes any provision in the will in favour of the former spouse (including any provision conferring a power of appointment) and any nomination of the former spouse as executor or trustee with effect as if the former spouse had predeceased the testator. A provision revoked by divorce should revive if the parties subsequently remarry each other. A decree of declarator of nullity of marriage should have the same effect as divorce for this purpose.

(b) Should a person's appointment of his or her spouse as tutor or curator to his or her child be revoked by divorce?

(Paras. 5.5 to 5.8)

6. Should the rule that a child born to the testator after the date of the will can challenge the will by invoking the conditio si testator sine liberis decesserit be abolished?

(paras. 5.9 to 5.11)

7. (a) If a writing which expressly revokes a will is itself the subject of a subsequent revocation should there be

(i) a rule that the revoked will is not thereby revived, or

(ii) a presumption that the revoked will is not thereby revived, rebuttable by proof that the testator intended it to revive (the proof in the case of a subsequent revocation in writing being limited to the terms of that subsequent revocation)?

(b) Should the same rule apply to the subsequent revocation of a will which only impliedly revoked the first will because inconsistent with it, or in such a case should the subsequent revocation of the second will leave the first will standing?

(Paras. 6.1 to 6.4 and 6.9 to 6.20)

8. (a) Is there any need for change in the law on the conditional revocation of a will?

(b) In particular, should it be provided that there is no absolute rule that the deletion of words in a will is always conditional on substituted words taking effect?

(Paras. 6.5 to 6.7 and 6.21 to 6.25)

NOTES TO PART II

1. For a fuller account of the law see our Consultative Memorandum No. 66 on the Constitution and Proof of Voluntary Obligations and the Authentication of Writings (1985) paras. 2.25 to 2.60. Under the present law oral ("nuncupative") wills are valid in relation to moveables up to £8.33 in value. We have proposed in Consultative Memorandum No. 66 that there should be no exception to the rule that a will must be in writing.

2. Ibid.

3. Twenty-Eighth Report of the Law Reform Committee of South Australia, Relating to the Reform of the Law on Intestacy and Wills (1974), pp.10 and 11.

4. Wills Act Amendment Act (No. 2) 1975, (South Australia), inserting a new s.12(2) in the Wills Act.

5. Op. cit. n.3.

6. (1978) 20 S.A.S.R. 198; other cases involving failure to comply with the requirements of s.8(c) of the Wills Act include: In the Estate of Kolodnicky, Deceased (1981) 27 S.A.S.R. 374; and In the Estate of Dale, Deceased, (Dale v. Wills) (1983) 32 S.A.S.R. 215.

7. (1983) 32 S.A.S.R. 413; see also In the Estate of Crocker, Deceased (1982) 30 S.A.S.R. 321 where an ex-serviceman who had made and signed an unwitnessed will on the incorrect assumption that he was entitled to make a 'privileged will' was held to have intended the document to constitute his will. Section 12(2) was therefore applied to validate the will.

8. (1983) 32 S.A.S.R. 437.

9. (Unreported) full Court of South Australia, 6 July 1984, No. 258 of 1983 - referred to in the Law Reform Commission of Western Australia's Discussion Paper on Wills: Substantial Compliance (1984) pp.20-21.

NOTES TO PART II

10. (1983) 32 S.A.S.R. 473, 479.

11. In the Estate of Standley, Deceased (1982) 29 S.A.S.R. 490.

12. Manitoba Law Reform Commission, Report on 'The Wills Act' and the Doctrine of Substantial Compliance (Report No. 43, 1980) pp.25, 26-30.

13. Ibid. p.25.

14. Israeli Succession Law 5725-1965.

15. Law Reform Commission of British Columbia, Report on The Making and Revocation of Wills, (Report No. 52, 1981), p.44 fn. 102.

16. Israel C.A. 869/75, 32 P.D. 98.

17. The case was reported in Hebrew and was translated for the Law Reform Commission of British Columbia by Dr F. S. Perles. Report No. 52 pp.44 and 45.

18. Op. cit. n. 15 at pp.45 and 46.

19. Op. cit n. 15 pp.47 to 54 Recommendation 5.

20. Ibid. at p.40.

21. Langbein, "Substantial Compliance with the Wills Act", (1975) 88 Harvard L. Rev., 489 at 518.

22. Report on 'The Wills Act' and the Doctrine of Substantial Compliance. (Report No. 43, 1980) p.23.

23. Based on the recommendations of the Queensland Law Reform Commission, On the Law Relating to Succession, (Report No. 22, 1978) p.7.

24. Op. cit. n. 21; Prof. Langbein's article was cited with approval in the Law Reform Commission's Report No. 22.

NOTES TO PART II

25. Manitoba Law Reform Commission supra n.12 pp.21 and 22; British Columbia Law Reform Commission, supra n. 15 p.42; The Law Reform Commission of Western Australia, Discussion Paper, Wills: Substantial Compliance (1984) pp.22 and 23.

26. Op. cit. n. 21 at p.490.

27. Discussion Paper, Wills: Substantial Compliance (1984) p.22.

28. Law Reform Commission of Tasmania, Report on Reform in the Law of Wills (Report No. 35, 1983), p.10.

29. Ibid.

30. Ibid.

31. The Law Reform Committee, Consultative Document on the Making and Revocation of Wills, (1977) p.6.

32. Law Reform Committee, Twenty-Second Report. (The Making and Revocation of Wills) Cmnd. 7902, (1980) p.4.

33. Ibid. at p.5. It is, however, of interest to note that the organisation 'Justice' has suggested that the present rules are not formal enough because they conceal from the testator the difficulties involved in disposing of his estate. They have recommended the adoption of a notarial system for the attestation of wills, as exists in some European countries, for example Germany and Holland, whereby a will would have to be executed before an authorised person. Justice, Home-Made Wills (1971) p.4.

34. Twenty-Second Report (1980) at p.4. The Victoria Chief Justice's Law Reform Committee has taken the same view. Report on Execution of Wills (1984) pp.9-10. See also Ormiston "Formalities and Wills: A Plea for Caution" (1980) 54 A.L.J. 451.

NOTES TO PART II

35. Consultative Document on the Making and Revocation of Wills (1977) at p.10; 22nd. Report, Cmnd. 7902, (1980) p.5.

36. Wills Act 1837 s.9(b) (as substituted by the Administration of Justice Act 1982, s.17).

37. See Theobald on Wills, First Supplement to 14th edn. para. L.

38. See para. 2.3 above.

39. Skinner v. Forbes (1883) 11 R. 88; Foley v. Costello (1904) 6 F. 365; Taylor's Exrs. v. Thom 1914 S.C. 79; McLay v. Farrell 1950 S.C. 149.

40. (1883) 11 R. 88 at p.91.

41. This point troubled the Law Reform Commission of Western Australia; Discussion paper: Wills: Substantial Compliance (1984) p.33.

42. Report on the Law Relating to Succession No. 22 (1978) p.7.

43. Law Reform Committee of Western Australia supra n. 41 p.33, footnote 1.

44. See e.g. Pattison's Trs. v. University of Edinburgh (1888) 16 R. 73; Gray's Trs. v. Dow (1900) 3 F. 79; Fraser's Exrx. v. Fraser's Curator Bonis 1931 S.C. 536; Reid's Exrs. v. Reid 1953 S.L.T. (Notes) 51: Cf. Syme's Exrs. v. Cherrie 1986 S.L.T. 161 (where, however, the alteration may well have been made before subscription by the testator.).

45. In fact, as the above cases show, the courts have been able in many cases to give effect to unauthenticated alterations.

46. See Pattison's Trs. supra.

47. Ibid.. We discuss this rule, which can have unfortunate results, in Part VI below.

NOTES TO PART III

1. Scot. Law Com. No. 79 (1983).

2. Nineteenth Report, Interpretation of Wills (1973).

3. [1971] P.62.

4. This is provided for in section 9 of the Act.

5. See Nineteenth Report of the Law Reform Committee para. 32.

NOTES TO PART IV

1. S.17. The provisions are now contained in the Mental Health Act 1983, ss.93-97.

2. See Parl. Debs. (H.C.) Vol. 777 col. 417.

3. McNeil, "Making a Will for an Incapax" 1979 Journal of the Law Society of Scotland p.415. In this most useful article Mr McNeil concludes that "legislation to enable a curator bonis to make a will for his ward would be an undesirable innovation in the law of Scotland".

4. Finance Act 1975, s.19. See now Capital Transfer Tax Act 1984. For this use of settlements on behalf of the mentally ill see Re C.W.M. [1951] 2 K.B. 714 and Re W.J.G.L. [1965] 3 All E.R. 865 at 870-871.

5. The Finance Bill 1986 Part V renames capital transfer tax, inheritance tax and removes liability for tax on certain transfers of value where the transfer occurs at least seven years before the transferor's death.

6. Cf. Henderson's J.F. v. Henderson 1930 S.L.T. 743; Couper's J.F. v. Valentine 1976 S.L.T. 83.

7. An example of this type, involving a divorce abroad not recognised by the English courts, was used by the Attorney General to support the introduction of the will-making power in England. See Parl. Debs. (H.C.) Vol. 777 col. 417.

8. Paras. 5.5 to 5.8.

9. See McNeil, loc. cit.

10. See McNeil, loc. cit. Re D.(J) [1982] 2 All E.R. 37.

11. See McNeil, loc. cit.

12. The question whether marriage should revoke a will is discussed below at paras. 5.1-5.4.

13. Cf. Re Davey [1981] 1 W.L.R. 164.

NOTES TO PART IV

14. In England this cannot be done after the death of one of the spouses as mental incapacity makes a marriage voidable only, and not void. Matrimonial Causes Act 1973 ss. 11 and 12. This may explain the choice of remedy in Re Davey. In Scotland mental incapacity makes a marriage void and it can be declared void after the death of one or both of the parties.

15. The Victoria Chief Justice's Law Reform Committee has recently recommended the introduction of such a power. Report on Wills for Mentally Disordered Persons (1985)

NOTES TO PART V

1. See the Law Reform Committee (England and Wales), The Making and Revocation of Wills (22nd. Report, 1980) paras. 3.1 to 3.7 and the Law Reform Commission of British Columbia, Report on Statutory Succession Rights (1983) pp.129 to 136.

2. This would very often be the case under the present law and would always be the case under certain options for reform considered in our consultative memorandum on Intestate Succession and Legal Rights.

3. This implemented the 22nd. Report of the Law Reform Committee.

4. [1976] Ch. 1.

5. Cf. the formula used by the Law Reform Commission of British Columbia in their report on Statutory Succession Rights (1983) Recommendation 23(a). Of course, a declared intention in the will that it should be effective notwithstanding any marriage would suffice to save the will. The general reference to any marriage would include the particular marriage.

6. Cf. s.18(2) of the Wills Act 1837, quoted in para. 5.4 above.

7. See the Divorce (Scotland) Act 1976 s.5 and the Family Law (Scotland) Act 1985 ss.8 to 16.

8. For arguments for and against revocation, or partial revocation of a will, by divorce see the Law Reform Committtee's 22nd. Report (cit. supra) pp.19 to 22. The Committee was divided on this question, a majority favouring a rule of partial revocation and a minority favouring no revocation by divorce.

9. S.18(2).

10. [1985] 2 W.L.R. 795.

11. See Oerton, "The Effect of a Testator's Divorce on his Will", Solicitors' Journal, 20 Sept. 1985, pp.646 to 648.

NOTES TO PART V

12. Twenty Second Report, (1980) paras. 3.26 to 3.38.

13. E.g. New Zealand (Wills Amendment Act 1977); Ontario (Succession Law Reform Act 1977); British Columbia (Wills Act, s.16 - effective 1981).

14. See the Law Reform Commission of British Columbia, Report on Statutory Succession Rights, (1983) pp.111 to 114.

15. Elder's Trs. v. Elder (1895) 21 R. 704, 22R. 505; Nicolson v. Nicolson's Tutrix 1922 S.C. 649; Stevenson's Trs. v. Stevenson 1932 S.C. 657. The rule of construction of bequests called the conditio si institutus sine liberis decesserit is discussed in the Consultative Memorandum No. 71.

16. Stevenson's Trs. supra per Lord Ormidale at p.667.

17. Elder's Trs. supra.

18. See Yule v. Yule (1758) Mor. 6400; Watt v. Jervie (1760) Mor. 6401. The conflict between two views of the nature of the rule is already apparent in these two cases.

19. For the pre-1837 law, see Johnston v. Johnston 1 Phil. 447 (1817) 161 Eng. Rep. 1039. The Wills Act 1837 ss.18 and 19 provide that a will is revoked by marriage but not by any presumption of intention on the ground of any other alteration in circumstances.

20. The French Civil Code, for example, provides only for express revocation of wills. See Art. 1035.

21. S.2-302.

NOTES TO PART VI

1. McLaren, Wills and Succession (3rd edn. 1894) p.401. It may, of course, be a question of construction of the later will whether there is in fact express revocation of the earlier will. See e.g. Clark's Exr. v. Clark 1943 S.C. 216.

2. Barclay v. Griffiths (1830) 8 S. 632; Scott's J.F. v. Johnston 1971 S.L.T. (Notes) 41.

3. Bruce's J.F. v. Lord Advocate 1969 S.C. 296; Scott's J.F. v. Johnston, supra. But cf. Elder's Trs. v. Elder (1895) 22 R. 505 (old will not revived when new will containing revocation of all prior wills treated as revoked by virtue of conditio si testator).

4. Ferguson v. Russell's Trs. 1919 S.C. 80 at p.84.

5. McLaren, Wills and Succession (3rd. edn. 1894) p. 412; Mitchell's Administratrix v. Edinburgh Royal Infirmary 1928 S.C. 47; Duthie's Exrs. v. Taylor 1986 S.L.T. 142.

6. See Kirkpatrick's Trs. v. Kirkpatrick (1874) 1 R. (H.L.) 37 at pp.44 and 48.

7. Nicolson v. Nicolson's Tutrix 1922 S.L.T. 473.

8. McLaren, op. cit. pp.409-414.

9. See Bruce's J.F. v. Lord Advocate 1969 S.C. 296 at p.311.

10. See Fotheringham's Tr. v. Reid 1936 S.C. 831; Syme's Exrs. v. Cherrie 1986 S.L.T. 161. We are here concerned, of course, only with cancellations after the execution of the will. See Reid, "Execution or Revocation" 1986 S.L.T. (Articles) 129.

11. (1888) 16 R. 73 at pp.76-77.

12. McLaren, op. cit. p. 411. Bruce's J.F. v. Lord Advocate 1969 S.C. 296.

NOTES TO PART VI

13. Clyde v. Clyde 1958 S.C. 343; Bruce's J.F. v. Lord Advocate supra.

14. See generally Meston, "Dependent Relative Revocation in Scots Law" 1977 S.L.T. (News) 77.

15. Kirkpatrick v. Kirkpatrick Trs. (1873) 11 M. 551 at 560 (decision reversed on other grounds (1874) 1 R. (H.L.) 37).

16. See McLaren, Wills and Succession (3rd edn. 1894) pp.402-403.

17. See Walker and Walker, Evidence pp. 282-294.

18. Thus in Thomson's Trs. v. Bowhill Baptist Church 1956 S.L.T. 302 a holograph revocation of a residue clause was held to be effective even though expressly stated to be done in the belief that there was no residue, and even though that belief turned out to be incorrect.

19. Erskine v. Erskine's Trs. (1850) 13 D. 223; Kirkpatrick v. Kirkpatrick's Trs. (1873) 11 M. 551 at 560; Reynolds v. Miller's Trs. (1884) 11 R. 759.

20. See e.g. Erskine v. Erskine's Trs. supra; Neilson v. Stewart (1860) 22 D. 646.

21. Cf. Re Jones [1976] Ch. 200, where it was held that a will revoked by mutilation was, on the evidence, revoked absolutely and not conditionally on a new will being made.

22. See Gemmell's Exr. v. Stirling 1923 S.L.T. 384 at p.386. Some of the dicta in this case seem, however, to be unsound. There is an over-reliance on English cases and a misinterpretation of some Scottish cases.

23. (1888) 16 R. 73 at p. 77.

24. Kirkpatrick's Trs. v. Kirkpatrick (1874) 1 R. (H.L.) 37.

NOTES TO PART VI

25. Ibid.

26. See Meston "Revival by Revocation of the Revoking Will", 1974 S.L.T. (News) 153.

27. 1969 S.C. 296.

28 1971 S.L.T. (Notes) 41.

29. Terms used to describe the state of a revoked will in Bruce's J.F. v. Lord Advocate 1969 S.C. 296 at pp. 305 and 311.

30. See 1969 S.C. 296 at pp.305 and 307.

31. Tucker v. Canch's Tr. 1953 S.L.T. 221 is not inconsistent with this view. Here the question was whether a document as a whole was a holograph document.

32. S.22.

33. S.87.

34. Dalloz, Nouveau Repertoire, "Legs" No. 151.

35. Ibid.

36. B.G.B. s.2257 (transl. by Forrester, Goren & Ilgen).

37. Ibid. s.2258.

38. Mellows, The Law of Succession, (4th edn. 1983) p.92 (footnote numbers altered).

39. (1716) 2 Vern. 741.

40. (1864) 3 Sw. & Tr. 583.

41. [1976] Ch. 200.

42. Report on The Making and Revocation of Wills (22nd Report, 1980) (Cmnd. 7902) p.25.

NOTES TO PART VI

43. A note to ss.2-509 of the Code cites a case (Matter of Patten's Estate, 1978, 587 P. 2d 1307) which attempts to confine the doctrine to cases where (a) there is a clear intent of the testator to make the revocation conditional (b) the new will has not changed the testamentary purposes of the old will and (c) it is clear that the first will is revoked because the second duplicated its purpose.

44. Expressly conditional revocations are, of course, recognised but we are concerned here with whether there is a rule of law that a revocation will be deemed to be conditional on new provisions taking effect.

45. (1888) 16 R. 73 at p.77.